

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

THEODORE KAGAN, et al,	)	Case Nos. 09-5337 SC
	)	11-0412 SC
Plaintiffs,	)	
	)	ORDER DENYING PLAINTIFFS'
v.	)	MOTION FOR PRELIMINARY
	)	APPROVAL OF PROPOSED CLASS
WACHOVIA SECURITIES, L.L.C., et	)	<u>SETTLEMENT</u>
al,	)	
	)	
Defendants.	)	
	)	

---

**I. INTRODUCTION**

Now before the Court is a Motion for Preliminary Approval of a Proposed Class Settlement. ECF No. 87 ("Mot."). Plaintiffs are or were beneficial owners of securities issued by the Asia Pulp and Paper Company ("APP"). Plaintiffs allege that they purchased APP securities through Defendants Wachovia Securities, L.L.C., Wachovia Securities Financial Network, L.L.C., Wachovia Capital Markets, L.L.C., Wells Fargo Advisors., L.L.C., Wells Fargo Advisors Financial Network., L.L.C., Wells Fargo Securities, L.L.C., and Wells Fargo & Company, or their successors in interest (collectively, "Wachovia" or "Defendants"). Plaintiffs bring claims for negligence, breach of contract, and breach of fiduciary duty against Wachovia, all stemming from Wachovia's alleged failure to provide Plaintiffs with required notice of an earlier class action settlement reached by APP. Wachovia and Plaintiffs have

1 reached an agreement to settle these claims. The Court determines  
2 pursuant to Civil Local Rule 7-1(b) that Plaintiffs' Motion is  
3 suitable for decision without oral argument. For the reasons set  
4 forth below, the Court DENIES the Motion without prejudice.

5  
6 **II. BACKGROUND**

7 **A. Previous Litigation**

8 The following factual allegations are taken from Plaintiffs'  
9 Amended Complaint. ECF No. 35 ("Am. Compl."). Plaintiffs are  
10 beneficial owners of securities issued by APP. Id. ¶¶ 2-7.<sup>1</sup>  
11 Defendants, or their predecessors in interest, are brokerage firms  
12 and the nominee or record owners of the APP securities. Id. ¶¶ 1,  
13 8-15, 18, 23. While the nominee or record owners appear on  
14 official corporate transfer records, the actual interest in the  
15 security is that of the beneficial owner. Id. ¶ 18.

16 On August 8, 2001, APP was sued in the Southern District of  
17 New York for violations of securities laws. Id. ¶ 19. On October  
18 18, 2005, the District Court preliminarily approved a settlement in  
19 the action ("the APP Settlement"). Id. ¶ 20. The District Court's  
20 order required nominee owners -- here, Wachovia -- to either  
21 forward notice of the APP Settlement to the beneficial owners or to  
22 provide the beneficial owners' names and contact details to the APP  
23 Settlement administrator. Id. ¶ 21. Plaintiffs allege that  
24 Defendants, or their predecessors in interest, failed to do either.

25  
26 \_\_\_\_\_  
27 <sup>1</sup> The FAC contains a numbering error, such that the first three  
28 paragraphs are sequentially numbered 1 through 3, but the fourth  
paragraph restarts the sequence at 2. This citation refers to the  
set of paragraphs appearing under the heading "Parties," beginning  
at the second paragraph numbered "2."

1 Id. ¶¶ 3,<sup>2</sup> 24. Plaintiffs further allege that if they had been  
2 notified, they would have submitted claims and obtained a recovery.

3 Id. ¶¶ 25-36.

4 On November 10, 2009, Plaintiffs filed a putative class-action  
5 lawsuit against Defendants. ECF No. 1 ("Compl."). On July 7,  
6 2010, the Court dismissed the Complaint without prejudice. ECF No.  
7 32. On August 6, 2010, Plaintiffs filed their Amended Complaint  
8 asserting claims for negligence, breach of fiduciary duty, and  
9 breach of contract. Am. Compl. ¶¶ 47-62. On November 23, 2010,  
10 the Court denied Wachovia's motion to dismiss these claims. ECF  
11 No. 48.<sup>3</sup> On January 25, 2012, the parties filed the instant  
12 Motion, accompanied by a joint stipulation of class settlement and  
13 release. ECF No. 87-2 ("Sett. Stip.").<sup>4</sup>

14 **B. The Stipulated Settlement**

15 1. Proposed Settlement Class

16 The stipulated settlement provides for a proposed settlement  
17 class of up to 1,162 members. See id. at 11. The proposed class  
18 consists of persons who both (1) were beneficial owners of APP  
19 securities during the period covered by the APP Settlement, August  
20 28, 1998 to April 4, 2001, and (2) had Wachovia accounts during the  
21 APP Settlement's notice period, November 30 through December 19,  
22 2005. Id. at 5 (definition of "APP Class Period"), 9 (definition

23 <sup>2</sup> This citation refers to the first paragraph numbered "3."

24 <sup>3</sup> On November 23, 2009, Plaintiff Brent Balkema filed a separate  
25 but substantially identical lawsuit in this District, Balkema v.  
26 Wachovia Securities, LLC, et al., No. 11-412 SC. On July 5, 2011,  
27 this Court denied a motion to dismiss Balkema's case and  
28 consolidated it with the instant case. ECF No. 66.

<sup>4</sup> Counsel for Plaintiffs, Richard L. Kellner, also submitted a  
declaration in support of the Motion. ECF No. 87-1 ("Kellner  
Decl.").

1 of "Class Period"), 11 (definition of "Potential Class Members").

2 The 1,162 potential class members were identified by  
3 Defendants rather than Plaintiffs. Id. at 11. Plaintiffs  
4 conducted limited discovery to confirm Defendants' identification  
5 of the potential class and to determine the amount of damages  
6 allegedly owed. Kellner Decl. ¶ 4. The parties forthrightly admit  
7 that Defendants' records are incomplete, in that Defendants lack  
8 complete or reliable data for some potential class members  
9 regarding "purchase dates, price, quantity and other information .  
10 . . ." Sett. Stip. at 11.

11 Apparently to address this difficulty, the parties have  
12 divided the class into two categories. The first, "Category A,"  
13 consists of 715 persons "for whom Defendants believe they have all  
14 trade information necessary to determine that they are Class  
15 Members . . . ." Id. According to the parties, the 715 potential  
16 members of Category A are entitled to no more than \$306,940.56  
17 collectively. Id. Category A consists of holders of APP bonds, as  
18 compared to APP stocks. Id.

19 The second category, "Category B," consists of persons for  
20 whom "the available electronic data is . . . insufficient to  
21 determine both whether they are class members and if so, how much  
22 money they might be able to claim in this settlement." Id. There  
23 are 447 Category B potential class members, which represents  
24 roughly 38 percent of the total class. See id. Of the 447, "353  
25 have been determined to have traded in APP stock securities." Id.  
26 As the Court reads the papers, these 353 -- roughly 30 percent of  
27 the total class -- appear to be entitled to at least some recovery  
28 under the stipulated settlement. For the remaining 94 members of

1 Category B, "incomplete or unreliable data do not permit a  
2 determination as to the APP Securities held, if any." Id. In  
3 other words, the parties cannot determine from Wachovia's records  
4 whether the members of this group of 94 are truly class members and  
5 therefore entitled to recovery. The group of 94 comprises about 8  
6 percent of the total class.

7 2. Class Recovery, Attorney Fees, and Costs

8 Under the proposed settlement, Wachovia has agreed to pay each  
9 class member who submits a valid claim the entire amount to which  
10 the APP Settlement would have entitled him or her, minus attorney  
11 fees and incentive payments for the lead Plaintiffs. See Mot. at  
12 5-6. As noted above, the parties estimate that Category A  
13 potential class members will recover a maximum aggregate amount of  
14 \$306,940.56. The parties do not estimate how much, if anything,  
15 Category B potential class members will recover.

16 Plaintiffs' counsel has agreed to request no more than  
17 \$100,000 for their fees and costs, and Wachovia has agreed not to  
18 oppose the request. Sett. Stip. at 28-29. The settlement also  
19 provides incentive payments of up to \$750 for plaintiff Theodore  
20 Kagan and up to \$500 each for the other six named plaintiffs. Mot.  
21 at 6. Assuming each named plaintiff receives the maximum amount  
22 requested, the incentive payments would total \$3,750. Together,  
23 attorney fees and incentive payments would reduce the potential  
24 class recovery by up to \$103,750. This represents 33.8 percent of  
25 the estimated recovery, assuming no recovery for Category B.<sup>5</sup>

26 \_\_\_\_\_  
27 <sup>5</sup> The Court appreciates that the 33.8 percent figure will go down  
28 if Category B class members recover. But, for the reasons  
explained in Sections IV.B and C, the Court is not optimistic about  
Category B's prospects at this juncture.

1           The settlement stipulation would also appoint a settlement  
2 administrator. Id. Wachovia has agreed to pay the settlement  
3 administrator's reasonable fees and costs separate and apart from  
4 the settlement fund, so the cost of administering the claims  
5 process would not be deducted from the potential class members'  
6 recovery. Id.

7           3.    Notice and Claim Forms

8           The parties propose to notify the class of the settlement by  
9 first-class mail sent to each potential class member's last-known  
10 address. Sett. Stip. at 18-19. The notice materials consist of a  
11 fifteen-page, single-spaced Class Notice, an Election Not To  
12 Participate In Settlement form, and, depending on which category  
13 the potential class member belongs to, either a Category A or  
14 Category B Proof Of Claim form. Id. at 11; Kellner Decl. Exs. B  
15 ("Class Notice"), C ("Election Not To Participate In Settlement"),  
16 F ("Category A Proof of Claim") & G ("Category B Proof of Claim").<sup>6</sup>  
17 The Category A Proof Of Claim indicates that Defendants will send  
18 potential class members Wachovia's records of their APP holdings.  
19 See Category A Proof of Claim at 2. Category A potential class  
20 members may submit documentary evidence to correct any inaccuracies  
21 in Wachovia's records, but are not required to do so. Id. at 2-3.

22           The Category B Proof Of Claim form is similar in all but one  
23 important respect. Like the Category A Proof of Claim form, the  
24 Category B form includes Wachovia's records, if any, of the  
25 potential class member's APP holdings -- but in the case of  
26 Category B, these records are described as "inaccurate or

27 \_\_\_\_\_  
28 <sup>6</sup> Two exhibits to Kellner's declaration are labeled "Exhibit B."  
The first is the Class Notice. The second, which follows Exhibit  
G, is the resume of Kellner's firm.

1 incomplete," and the potential class member must "independently  
2 verify" and "submit documentary evidence" of their APP holdings,  
3 rather than, as in the case of Category A, submitting documents  
4 only if needed to correct an inaccuracy. Compare Category B Proof  
5 Of Claim at 2-3 with Category A Proof Of Claim at 2-3.

6 4. Scope of Release

7 Both Category A and Category B potential class members are  
8 included within the settlement's proposed release of liability.  
9 See Sett. Stip. at 16-17. The release would purportedly settle,  
10 among other things, "any and all claims" related to the allegations  
11 and claims in the Amended Complaint, and also any claims "which  
12 relate in any way to the purchase, sale or custody of APP  
13 Securities during the APP Class Period . . . ." Id. at 13.

14  
15 **III. LEGAL STANDARD**

16 No class action may be settled without court approval. Fed.  
17 R. Civ. P. 23(e). When the parties to a putative class action  
18 reach a settlement agreement prior to class certification, "courts  
19 must peruse the proposed compromise to ratify both the propriety of  
20 the certification and the fairness of the settlement." Staton v.  
21 Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003). First, the Court  
22 must assess whether a class exists. Id. (citing Amchem Prods. Inc.  
23 v. Windsor, 521 U.S. 591, 620 (1997)). Second, the court must  
24 determine whether the proposed settlement "is fundamentally fair,  
25 adequate, and reasonable." Hanlon v. Chrysler Corp., 150 F.3d  
26 1011, 1026 (9th Cir. 1998).

27 ///

28 ///

1 **IV. DISCUSSION**

2 **A. Class Certification**

3 Federal Rule of Civil Procedure 23(a) provides four  
4 requirements for class certification: (1) numerosity ("the class is  
5 so numerous that joinder of all members is impracticable"); (2)  
6 commonality ("there are questions of law or fact common to the  
7 class"); (3) typicality ("the claims or defenses of the  
8 representative parties are typical of the claims or defenses of the  
9 class"); and (4) adequacy of representation ("the representative  
10 parties will fairly and adequately protect the interests of the  
11 class"). Fed. R. Civ. P. 23(a)(1)-(4). In addition, the court  
12 must also find that the requirements of Rule 23(b)(1), (b)(2), or  
13 (b)(3) are satisfied. Wal-Mart Stores, Inc. v. Dukes, \_\_ U.S. \_\_,  
14 131 S. Ct. 2541, 2548 (2011). Rule 23(b)(3) requires a finding by  
15 the court "that questions of law or fact common to class members  
16 predominate over any questions affecting only individual members,  
17 and that a class action is superior to other available methods for  
18 fairly and efficiently adjudicating the controversy." Fed. R. Civ.  
19 P. 23(b)(3). Courts refer to the requirements of Rule 23(b)(3) as  
20 its "predominance" and "superiority" requirements. E.g., Amchem,  
21 521 U.S. at 615.

22 1. Numerosity

23 Rule 23(a)(1) provides that a class action may be maintained  
24 only if "the class is so numerous that joinder of all parties is  
25 impracticable." Fed. R. Civ. P. 23(a)(1). However,  
26 "impracticable" does not mean impossible; it refers only to the  
27 difficulty or inconvenience of joining all members of the class.  
28 Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14



1 (9th Cir. 1964).

2 Here, the parties estimate that the class consists of up to  
3 1,126 potential members. See Sett. Stip. at 11-12. In support of  
4 this estimate, Plaintiffs' counsel declares that Wachovia has  
5 provided a list of its customers who have been identified as  
6 potential class members, and that his firm has confirmed Wachovia's  
7 list. Kellner Decl. ¶ 4. Based on the parties' representations as  
8 to the number of potential class members, the Court finds the  
9 numerosity requirement to be satisfied.

10 2. Commonality

11 Rule 23(a)(2) requires that there be "questions of law or fact  
12 common to the class." Fed. R. Civ. P. 23(a)(2). This  
13 "commonality" requirement "requires the plaintiff to demonstrate  
14 that the class members 'have suffered the same injury.'" Wal-Mart,  
15 131 S. Ct. at 2551 (quoting Gen. Tel. Co. of the Southwest v.  
16 Falcon, 457 U.S. 147, 157 (1982)). The class members' "claims must  
17 depend on a common contention," and that common contention must be  
18 "of such a nature that it is capable of classwide resolution --  
19 which means that determination of its truth or falsity will resolve  
20 an issue that is central to the validity of each one of the claims  
21 in one stroke." Id.

22 In this case, each potential class member's alleged injury is  
23 identical in kind: each allegedly was entitled to receive notice of  
24 the APP Settlement from Wachovia, but did not. Any difference  
25 between the injuries allegedly suffered by particular class members  
26 is merely one of degree, that is, the amount of settlement money  
27 that they missed out on due to Wachovia's alleged failure to notify  
28 them. That difference is not enough to destroy the basic

1 commonality of their claims. Accordingly, the Court finds the  
2 commonality requirement to be satisfied.

3 3. Typicality

4 Rule 23(a)(3) requires that the representative parties' claims  
5 be "typical of the claims . . . of the class." Fed. R. Civ. P.  
6 23(a)(3). "Under the rule's permissive standards, representative  
7 claims are 'typical' if they are reasonably co-extensive with those  
8 of absent class members; they need not be substantially identical."  
9 Hanlon, 150 F.3d at 1020. Here, however, the named Plaintiffs'  
10 claims are substantially identical. Each Plaintiff alleges, in  
11 brief, that they were the beneficial owner of APP Securities; that  
12 they never received notice of the APP Settlement from Wachovia, the  
13 record owner of the securities; and that they would have submitted  
14 a claim if they had known of the APP Settlement. These allegations  
15 entirely comport with the definition of the proposed class.  
16 Accordingly, the Court finds that the typicality requirement is  
17 satisfied.

18 4. Adequacy of Representation

19 Rule 23(a)(4) requires a showing that "the representative  
20 parties will fairly and adequately protect the interests of the  
21 class." Fed. R. Civ. P. 23(a)(4). This factor requires: (1) that  
22 Plaintiffs are represented by qualified and competent counsel and  
23 (2) that the proposed representative Plaintiffs do not have  
24 conflicts of interest with the proposed class. Hanlon, 150 F.3d at  
25 1020.

26 The declaration submitted by Plaintiffs' counsel discusses his  
27 firm's "extensive experience in complex and class action  
28 litigation" and related qualifications. Kellner Decl. ¶¶ 8-11.

1 Plaintiffs' counsel has also provided his firm's resume. See note  
2 6 supra. Having reviewed the papers, the Court sees no issue with  
3 the qualifications of Plaintiffs' counsel and, as discussed above,  
4 Plaintiffs' claims are coextensive with those of the settlement  
5 class. Accordingly, the Court finds that the proposed settlement  
6 class is adequately represented.

7 5. Predominance and Superiority

8 Rule 23(b)(3) requires the court to find that "the questions  
9 of law or fact common to class members predominate over any  
10 questions affecting only individual members." Fed. R. Civ. P.  
11 23(b)(3). While evaluation of Rule 23's predominance requirement  
12 on a settlement motion does not require an analysis of potential  
13 trial management problems, "other specifications of the Rule --  
14 those designed to protect absentees by blocking unwarranted or  
15 overbroad class definitions -- demand undiluted, even heightened,  
16 attention in the settlement context." Amchem, 521 U.S. at 620.  
17 The terms of a proposed settlement are "relevant to a class  
18 certification." Id. Rule 23(b)(3) also requires that the class  
19 action be "superior to other available methods for fairly and  
20 efficiently adjudicating the controversy." Fed. R. Civ. P.  
21 23(b)(3). The factors relevant to assessing superiority include:  
22 (A) the class members' interests in individually  
23 controlling the prosecution or defense of separate  
24 actions; (B) the extent and nature of any litigation  
25 concerning the controversy already begun by or against  
26 class members; (C) the desirability or undesirability of  
concentrating the litigation of the claims in the  
particular forum; and (D) the likely difficulties in  
managing a class action.

27 Fed. R. Civ. P. 23(b)(3).

28 Here, the Court determines that common issues of law and fact

1 predominate. As discussed in Section IV.A.2 supra, if potential  
2 class members were to sue individually, each would bring  
3 essentially the same claim against Wachovia, namely, the claim that  
4 Wachovia breached a duty to provide the potential class member with  
5 notice of the APP Settlement. Under such circumstances, the class  
6 action is an obviously superior method of fairly and efficiently  
7 adjudicating these substantively identical claims, especially  
8 because none of the countervailing factors enumerated in Rule  
9 23(b)(3) are present here. Accordingly, the Court finds that the  
10 predominance and superiority requirements are met here.

11 Because all the requirements of settlement class certification  
12 are satisfied here, the Court determines that an appropriate  
13 settlement class exists. Staton, 327 F.3d at 952 (citing Amchem,  
14 521 U.S. at 620). The Court therefore proceeds to determining  
15 whether the proposed settlement "is fundamentally fair, adequate,  
16 and reasonable." Hanlon, 150 F.3d at 1026.

17 **B. Fairness of the Settlement**

18 The Ninth Circuit has warned that "there are real dangers in  
19 the negotiation of class action settlements of compromising the  
20 interests of class members," because "[i]ncentives inherent in  
21 class-action settlements" can "result in a decree in which the  
22 rights of [class members, including the named plaintiffs] may not  
23 [be] given due regard by the negotiating parties." Staton, 327  
24 F.3d at 959 (internal quotation marks omitted). These incentives  
25 stem from the fact that "[t]he class members are not at the table;  
26 class counsel and counsel for the defendants are." Id. This can  
27 "influence the result of the negotiations without any explicit  
28 expression or secret cabals," and is why "district court review of

1 class action settlements includes not only consideration of whether  
2 there was actual fraud, overreaching or collusion but, as well,  
3 substantive consideration of whether the terms of the decree are  
4 'fair, reasonable and adequate to all concerned.'" Id. at 950  
5 (citing Officers for Justice v. Civ. Serv. Comm'n of San Francisco,  
6 688 F.2d 615, 625 (9th Cir. 1982)). Due in part to these dangers  
7 of "collusion between class counsel and the defendant," the Ninth  
8 Circuit has adopted the rule that "settlement approval that takes  
9 place prior to formal class certification requires a higher  
10 standard of fairness," leading to "a more probing inquiry than may  
11 normally be required under Rule 23(e)." Hanlon, 150 F.3d at 1026.

12 Not all proposed class action settlements require the same  
13 level of court scrutiny. A settlement that is structured so that  
14 the interests of the class are tied to the interests of the named  
15 plaintiffs, their counsel, or the defendant demands less scrutiny.  
16 For example, a settlement that tethers the size of the class  
17 counsel's attorney fee award to the number of claim forms submitted  
18 or the amount disbursed to the class gives class counsel motivation  
19 to ensure that notice to the class is as effective as possible.  
20 Similarly, because a defendant benefits from the largest possible  
21 release of liability, a settlement in which only class members who  
22 submit a claim form release their claims against a defendant aligns  
23 the interests of the defendant and the class members.

24 Here, the proposed settlement goes beyond a mere lack of  
25 alignment between the class's interests and those of the parties:  
26 Wachovia's interests are in actual conflict with those of the  
27 class. This is not a lump-sum settlement; rather, the settlement  
28 obligates Wachovia to pay only those class members who submit a

1 valid Proof of Claim. And Wachovia pays out on this limited basis  
2 even though it receives a release of liability from the entire  
3 class. Wachovia, therefore, has an incentive to suppress the  
4 number of claimants by undertaking minimal notice procedures and  
5 making the process for submitting Proofs of Claim unduly difficult.  
6 Additionally, Wachovia has agreed to pay for settlement  
7 administration (such as the cost of notifying potential class  
8 members and handling fees) separate and apart from the settlement  
9 fund. Normally, this would be a welcome gesture, but on the facts  
10 of this case it appears to give Wachovia an additional incentive to  
11 supply notice on the cheap.

12       The Court's concerns might be alleviated if it were apparent  
13 that Plaintiffs and their counsel had incentives to advocate  
14 vigorously on the class's behalf. But they do not. Even though a  
15 class member's recovery is contingent on receipt of notice and  
16 submission of a valid claim, both Plaintiffs and their counsel have  
17 agreed to receive lump-sum payments. The only persons guaranteed  
18 to get a check from Wachovia in this case are named Plaintiffs and  
19 their counsel, and the size of the check is unaffected by the size  
20 of the benefit received by the class. Plaintiffs and their counsel  
21 lack any structural incentive to ensure that the class benefits  
22 from robust notice and simplified claim procedures.

23       This misalignment of incentives reveals itself in the  
24 particulars of the proposed settlement. Most troubling is the  
25 proposed settlement's treatment of Category B class members. While  
26 the parties estimate that Category A claimants may receive up to  
27 roughly \$306,000 in total, the parties provide no estimate for  
28 Category B claimants. And indeed, it is entirely possible that

1 Category B claimants will receive no money at all, even though they  
2 comprise nearly two-fifths of the class. Unlike Category A  
3 claimants, Category B claimants are required to engage in the  
4 absurd exercise of proving to Wachovia that they were the  
5 beneficial owners of securities purchased for them by Wachovia.  
6 The Court notes that the relevant ownership period ended in 2001.  
7 It would be a rare bookkeeper who retained careful records of a  
8 stock purchase in an obscure paper company for a dozen years or  
9 more -- especially when class members would have every good reason  
10 to think that the record owner of the stocks would keep records.  
11 Ultimately, the Court fails to see why Category B class members  
12 should not enjoy the same presumption of recovery as Category A  
13 class members. The only apparent reason for the difference is that  
14 Wachovia kept better records for the latter than the former; if  
15 other reasons exist, the parties have not brought them to the  
16 Court's attention. As the matter now stands, it would be patently  
17 unfair to permit Wachovia to benefit from gaps in its own records,  
18 especially in a case like this one, which hinges on Wachovia's  
19 alleged failures to provide proper notifications to its account  
20 holders.

21 The Court is also concerned about the scope of the release  
22 Wachovia has bargained for. This case arises from Wachovia's  
23 alleged failure to perform an essentially ministerial act, that is,  
24 to provide its account holders with notice of a class action  
25 settlement. Yet the definition of "Settled Claims" stipulated by  
26 the parties would release Wachovia not only from claims related to  
27 this alleged ministerial failure, but also from any and all claims  
28 "which relate in any way to the purchase, sale or custody of APP

1 Securities during the APP Class Period . . . ." Sett. Stip. at 13.  
2 This release goes far beyond Wachovia's exposure to claims for  
3 failures to provide notice. The Court recognizes that because the  
4 APP Class Period ended nearly eleven years ago, many claims covered  
5 by this purported release likely would be time-barred. But the  
6 Court also recognizes that the release is worded broadly enough to  
7 encompass claims that might be equitably tolled. As a result, the  
8 Court is concerned that the scope of release is too broad. The  
9 Court's concerns are exacerbated by the fact that, under the  
10 parties' agreement, Category B class members -- that is, 38 percent  
11 of the class -- might receive no payment at all in exchange for  
12 this sweeping release. This is especially unfair in light of the  
13 fact that roughly four out of five members of Category B traded APP  
14 stock during the APP Class Period and thus ought to receive some  
15 recovery. See Section II.B.1 supra.

16 In evaluating the fairness of this settlement with respect to  
17 Category B class members, the Court also would like to know more  
18 about the size of the initial APP Settlement and the percentage of  
19 APP Settlement class members who were Wachovia account holders. If  
20 the entire APP Settlement amounted to only a few hundred thousand  
21 dollars and most of the parties to the settlement were Wachovia  
22 account holders, then a recovery of up to \$306,000 for Category A  
23 class members and relatively small recovery for Category B class  
24 members might seem eminently fair. But if the earlier settlement  
25 was much larger, and the class had a high proportion of Wachovia  
26 account holders, then the proposed settlement might not be fair.  
27 Without some sense of the size of the APP Settlement and the  
28 proportion of Wachovia account holders, the Court is hard-pressed



1 to evaluate the proposal before it. The parties should place this  
2 information before the Court.

3 The Court is also concerned by how little light the parties  
4 have shed on the distribution of settlement funds among individual  
5 claimants. The parties have told the Court that a proper claimant  
6 will receive everything they would have received under the APP  
7 Settlement, minus Plaintiffs' incentive payments and Plaintiffs'  
8 counsel's fees and costs. But this says very little about how the  
9 settlement would benefit a typical class member, since the parties  
10 have provided no information about the average, median, or highest  
11 individual recovery amounts, even for the Category A potential  
12 class members for whom Wachovia believes it has complete records.

13 As a result, the Court cannot ascertain whether it is  
14 fundamentally fair to require some, but not all, class members to  
15 undertake a laborious Proof of Claim procedure. The Proof of Claim  
16 form for Category B class members requires them to independently  
17 verify and submit documentary evidence of their ownership of APP  
18 Securities during the APP Class Period. Category B Proof of Claim  
19 at 3. Then, after marshaling documentary evidence of securities  
20 transactions dating as far back as 1998, Category B claimants must  
21 navigate a complicated series of tables and coded charts. See id.  
22 at 7-11. Category B claimants who had more than one Wachovia  
23 account containing APP securities must repeat this process and  
24 provide a separate Proof of Claim form for each account. Id. at 3.  
25 While a claimant might be motivated to leap such high hurdles if  
26 there were a significant reward at the finish line, the Court  
27 cannot discern from the papers submitted what recovery, if any, a  
28 typical claimant should expect. Hence, the Court cannot determine

1 whether these procedures are justifiable. Moreover, the parties  
2 have not explained why, as a matter of either fairness or practical  
3 necessity, it is the class who must fill in the gaps in Wachovia's  
4 bookkeeping, rather than Wachovia or Plaintiffs' counsel.

5 Finally, the Court finds that the objection process is  
6 excessively cumbersome. The parties have agreed that objectors  
7 must mail a written objection not only to the settlement  
8 administrator, but also to both sets of counsel. Sett. Stip. at  
9 21. Moreover, objectors must file their documents with the Court.  
10 Id. The Court sees no reason to require objectors to notify four  
11 parties when one -- the settlement administrator -- will do.

12 Because the Court has grave reservations about the fundamental  
13 fairness of the proposed settlement as it has been explained thus  
14 far, the Court DENIES Plaintiffs' Motion for Preliminary Approval  
15 of the Proposed Class Settlement.

16 **C. Adequacy of Proposed Notice**

17 Though the concerns enumerated in the previous Section supply  
18 sufficient grounds to deny the instant motion, in the interest of  
19 judicial economy the Court now reviews the adequacy of the parties'  
20 proposed notice procedures. The Court has additional concerns  
21 about these procedures.

22 Notice to a class must provide:

23 the best notice practicable under the  
24 circumstances, including individual notice to  
25 all members who can be identified through  
26 reasonable effort. The notice must concisely  
27 and clearly state in plain, easily understood  
28 language: the nature of the action; the  
definition of the class certified; the class  
claims, issues, or defenses; that a class  
member may enter an appearance through counsel  
if the member so desires; that the court will  
exclude from the class any member who requests

1 exclusion, stating when and how members may  
2 elect to be excluded; and the binding effect of  
3 a class judgment on class members under Rule  
4 23(c)(3).

5 Fed. R. Civ. P. 23(c)(2)(B). The Court is concerned that the  
6 parties may not have selected "the best notice practicable under  
7 the circumstances." The Court is particularly sensitive to this  
8 issue in light of the origin of this lawsuit, Wachovia's alleged  
9 failure to notify members of an earlier settlement class. The  
10 Court notes that, here, the parties have chosen to notify the class  
11 only by first-class mail sent to class members' last-known  
12 addresses. The proposed class consists of individuals who had  
13 Wachovia accounts in late 2005, and the Court is concerned that the  
14 last-known addresses for some or many of these individuals may have  
15 obsolesced in the intervening six-plus years. This concern is  
16 heightened further by the misalignment of incentives between  
17 Wachovia and the proposed settlement class, and exacerbated by  
18 Plaintiffs' failure to explain why the parties have included no  
19 back-up system of notification, such as email or publication  
20 notice. Publication notice was used in the original APP  
21 Settlement, ECF No. 1 Ex. B; the Court cannot fathom why this case,  
22 which seeks relief for earlier failures of notice, calls for less  
23 notice rather than more.

24 The Court also finds fault with the content of the proposed  
25 Class Notice. First, it is simply too long. The Court is  
26 concerned that few class members will read a fifteen-page, single-  
27 spaced Class Notice without having been given some initial hint as  
28 to why they should bother. The parties should provide an industry-  
standard short-form notice that directs them to the long-form  
notice for details. Second, the Class Notice does not provide

1 potential class members with enough information about the size of  
2 their possible recovery to make an informed decision about whether  
3 to accept the settlement. The Class Notice tells class members  
4 that they may recover "what [they] would have received in the APP  
5 Litigation, minus a pro-rata percentage for attorneys' fees and  
6 incentive payments to the Class Representatives," Class Notice at  
7 5, and that class counsel's request for \$100,000 in attorney fees  
8 "will proportionally reduce your settlement payment," id. at 10.  
9 What the Class Notice does not say is how much this pro-rata,  
10 proportionate reduction might amount to, in either absolute or  
11 percentage terms. The Class Notice tells class members, in  
12 essence, that they may recover a fraction of what they would have  
13 if they had received proper notice in the first place -- but it  
14 only tells them the fraction's numerator, not its denominator.  
15 From that information, it is impossible for a class member to  
16 determine how much of the settlement fund will be consumed by  
17 attorney fees and whether they should object. The Court is  
18 concerned that class members will be unable, therefore, to make an  
19 informed decision about whether to accept the proposed settlement,  
20 withdraw from it, or object to it. Plaintiffs' Motion makes it  
21 clear that, based solely on the maximum recovery of Category A  
22 claimants, attorney fees would consume roughly 34 percent of the  
23 settlement fund, if the Court awarded Plaintiffs' counsel all they  
24 ask for and Category B class members submitted no valid claims.  
25 But this information does not appear in the Class Notice.

26 In sum, the Court is not convinced that the proposed notice  
27 plan would provide the class with "the best notice practicable  
28 under the circumstances," as Rule 23 requires. The parties have

1 not satisfied the Court that they are taking appropriate steps to  
2 notify the largest practicable number of class members, or to  
3 include important, readily available information in the notice.  
4 The inadequacy of the proposed notice provides another, independent  
5 reason for the Court to deny Plaintiffs' Motion.

6

7 **V. CONCLUSION**

8 For the foregoing reasons, the Court DENIES without prejudice  
9 Plaintiffs' Motion for Preliminary Approval of the Proposed Class  
10 Settlement. The Court determines that an appropriate settlement  
11 class exists but that the Proposed Settlement must be rejected at  
12 this time because, first, the Court cannot determine from the  
13 information submitted whether the Proposed Settlement is  
14 fundamentally fair, particularly to Category B class members, and  
15 second, the proposed notice procedures would not notify the highest  
16 practicable number of class members or give them adequate  
17 information to evaluate the settlement.

18 Plaintiffs may resubmit an amended Motion and supporting  
19 materials within thirty (30) days of this Order. Failure to do so  
20 will result in Plaintiffs' Motion being deemed DENIED WITH  
21 PREJUDICE and the Court setting this action for trial.

22

23 IT IS SO ORDERED.

24

25 Dated: April 2, 2012

26

  
UNITED STATES DISTRICT JUDGE

27

28