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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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8 THE CHARLES SCHWAB CORPORATION,

No. C 10-04030 SI

9 Plaintiff,

**ORDER GRANTING MOTION TO
REMAND AND REMANDING ACTION
TO SAN FRANCISCO SUPERIOR
COURT**

10 v.

11 BNP PARIBAS SECURITIES, *et al.*,

12 Defendants.
13 _____/

14 Currently before the Court is plaintiff's motion to remand. The motion is scheduled for hearing
15 on February 25, 2011. Pursuant to Civil Local Rule 7-1(b), the Court determines that the matter is
16 appropriate for resolution without oral argument, and VACATES the hearing. Having considered the
17 papers submitted, and for good cause shown, the Court GRANTS plaintiff's motion to remand.

18
19 **BACKGROUND**

20 This case stems from plaintiff's \$1.38 billion purchase of 37 certificates in 36 securitization
21 trusts backed by residential mortgage loans. Amended Complaint, ¶ 1, Docket No. 1 (Notice of
22 Removal). Plaintiff now claims that defendants made numerous untrue and misleading statements to
23 Schwab about the certificates and the credit quality of the mortgage loans that backed them. *Id.*
24 Plaintiff filed this suit in San Francisco County Superior Court against twenty seven defendants,
25 asserting claims under the California Corporate Securities Act (§§ 25401 and 25501), under the
26 Securities Act of 1933 (§§ 11, 12(a)(2),15), for negligent misrepresentation (Cal. Civil Code §§ 1572,
27 1709), and for rescission of contract (Cal. Civ. Code §§ 1689, 1710).

28 On September 8, 2010, defendants Wells Fargo Bank, N.A. and Wells Fargo Asset Securities

1 Corporation (Wells Fargo) removed the action to this Court under 28 U.S.C. § 1452(a) and 28 U.S.C.
2 § 1334, asserting that this action “relates to” bankruptcy proceedings in *In re American Home Mortgage*
3 *Holdings, Inc.*, Case No. 07-11047 (“AHM”), pending in the bankruptcy court in the Eastern District
4 of Delaware. Notice of Removal, ¶¶ 9, 13. Specifically, Wells Fargo asserts that 262 of the loans in
5 one of the trusts issued by Wells Fargo were originated by AHM, and pursuant to an indemnity
6 agreement AHM is required to indemnify Wells Fargo for claims relating to alleged misstatements or
7 omissions about those loans. *Id.*, ¶¶ 8, 10-12; *see also* Opposition at 4.¹ Wells Fargo asserts that it has
8 filed a proof of claim in the AHM bankruptcy proceedings that relates specifically to this case and seeks
9 indemnity on the claims plaintiff asserts here. *Oppo.* at 5; Declaration of James C. Rutten, Ex. 1. The
10 other defendants joined or consented to Wells Fargo’s Notice of Removal.

11 Plaintiff now moves to remand this action to Superior Court, arguing that removal jurisdiction
12 does not exist on these facts where Wells Fargo cannot prove that this case will have any impact on
13 AHM’s now-confirmed plan of liquidation in bankruptcy court. Plaintiff also argues that even if
14 removal jurisdiction exists, the connection of this action to the bankruptcy proceedings is remote, since
15 AHM’s loans constitute only 5.5% of the loans in one out of the 36 trusts in this action, so in light of
16 the significant comity concerns, the action should be remanded as a matter of equity.²

18 LEGAL STANDARD

19 Federal courts are courts of limited jurisdiction, and a cause of action is presumed to lie outside
20 this limited jurisdiction until the party asserting jurisdiction establishes the contrary. *Kokkonen v.*
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22 ¹ In its notice of removal, Wells Fargo asserted that AHM originated loans in two of the three
23 trusts issued by Wells Fargo, but in its opposition, Wells Fargo clarifies that while two of the Wells
24 Fargo trusts contained loans originated by AHM, only the loans in one of the trusts – Wells Fargo
25 Mortgage Backed Securities Trust 2007-8 – are covered by a contractual indemnity agreement. *See*
Oppo. at 4 & n.3. Wells Fargo also clarified that Wells Fargo Funding, Inc. purchased the loans from
AHM but then transferred them, along with the contractual rights, to Wells Fargo Bank, N.A. *Id.*, at n.
4.

26 ² Plaintiff also argued in its motion to remand that removal violated Section 22(a) of the
27 Securities Act of 1933. *See* Motion to Remand at 9-11. However, after Judge Conti rejected that
28 argument in *Fed. Home Loan Bank of San Francisco v. Deutsche Bank Secs.*, Case No. 10-3039 SC,
2010 U.S. Dist. LEXIS 138564 (N.D. Cal. Dec. 20, 2010), Schwab abandons this argument in its Reply.
See Plaintiff’s Reply at 1, fn. 1.

1 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A defendant may remove an action from state
2 court if it could have originally been brought in federal court. 28 U.S.C. § 1441. The defendant has the
3 burden of establishing that removal is proper. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

4 5 DISCUSSION

6 I. “Related to” Jurisdiction

7 Under 28 U.S.C. § 1452, a party may remove a claim to the district court if the district court has
8 jurisdiction under 28 U.S.C. § 1334. Section 1334 establishes original jurisdiction over proceedings
9 “related to cases under title 11.” 28 U.S.C. § 1334(b). A proceeding is related to a bankruptcy case
10 where “‘the outcome of the proceeding could conceivably have any effect on the estate being
11 administered in bankruptcy,’” meaning that “‘the outcome could alter the debtor’s rights, liabilities,
12 options, or freedom of action (either positively or negatively) and which in any way impacts upon the
13 handling and administration of the bankrupt estate.’” *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988)
14 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis in original)).

15 However, once a bankruptcy plan has been confirmed, the broad scope of “related to”
16 jurisdiction is necessarily more limited. At that point, it extends only to situations where there is a
17 “close nexus” between the confirmed plan and the matter allegedly related thereto; matters affecting
18 “‘the interpretation, implementation, consummation, execution, or administration of the confirmed plan
19 will typically have the requisite close nexus.’” *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d
20 1189, 1194 (9th Cir. 2005) (quoting and adopting test *In re Resorts Int’l, Inc.*, 372 F.3d 154, 67 (3d Cir.
21 2004)).

22 Here, plaintiff asserts that the AHM liquidation plan has been confirmed and that Wells Fargo
23 has failed to demonstrate the requisite “close nexus” of its potential claims against AHM related to the
24 262 loans originated by AHM to the bankruptcy proceedings. *See* Reply at 1-2. Wells Fargo, relying
25 on the more lenient “any conceivable impact” pre-confirmation test, argues that its rights to contractual
26 indemnity and defense costs from AHM for the claims in this action are more than sufficient to
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1 demonstrate “related to” jurisdiction here.³ Wells Fargo provides no explanation of how its claims
2 regarding the 262 loans in the Wells Fargo Mortgage Backed Securities Trust 2007-8 will be treated
3 under the AHM liquidation plan or what further proceedings, if any, Wells Fargo can foresee with
4 respect to its rights asserted in the AHM bankruptcy. Wells Fargo also fails to explain either how its
5 rights with respect to 262 loans, only 5.5% of the loans in one of the three Wells Fargo trusts, would
6 lead to a significant amount of indemnity for the claims in this action, or, relatedly, whether other
7 indemnity agreements cover other loans in its trusts. However, even assuming that Wells Fargo had
8 demonstrated a “close nexus” sufficient to demonstrate “related to” jurisdiction in this Court under 28
9 U.S.C. § 1334(b), for the reasons identified below, the Court finds that this case should be remanded
10 under equitable considerations.⁴

11 12 **II. Remand on Equitable Considerations**

13 Under Section 1452(b), any claim removed pursuant to Section 1334 may be remanded on “any
14 equitable ground.” In the Ninth Circuit, courts have identified seven factors governing the decision to
15 remand:

16 (1) the effect of the action on the administration of the bankruptcy estate; (2) the extent to which
17 issues of state law predominate; (3) the difficulty of applicable state law; (4) comity; (5) the
18 relatedness of the action to the bankruptcy case; (6) any jury trial right; and (7) prejudice to
plaintiffs from removal.

19 *Hopkins v. Plant Insulation Co.*, 349 B.R. 805, 813 (N.D. Cal. 2006) (citing *Williams v. Shell Oil Co.*,
20 169 B.R. 684, 692-93 (S.D. Cal. 1994)). Judge Conti in this District recently applied these factors to

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22 ³ Wells Fargo relies on the pre-confirmation test in large part because plaintiff relied on the
23 same in its motion. Plaintiff did so, however, because its motion to remand was filed before the AHM
liquidation plan was confirmed on November 20, 2010. See Reply at 2, fns. 2-3.

24 ⁴ At least two recent cases have found that indemnity claims submitted to the AHM bankruptcy
25 proceeding were sufficient to demonstrate “related to” jurisdiction under either the “conceivably
26 related” to or “close nexus” standards. In one, *Fed. Home Loan Bank of San Francisco v. Deutsche
27 Bank Secs.*, 2010 U.S. Dist. LEXIS 138564 (N.D. Cal. Dec. 20, 2010), the court found “related to”
28 jurisdiction as a result of AHM and other similar indemnification agreements, but granted remand based
on equitable considerations; see discussion *infra*. In the other, *Stichting Pensioenfonds ABP v.
Countrywide Fin. Corp.*, 2010 U.S. Dist. LEXIS 139289 (C.D. Cal. Dec. 29, 2010), the court found a
“close nexus” based on an AHM indemnity agreement that covered a substantially larger proportion of
the loans involved – 50% of the issue from one of the fourteen trusts involved in the case -- and denied
remand based on equitable considerations not present in this case.

1 a factually similar case and found that they weighed in favor of remand. *See Fed. Home Loan Bank of*
2 *San Francisco v. Deutsche Bank Secs.*, 2010 U.S. Dist. LEXIS 138564, *33-40 (N.D. Cal. Dec. 20,
3 2010) (remanding case based on the “very small number of loans in the trusts that had bankrupt
4 originators,” where AHM originated 57% of the loans in one trust, as well as an undisclosed small
5 number of loans in four additional trusts, out of the 74 trusts at issue); *cf. Fed. Home Loan Bank of Chi.*
6 *v. Banc of Am. Funding Corp.*, 2011 U.S. Dist. LEXIS 4945, *14 (N.D. Ill. Jan. 18, 2011) (rejecting
7 “related to” jurisdiction contemplated in the Bankruptcy Code, as “the prospect that a few of the
8 defendants may have such a potential basis for invoking federal jurisdiction in a couple of the situations
9 targeted by [plaintiff’s] enormous Complaint cannot serve as a very small jurisdictional tail that can wag
10 the very large jurisdictional dog of this lawsuit as a whole.”).

11 Turning to the factors that govern equitable remand, the Court notes first that Wells Fargo does
12 not explain how its claims will be treated under the AHM liquidation plan or how this action could
13 impact the administration of that plan, given the fact that only a small number of loans – *e.g.*, 292 loans
14 of the more than 70,000 loans covered by the Amended Complaint – are covered by the AHM indemnity
15 agreement benefitting Wells Fargo.

16 The Court finds that this case raises substantial state law claims, as well as claims arising under
17 the Securities Act of 1933, so neither federal nor state law predominates. However, claims under the
18 Securities Act first filed in state court are normally not removable. *See* 15 U.S.C. § 77v(a). Therefore,
19 the Court finds that comity concerns weigh in favor of remanding this action to state court.

20 The Court cannot tell, and neither party asserts, that the claims at issue here are related in any
21 way to claims at issue in the AHM bankruptcy proceeding. The Court can tell that only 262 loans –
22 5.5% of the loans in *one* of three Wells Fargo trusts – are implicated by the AHM indemnity agreement.
23 The Court can also tell that the matter pending before this Court does not involve “core” bankruptcy
24 matters. As a result, the Court finds that the connection between this case and the bankruptcy
25 proceedings in Delaware is very, very remote. *See* Reply at 1 (asserting that 99.63% of the loans in this
26 action were made by non-bankrupt originators); *see also Fed. Home Loan Bank of San Francisco v.*
27 *Deutsche Bank Secs.*, 2010 U.S. Dist. LEXIS 138564 at *34; *cf. Fed. Home Loan Bank v. Deutsche*
28 *Bank Sec., Inc.*, 2010 U.S. Dist. LEXIS 97393, *20 (W.D. Wash. Sept. 1, 2010) (remanding claims

1 which did not implicate “core” bankruptcy proceedings).⁵


2 Finally, the Court notes that Schwab asserts that it “has not alleged and does not intend to prove
3 that Wells Fargo made untrue or misleading statements about the few loans that were sold into” the
4 Wells Fargo trust by American Home Mortgage, and “represents to the Court that it will not present
5 evidence in this action that Wells Fargo made untrue or misleading statements about any loans from this
6 originator.” Motion to Remand at 4, 5. While this representation, on its own, would not mandate
7 remand, it does weigh in favor of remand along with the other factors considered by the Court, and is
8 a representation that the Superior Court can ensure plaintiff abides by in litigating its claims in state
9 court.

10
11 **CONCLUSION**

12 For the foregoing reasons, the Court GRANTS plaintiff’s motion to remand and REMANDS this
13 action to the Superior Court for the County of San Francisco, pursuant to 28 U.S.C. § 1452(b).

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15 **IT IS SO ORDERED.**

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17 Dated: February 23, 2011

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20 SUSAN ILLSTON
21 United States District Judge

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26 _____
27 ⁵ Plaintiff asserts, and defendant does not dispute, that the loans originated by AHM were such
28 a small fraction of the loans offered in the trust that they were not identified in the prospectus
supplement for the issue. *See, e.g.*, Wells Fargo Mortgage Backed Securities Trust 2007-8, incorporated
in Amended Complaint by Schedule 26 (Docket No. 1, pg. 147).