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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DANNY LANE, BEVERLY LANE, and MERCEDES GUERRERO, individually, and for other persons similarly situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.

Defendant.

Case No. CV-12-4026 WHA

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE

Date: June 20, 2013
Time: 8:00 A.M.
Crtrm: 8
Judge: Hon. William H. Alsup

Action Filed: July 31, 2012
Trial Date: April 21, 2014

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## I. INTRODUCTION

The Court should deny the Motion to Intervene. The Motion is untimely, seeks uncertain and improper relief, and is premised on misinterpretations of law. The only effect of granting the relief Movants seek will be further delay of force-placed insurance litigation against Wells Fargo Bank, N.A. for no purpose other than to secure control of a small fraction of the litigation (the force-placed *flood* insurance claims) for Movants' counsel.[1]

Plaintiffs in *Morris v. Wells Fargo Bank, N.A.*, Case No. 2:11-cv-00474 (W.D. Pa.) and *McKenzie v. Wells Fargo Bank, N.A.*, Case No. 3:11-cv-04965 (N.D. Cal.)(collectively "Movants") argue that they seek to intervene to protect their interests from "inadequate counsel." It is unclear what relief Movants seek. They variously ask to ensure the protection of their undefined interests, postpone a class certification ruling so they can develop a "more complete" factual record by submitting a "supplemental memorandum," correct certain misstatements in Plaintiffs' motion for class certification, consolidate this case with *McKenzie*, or stay a ruling on Plaintiffs' motion for class certification indefinitely.[2] The motion appears to be an attempt to delay this litigation so Movants' counsel can advance their flood insurance claims in *McKenzie*. Delay is not the purpose of Fed. R. of Civ. P. 24 or the First-Filed Rule.

Additionally, rather than address the factors under Rule 24, the Motion fixates on arguments *ad hominem* against Plaintiffs' attorneys in an attempt to direct attention away from the relevant issues—adequacy of the named *Plaintiffs* to represent the Class and Movants—to issues that are irrelevant—whether Plaintiffs' attorneys are "as adequate" as Movants' attorneys.

The timing of the Motion to Intervene is also troubling. Movants delayed filing their motion until after Plaintiffs filed their motion for class certification. This motion is also not

[1] Movants' cases are putative class actions relating only to forced-placed flood insurance. This case involves force-placed flood and hazard insurance. Plaintiffs' expert estimates that flood insurance makes up ten to twelve percent of the total combined force-placed flood and hazard insurance market. See Decl. of Steve Owings, **Exhibit 1**, **Second Supplemental Report** of Birny Birnbaum ("Birnbaum Supp."). All numbered exhibits referenced herein refer to exhibits attached to the declaration of Steve Owings filed concurrently herewith unless otherwise noted.

[2] Movants' request to stay this case pending a ruling on class certification in *Morris* would result in an indefinite stay. *Morris* has languished in the Western District of Pennsylvania for 26 months, and no class certification motion is pending or scheduled.

Movants' first attempt to gain control of *Lane*. Movants have been aware of this case since October 2012 when they previously sought to relate this case to *McKenzie*. Judge Spero denied the *McKenzie* Motion to Relate Cases. Judge Chen also declined to relate the cases in *Cannon v. Wells Fargo Bank, N.A.*, Case No. 3:12-cv-1376 (N.D. Cal.). The Motion to Relate was denied by both courts because these cases are not sufficiently similar to warrant consolidation. Movants did nothing during the next seven (7) months, instead waiting until May 22, 2013—the day before filing their Motion to Intervene—before they informed Plaintiffs' counsel of their intention to seek intervention. Decl. of Steve Owings, ¶ 10, **Exhibit 5**, Correspondence.

Movants' delay is particularly significant given what they hope to accomplish. Movants challenge the litigation strategy in *Lane*, but waited until after class certification briefing to do so. They seek to add Wells Fargo Insurance, Inc. (WFI) and their own named plaintiffs as parties to this litigation four months after the Court's January 18, 2013 deadline to add parties to the case. Movants knew of this deadline (and the fact that WFI was not a party to this case) before it passed. But they did not act. They have not been diligent in seeking to add parties. Further, Plaintiffs strongly disagree that WFI should be a party to this litigation.[3]

Movants ask that the Court delay ruling on class certification so they can submit a "supplemental memorandum."[4] If Movants' objective was to "help" the class and ensure the best opportunity for its certification, they would have contacted Plaintiffs' counsel and arranged to work cooperatively to achieve that common goal. Movants have known of the class certification filing deadline for almost six months, as the Court set the deadline on November 30, 2012. Movants did nothing until May 22, 2013, when they notified Plaintiffs of their intent to intervene the day before filing 402 pages of pleadings and exhibits in support of intervention. **Exhibit 5**.

Movants' claim that Plaintiffs' counsel are not "as adequate" as Movants' counsel is belied by the records of each of the firms' force-placed insurance cases. The record in *McKenzie*,

[3] This case is about a kickback scheme that was designed, organized and controlled by Wells Fargo Bank (WFB). WFI is only a pass through entity that is owned by WFB or its corporate parent. Adding WFI as a defendant does not enhance this litigation, and Movants do not demonstrate any value in adding WFI as a defendant.

[4] Plaintiffs thoroughly briefed all issues relevant to class certification and attached a copious record in support. Any "supplemental memorandum" would duplicate the class certification motions filed in this case and *McKenzie*.

for example, demonstrates *McKenzie* counsel's[5] consistent lack of diligence. Although *McKenzie* was filed months before *Lane*, the plaintiffs did not adequately plead any kickback or backdating claim.[6] As such, Judge Spero dismissed the case in its entirety on September 7, 2012 with leave to allege kickback claims. *McKenzie* did not allege kickback claims until November 29, 2012, almost four months after Plaintiffs filed *Lane*. *McKenzie's* claim to "first filed California case" status evaporates under close scrutiny of the record in *McKenzie*. The record in *McKenzie* implies that *McKenzie* counsel did not conduct any class discovery. This explains why *McKenzie* counsel imported the *Morris* discovery on April 22, 2013. The *McKenzie* motion for class certification references only documents and deposition testimony obtained in *Morris*, a handful of documents specific to each of the named plaintiffs, and expert reports.

Finally, the most important reason why Movants' motion should be denied is that there is minimal overlap between this case and Movants' cases. The *Lane* Plaintiffs allege claims regarding both force-placed flood insurance and hazard insurance. *Morris* and *McKenzie* allege claims relating only to force-placed flood insurance. Movants have no standing to intervene with respect to the Lanes' force-placed hazard insurance claims. Force-placed flood insurance represents only ten to twelve percent of all force-placed insurance. **Exhibit 1**, Birnbaum Supp. § 2. Putting the hazard insurance case on hold for "supplemental briefing" on certification of the flood insurance issues serves no legitimate purpose.

## II. FACTUAL BACKGROUND

### A. *Lane v. Wells Fargo Bank, N.A.*

Plaintiffs filed this case on July 31, 2012, (Dkt. No. 1), alleging three theories of liability: kickbacks, backdating, and excessive insurance requirements. On November 30, 2012, the Court entered a Case Management Order, to which Plaintiffs have strictly adhered. On January 24, 2013, the Court denied Wells Fargo's Motion to Dismiss, (Dkt. No. 45), with respect to kickback

[5] "*Morris* counsel" refers to the Nichols Kaster firm that originally litigated *Morris*. "*McKenzie* counsel" refers to Feazell & Tighe, L.L.P., Taus, Cebulash & Landau, LLP, Kabateck Kellner LLP, and Berger Montague, P.C., which initially litigated *McKenzie*. In April 2013, some of the *McKenzie* attorneys entered appearances in *Morris*, and one of the *Morris* attorneys entered an appearance in *McKenzie*. *Morris* Dkt. Nos. 141, 145; *McKenzie* Dkt. No. 104.

[6] Initially, *McKenzie* was a purely "excess insurance" case with only conclusory allegations regarding kickbacks.

claims, granted Plaintiffs leave to amend their backdating allegations, dismissed all "excess insurance" claims, and dismissed California law claims. (Dkt. No. 70). The Court granted leave to file an amended complaint, wherein Plaintiffs alleged five causes of action: violations of the Bank Holding Company Act (BHCA) and California Unfair Competition Law (UCL), breach of contract and the implied covenant of good faith and fair dealing, unjust enrichment, and conversion. (Dkt. No. 83). All claims survived a second motion to dismiss. (Dkt. No. 90).

The parties have diligently and expeditiously conducted discovery. After Plaintiffs raised discovery disputes with the Court, (Dkt. No. 60), and received a favorable ruling, (Dkt. Nos. 69, 72), Wells Fargo immediately produced over 300,000 pages of documents on February 8, 2013. To date, Wells Fargo has produced a total of 331,781 pages of documents in discovery. Decl. of Steve Owings, ¶ 13. Plaintiffs simultaneously took depositions of corporate representatives for Wells Fargo, ASIC, and QBE. Although Plaintiffs deposed Wells Fargo's representative, Thomas Farrell, just one week after Wells Fargo's document production, Plaintiffs' counsel were able to quickly identify relevant documents due to their past experience in similar LPI litigation against Wells Fargo.[7] Decl. of Steve Owings, ¶ 2. Mr. Farrell provided information necessary to prove commonality, typicality, adequacy, predominance, and superiority.[8] Plaintiffs then served subpoenas on QBE and ASIC and received 5,166 pages of documents in response. Decl. of Steve Owings, ¶ 13. Plaintiffs reviewed these documents and took depositions of QBE's and ASIC's representatives on May 1, 2013 and May 3, 2013, respectively, uncovering additional facts supporting class certification. *Id.*

*Lane* Plaintiffs' counsel have diligently prosecuted this case. Their record in this case demonstrates diligence in meeting deadlines, expeditiousness in discovery, and effective representation of the interests of the proposed classes. Plaintiffs' counsel have extensive experience litigating nationwide class actions against large financial institutions, including

[7] Plaintiffs' later asked for all deposition transcripts and documents produced in *Sayago v. Wells Fargo Bank, N.A.*, Case No. 8:11-cv-02009 (M.D. Fla.). This included thousands of pages of documents and an additional deposition transcript, which Plaintiffs' counsel had already reviewed because they are counsel for plaintiffs in *Sayago*.

[8] He further revealed that ASIC and QBE would be able to provide further information relating to adequacy, typicality, numerosity, and the other class certification elements.

numerous cases alleging kickback schemes in connection with force-placed insurance. Decl. of Steve Owings, ¶ 2. Currently, Plaintiffs' counsel are also counsel of record in three other cases against Wells Fargo relating to force-placed hazard, flood, and wind insurance.[9] *Id.*

**B. *McKenzie v. Wells Fargo Bank, N.A.***

Clifford McKenzie, a Texas resident, filed his complaint against Wells Fargo Home Mortgage, Inc., Wells Fargo Bank, N.A., Wells Fargo & Company, and Does 1 through 10 on October 7, 2011, alleging breach of contract and violations of the Truth in Lending Act (TILA) relating to Wells Fargo's excessive insurance requirements. Decl. of Steve Owings, **Exhibit 2**, *McKenzie* Docket ("*McKenzie* Dkt.") No. 1. After two (2) amended complaints, and four (4) additional plaintiffs, the parties filed a joint case management statement on May 4, 2012, seven months after filing the complaint. *McKenzie* Dkt. No. 30. On October 30, 2012, a full year after the original complaint, Judge Spero dismissed the second amended complaint, but granted plaintiffs leave to file an amended complaint regarding kickback claims, stating that "the allegations in Plaintiffs' SAC regarding Defendants' alleged scheme consist of only the bare conclusory factual allegations that Defendants received kickbacks." *McKenzie v. Wells Fargo Home Mortg., Inc.*, 2012 U.S. Dist. LEXIS 155480, *60 (N.D. Cal. Oct. 30, 2012). The *McKenzie* plaintiffs filed their Third Amended Complaint, with kickback allegations, on November 29, 2012. *McKenzie* Dkt. No. 78. Judge Spero partially dismissed the TAC for re-alleging the excess insurance theory on March 14, 2013. *McKenzie* Dkt. No. 96. The TAC alleges only state law claims, under the laws of the Plaintiffs' states of residence. *McKenzie* Dkt. No. 78.[10]

Based on the *McKenzie* docket, the *McKenzie* motion for class certification, and the motion to intervene, it appears that the *McKenzie* plaintiffs have not conducted any discovery. There is no evidence that counsel for *McKenzie* served interrogatories or requests for production

[9] *Sayago v. Wells Fargo Bank, N.A.*, Case No. 8:11-cv-2009 (M.D. Fla.); *Fladell v. Wells Fargo*, Case No. 0:13-CV-60721 (S.D. Fla.); and *Cannon v. Wells Fargo Bank, N.A.*, Case No. 3:12-cv-1376 (N.D. Cal.).

[10] As of May 31, 2013, when the *McKenzie* plaintiffs filed their motion for class certification, it appears that the only remaining plaintiffs are Clifford McKenzie and Daniel Biddix, both residents of Texas. *McKenzie* Dkt. No. 139.

of documents relating to class issues, nor any evidence that a single deposition of any defendant was taken in *McKenzie*. Facing class certification deadlines, *McKenzie* counsel hurriedly associated *Morris* counsel to work with them on the case. On April 19, 2013—twenty (20) days before the *Lane* class certification deadline and forty-two (42) days before the *McKenzie* class certification deadline—the parties entered a stipulation whereby *McKenzie* plaintiffs could use a portion of the discovery obtained in *Morris*.[11] *McKenzie* Dkt. No. 119, 121.

The *McKenzie* plaintiffs filed their motion for class certification on May 31, 2013, *McKenzie* Dkt. No. 139, attaching eight (8) declarations and approximately sixty-nine (69) substantive exhibits. Many of these exhibits were filed under seal and are not identified by name, but each was obtained in discovery in *Morris* or is a publicly available document.[12] *McKenzie* Dkt. No. 143 ¶¶ 1–49. The only documents actually obtained in *McKenzie* relate to the named plaintiffs. *McKenzie* Dkt. Nos. 140, 141. If *McKenzie* counsel obtained any class documents in discovery, they did not use them for their class certification motion.

**C. *Morris v. Wells Fargo Bank, N.A.***

Desiree Morris, a Pennsylvania resident, filed her case on April 7, 2011, alleging that Wells Fargo required excessive insurance, and vaguely alleging that Wells Fargo also received "kickbacks" or "commissions." Decl. of Steve Owings, **Exhibit 3**, *Morris* Docket ("*Morris* Dkt.") No. 1. The Court entered its initial scheduling order and the parties began mediation on August 1, 2011. *Morris* Dkt. Nos. 31–33. The plaintiff filed a motion for leave to file an amended complaint on November 14, 2011, while the motion to dismiss was still pending. *Morris* Dkt. No. 42. On September 7, 2012,[13] the court entered an order granting in part and

[11] The stipulation prohibits *McKenzie* from using any *Morris* documents relating to the "excess insurance" theory, which was dismissed in *McKenzie*. This likely represents a large portion of the *Morris* discovery.

[12] Exhibits 1 to 43 to Mr. Richter's declaration contains a "Morris" Bates number or are described as obtained in *Morris*. Exhibit 43-49 are publicly available documents. Several other exhibits—specifically Art Olsen's past expert reports attached to Art Olsen's expert report—were from the *Hofstetter* litigation. The only remaining exhibits were firm resumes and documents specific to the named plaintiffs. *McKenzie* Dkt. Nos. 140-141, 144-147.

[13] During the seventeen (17) month period between the original complaint and the court's first—and only—substantive order, the parties attempted mediation, filed numerous requests for extensions and modifications of the scheduling order, and engaged in a discovery dispute. *Morris* Dkt. Nos. 13, 32-33, 48, 51, 55, 69, 76, 80.

denying in part Wells Fargo's motion to dismiss, dismissing all but one claim against WFI (unjust enrichment survived), and several claims against WFB (violations of TILA and breach of contract survived). *Morris v. Wells Fargo Bank, N.A.*, 2012 U.S. Dist. LEXIS 127487 (W.D. Pa. Sept. 7, 2012). The *Morris* plaintiff filed a motion for class certification on September 19, 2012. *Morris* Dkt. No. 103. The Court denied the motion two days later and stated that the plaintiff could file a new motion for class certification after a status hearing. *Morris* Dkt. No. 110. Currently, the *Morris* case has motions for judgment on the pleadings under Fed. R. Civ. P. 23(c) and an interlocutory appeal related to the "excess insurance" theory pending. *Morris* Dkt. Nos. 114–119.

The only claims remaining in *Morris* at this time are TILA and breach of contract claims against WFB and an unjust enrichment claim against WFI. The TILA claim is predicated wholly on the "excess insurance" theory of liability, which is the subject of Wells Fargo's requested interlocutory appeal. *Morris* Dkt. Nos. 46, 118. The original breach of contract claim involved only the "excess insurance" theory as well. Dkt. No. 46. Although the Court's order dismissing the amended complaint in part allowed the plaintiff to pursue her implied covenant of good faith and fair dealing claim,[14] which referenced kickbacks, it is unclear whether *Morris* even includes a kickback claim against WFB, or if this claim is only asserted against WFI.

Throughout the course of the *Morris* litigation, *Morris* counsel has either actively agreed to or acquiesced to delaying the case. The case has been pending for over two years, and the plaintiff has no class certification motion even pending, much less a certified class. *Morris* counsel filed two separate joint motions or stipulations to extend time to file their class certification motion. *Morris* Dkt. Nos. 48, 69. Although Plaintiffs acknowledge that this may be partially due to Wells Fargo's obstructionist tactics,[15] nothing justifies a two year delay in filing a motion for class certification. *Morris* counsel filed their first motion to compel discovery on June 5, 2012, more than a year after filing the case. *Morris* Dkt. No. 76. Based on the publicly-

[14] The Court allowed Morris to pursue her implied covenant claim as part of the breach of contract claim.

[15] Plaintiffs have dealt with the same tactics in this case.

available docket information, the only thing keeping the *Morris* plaintiff from filing a motion for class certification is a status conference. *Morris* Dkt. No. 110. Despite *Morris* counsel's complaint that Wells Fargo will not agree to a status conference, in the eight and a half months since the court denied the original class certification motion, *Morris* counsel has not moved once to set the requested status conference.

**D. Differences Among *Lane*, *McKenzie*, and *Morris***

There is no significant overlap between this case and *Morris* or *McKenzie*. Each case involves Wells Fargo and force-placed insurance, but the overlap ends there. This case challenges Wells Fargo's kickback scheme and backdating of force-placed hazard and flood insurance. *Morris* and *McKenzie* are exclusively force-placed flood insurance cases; *Morris* centers on "excess insurance" claims which are not present here. Judge Chen, in *Cannon v. Wells Fargo Bank, N.A.*, Case No. 3:12-cv-01376, and Judge Spero, in *McKenzie*, both found that *Lane*, *McKenzie*, and *Cannon* (also a flood insurance case) were not related to one another.[16]

While Wells Fargo's scheme does not differ by type of insurance (hazard vs. flood), the *Morris* and *McKenzie* flood insurance plaintiffs do not have standing to represent hazard insurance class members. *Morris* and *McKenzie* do not even seek relief on behalf of individuals force-placed into hazard insurance, nor could they have standing to do so. Force-placed flood insurance only accounts for ten to twelve percent of all force-placed insurance. **Exhibit 1**, Birnbaum Supp. § 2. While the proposed classes in *Lane* may engulf the proposed classes in *McKenzie* and one of the classes alleged in *Morris*, none of the proposed classes in *Morris* or *McKenzie* would protect more than ten to twelve percent of the proposed classes in *Lane*.[17]

The cases all differ by causes of action as well. Only *Lane* seeks certification of any unifying federal claim for Wells Fargo's kickbacks. The *Lane* Plaintiffs seek certification of a

[16] Movants incorrectly assert that the motion to relate cases was denied because Plaintiffs refused to submit to magistrate jurisdiction. Although Plaintiffs requested that Judge Chen determine whether the cases were related because the parties in *Lane* and *Cannon* had not submitted to magistrate jurisdiction, Wells Fargo objected to relating the cases because *Cannon* and *Lane* involved kickbacks, whereas *McKenzie* did not. Judge Chen reviewed the complaints and determined, on substantive grounds, that the cases were not related. *Cannon* Dkt. No. 74.

[17] *Morris* is primarily an excessive insurance case. These excess insurance claims are currently holding up the *Morris* litigation. Delaying this litigation while *Morris* litigates claims already resolved by this Court is improper.

national class for violation of the BHCA and breach of contract, as well as California and Arkansas sub-classes for unjust enrichment, conversion, and violation of the California UCL. The BHCA also entitles all class members to treble damages, and the BHCA and UCL claims address the anti-competitive effects of Wells Fargo's practices. Thus, *Lane* is fundamentally different from Movants' cases. Two Texas plaintiffs in *McKenzie* seek certification of breach of contract, unjust enrichment, and conversion claims for Wells Fargo's kickbacks nationally and a tortious interference claim on behalf of a Texas sub-class. *McKenzie* Dkt. No. 139. The class claims in *Morris* are unclear at this time, but presumably plaintiff seeks certification of TILA and breach of contract claims against WFB nationally in connection with excess insurance claims, and unjust enrichment claims against WFI (and maybe an implied covenant claim against WFB) for kickbacks. Furthermore, the Texas and Pennsylvania residents in Movants' cases cannot represent the *Lane* Plaintiffs' California and Arkansas sub-classes.

**E. The MDL Petition**

One day after filing the Motion to Intervene in this case, Movants' counsel Shannon Carson and Patrick Madden filed a petition with the Judicial Panel on Multidistrict Litigation (JPML) to transfer and consolidate this case with a case pending in the Southern District of Illinois. Decl. of Steve Owings, ¶ 8, **Exhibit 4,** MDL Petition. It is no accident that this petition was filed shortly after Plaintiffs filed their motion for class certification in *Lane*. Movants' counsel seek to delay a class certification ruling in this Court, while securing a transfer of the majority of this case to the Southern District of Illinois. The JPML petition states that it only seeks to transfer the Lanes' hazard insurance claims involving Assurant into the proposed MDL. **Exhibit 4**, p. 13. To be clear, Movants seek to indefinitely stay *Lane* class certification briefing, transfer all of the *Lane* hazard claims to Illinois, and retain the flood claims for adjudication in this district—with Movants' counsel appointed class, or co-lead, counsel, of course. It is difficult to understand how this gamesmanship could possibly be construed as beneficial to the class.

**F. The Comparative Adequacy of Counsel**

Rather than address the adequacy of the *parties*, which is the relevant consideration on a

motion to intervene, Movants' counsel direct a series of *ad hominem* attacks at Plaintiffs' counsel and argue that Movants' counsel are "more adequate" than Plaintiffs' counsel. This is irrelevant to the motion to intervene. However, Plaintiffs' counsel obtained and reviewed 331,781 pages of documents before filing their class certification motion. They took three depositions in this case, plus a fourth in *Sayago*, the transcript of which was produced in this case. Decl. of Steve Owings, ¶ 13. They have carefully crafted their claims to the evidence that they have obtained in discovery and moved this case forward in a timely manner, according to the Court's scheduling order.

In contrast, *McKenzie* and *Morris* counsel have allowed their cases to go stale. The only evidence submitted for the adequacy of Berger & Montague, P.C., counsel in *McKenzie*, is a recent settlement in the JPMorgan Chase Bank, N.A. force-placed flood insurance litigation. The most recent development in that settlement occurred when the parties filed a notice in *Scheetz v. JPMorgan Chase Bank, N.A.*, Case No. 12-cv-4113 (S.D.N.Y.), notifying the court that they had reached a settlement in private mediation, but had not yet chosen a Court in which to file the settlement papers. Decl. of Steve Owings, ¶ 15, **Exhibit** 7, *Scheetz* Dkt. No. 39. In *Morris*, since the Court *sua sponte* denied the first motion for class certification on September 21, 2012, *Morris* counsel has failed to set the status conference that would enable them to file a renewed motion for class certification. Movants' counsel have also filed numerous motions to stay pending mediation before seeking class certification. Decl. of Steve Owings, ¶ 16.[18] While *Morris* counsel may have developed a thorough record in *Morris* and achieved a good recovery for the class in *Hofstetter*, their track record in cases against Wells Fargo does not indicate they are "more adequate" than Plaintiffs' counsel.

**G. Plaintiffs' Counsel's Motion to Intervene in *Hofstetter***

Movants argue or imply that *Lane* counsel are somehow inadequate because they sought to intervene in the *Hofstetter* case. In that case, the settlement stated that it released all claims or causes of action asserted in the Second Amended Complaint, which could be construed to

[18] In fact, Movants counsel have not filed a single class certification motion in any of the numerous force-placed insurance cases they tout in their motion since *Hofstetter*, excluding the immediately denied motion in *Morris*. *Id.*

broaden the scope of the settlement beyond just the causes of action pled in the complaint.[19] (Dkt. No. 104, Decl. of Kai Richter, Ex. 10, p. 7). This would, of course, directly contravene the Court's "Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement" issued in this case. (Dkt. No. 39)("The release should be limited only to the claims certified for class treatment.") Plaintiffs' counsel sought to intervene to determine whether the scope of that release included claims alleged in *Gibson v. Chase Home Finance, LLC*, Case. No. 8:11-cv-1302 (M.D. Fla.). (Dkt. No. 104, Decl. of Kai Richter, Ex. 10, p. 7). At the final fairness hearing, both defendants' and plaintiffs' counsel in *Hofstetter* affirmed, on the record, that the release did not encompass Plaintiffs' claims. *Id.* at pp. 9, 15. This was, for the most part, exactly the result counsel sought for their client, and it is hard to see how this detracts from their adequacy in this case.

## III. ARGUMENT

### A. Movants' Wrongfully Premise Their Intervention Arguments on the First-Filed Rule.

Movants seek to sway the Court on the intervention issue by claiming "first-filed" status. Intervention is *not* a remedy under the first-filed rule. Instead, "under the first-to-file rule, a district court may—at its discretion—transfer, stay, or dismiss an action when a similar action has been filed in another district court." *Dubee v. P.F. Chang's China Bistro, Inc.,* 2010 WL 3323808 (N.D. Cal. 2010)(citing *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625–26 (9th Cir. 1991)). Allowing intervention under the first-filed rule would promote forum-shopping—it would allow the first-filed plaintiff to choose between moving forward in the original jurisdiction and seeking to intervene in a later-filed case, like Movants try to do here. When forum-shopping is involved, courts do not grant relief based on the first-filed rule. *Alltrade, Inc.*, 946 F.2d at 628; s*ee also*, Section III. D, *infra* (further analysis of first-filed rule).

The Motion to Intervene is not aimed at protecting the status of earlier filed cases. If it were, Movants would have sought a stay, dismissal, or transfer of this action when they became

[19] The issue was whether "claims or causes of action" included factual theories of liability arising out of the same general practice or only those specific theories and causes of action raised in the complaint.

aware of it. At the latest, this was October 22, 2012—when the *McKenzie* plaintiffs sought to relate these cases.[20] "Whatever rights or interests Proposed Intervenors may have had in enforcing a first-filed rule, those rights and interests (if any) necessarily arose the moment this action was filed, and were known or should have been known to Proposed Intervenors when they learned of the very *existence* of this lawsuit." *Lane v. Facebook, Inc.*, 2009 WL 3458198, at *3 (N.D. Cal. Oct. 23, 2009)(emphasis in original). Further, if Movants sought to protect the first-filed status of their earlier cases, then the *Morris* plaintiffs would have sought relief under the first-filed rule by seeking to stay, dismiss, or transfer all of the following force-placed flood insurance cases that were filed after *Morris*:

> *Sayago v. Wells Fargo*, 8:11-cv-02009 (M.D. Fla.), filed September 2, 2011;
> *Passantino-Miller v. Wells Fargo*, 2:12-cv-00420 (E.D. Cal.), filed February 17, 2012;
> *Cannon v. Wells Fargo*, 4:12-cv-01376 (N.D. Cal.), filed March 19, 2012;
> *Feaz v. Wells Fargo*, 1:12-cv-00350 (S.D. Ala.), filed May 24, 2012;
> *Fladdell v. Wells Fargo*, 0:12-cv-61368 (S.D. Fla.), filed July 11, 2012;
> *Roberts v. Wells Fargo*, 4:12-cv-00200 (S.D. Ga.), filed July 24, 2012.

The *Morris* plaintiff also did not seek first-filed relief in *McKenzie*, which was filed October 7, 2011. Instead, the *Morris* and *McKenzie* lawyers teamed up and exported all discovery from *Morris* into the later-filed *McKenzie* action. They did this in an apparent attempt to *escape* the first-filed district (the Western District of Pennsylvania) where their case has languished for twenty-six (26) months with no class certification motion pending or hearing scheduled. The only first-filed arguments Movants have made anywhere are in this case in the Motion to Intervene. Rather than preserve the jurisdiction of the first-filed court, at the eleventh hour, Movants seek to take the helm in *this* case, which Plaintiffs' counsel have diligently pursued for nearly a year. Because this relief is not even available under the first-filed rule, the Court should disregard Movants' "first-filed" arguments with respect to the motion to intervene.

**B. Movants Have No Right to Intervene**

Rule 24(a) provides that "[o]n timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action,

[20] Both Judge Spero and Judge Chen found that *Lane* and *McKenzie* are not related cases. Dkt Nos. 12, 20.

and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). As this Court recently stated:

> [a]n applicant seeking to intervene of right in a pending lawsuit pursuant to Rule 24(a) must satisfy four requirements: (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

*Golden Eagle Ins. Corp. v. Moon Marine (U.S.A.) Corp.*, 2013 WL 594283, at *2 (N.D. Cal. Feb. 14, 2013). The Intervenors do not satisfy these requirements.

**1. Movants Do Not Have a Significant Protectable Interest**

The Ninth Circuit "considers the first requirement, the interest test, as a threshold requirement to intervention of right." *Golden Eagle*, 2013 WL 594283, at *2 (citing *Fresno Cnty. v. Andrus,* 622 F.2d 436, 438 (9th Cir. 1980)). "Applicants for intervention have a 'significantly protectable' interest in an action if (1) they assert an interest that is protected under some law and (2) there is a relationship between the legally protected interest and the plaintiff's claims." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 2005 WL 6789301, at *4 (N.D. Cal. May 31, 2005)(Alsup J.)(citing *Nw. Forest Resource Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). "'An economic stake in the outcome of litigation, even if significant, is not enough.'" *Golden Eagle*, 2013 WL 2013 WL 594283, at *2 (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993)).

"'[A]n undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right.'" *S. California Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)(quoting *Public Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998)). Movants appear to claim an interest in how the questions of law and fact are resolved in this case because this might affect their pending case. As this Court held in a similar situation, there is "no controlling authority that resolving a question of law or fact is a legally protected interest." *Golden Eagle*, 2013 WL 594283, at *3. The Court also found that a

claim by a plaintiff in another case that the outcome of a case in this court might affect a claim for damages in her case was "speculative because it ultimately depends on a jury finding defendant liable and awarding her damages." *Id.* at *2. "'An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant.'" *Ins. Corp. of New York*, 2008 WL 2774181, at *4 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003)).

The Intervenors' *attorneys'* stated "interest" here is in representing the yet uncertified classes. Specifically, Intervenors assert that "[b]ecause the *Lane* Plaintiffs have moved for certification of a class that includes Movants as class members, Movants necessarily have an interest as intervenors." Mot. at 19. The cases Movants cite on this point do not support their arguments.[21] Additionally, Intervenors' claim that "Rule 23(d)(1)(B)(iii) expressly provides for intervention by putative class members" misstates the Rule. The plain language of the Rule expressly applies only to class members in a *certified* class, not *putative* class members in an *uncertified* class action. Intervening under this Rule, such as when a class representative's claim becomes moot, is appropriate "when a class has been *certified*." 5 Newberg on Class Actions, § 2.17 (2013). In contrast, Intervenors here are like the potential intervenor in *Golden Eagle*, whose principal complaint was the effect that a similar case may have on her case. Like in *Golden Eagle*, Intervenors here do not have a protectable interest in "resolving a question of law or fact." *See Golden Eagle*, 2013 WL 594283.

**2. Disposition of the *Lane* Case Will Not Impair or Impede the Intervenors' Ability to Protect Their Interests**

Contrary to Movants' claim, this Court's decision on Plaintiffs' Motion for Class Certification cannot impair Movants' interests. If this Court grants Plaintiffs' Motion for Class

[21] *See, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)(permitting post-judgment intervention *after* denial of class certification for purposes of appeal); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 330–31 (1980)(mentioning "rights of putative class members as potential intervenors" but also noting that "[a]t no time has any putative class member sought to intervene."); *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 314–15 (intervention of right is not automatic and "filing of individual motions to join or to intervene was 'precisely the multiplicity of activity which Rule 23 was designed to avoid."); *Dickstein v. Able Telcom Holding Corp.*, 192 F.R.D. 331, 334 (N.D. Ga. 2000)(intervenors were already granted lead plaintiff status in a securities class action brought under the PSLRA and the two actions were substantially identical, unlike here).

Certification, the Intervenors will be protected by this Court's oversight and class counsel. Movants can also opt-out and proceed with their own cases. If the Court denies the motion for class certification, the Intervenors remain free to file their own motion for class certification or intervene at that time to appeal the Court's ruling.[22] At most, this Court's decision will impede Intervenors' *attorneys*' interests. *See* Mot. at 20 ("if the Court certifies the proposed classes, Movants will be relegated to bystander status.") This is the real purpose of Intervenors' Motion—to protect their attorneys.

Intervenors' argument, that "[i]f class certification is denied in *Lane* . . . this may have negative repercussions for Movants' class certification motions in *Morris* and *McKenzie*," Mot. at 20, is simply false. "Neither a proposed, nor a rejected, class action may bind nonparties." *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2372 (2011). In fact, the Supreme Court acknowledged that the rule "permit[s] class counsel to try repeatedly to certify the same class simply by changing plaintiffs." *Id.* This is exactly what Magistrate Judge Spero told the *McKenzie* plaintiffs at the Case Management Conference on May 20, 2013, when they raised these same issues in that Court. *See* Decl. of Sheri Kelly, ¶ 4. The Intervenors' citation to *United States v. State of Or.*, 839 F.2d 635 (9th Cir. 1988), for the proposition that this Court's decision would have *stare decisis* effect is misplaced. The Court in *United States v. Oregon* held that "[s]uch determinations *when upheld by an appellate ruling* will have a persuasive *stare decisis* effect in any parallel or subsequent litigation." *Id.* at 638 (emphasis added). In contrast:

> [F]ederal district courts do not follow precedents of other district courts, including those in the same district . . . . This has generally been the practice of district courts presiding over claim construction issues where other district courts have considered and ruled on identical or similar issues.

*Sw. Bell Tel., L.P. v. Arthur Collins, Inc.*, 2005 WL 6225305, * 5 (N.D. Tex., Oct. 15, 2005).

[22] "[A]pplications for intervention filed prior to the court's determination of the class should generally be held in abeyance until the court has ruled on the class." 7 Newberg on Class Actions § 22:78 (4th ed.). "This procedure dispenses with unnecessary expenditures of time. If the class is upheld, intervention is generally unnecessary; the representative has been determined to be an adequate representative of all class members and their claims. If the class is dismissed, the absent class members may timely commence another action or intervene at that time." *Id.* at § 22:78 n. 5.

**3. Movants' Motion to Intervene is Untimely**

"Three factors are considered in determining whether a motion to intervene is timely: '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.'" *Harris v. Vector Mktg. Corp.*, 2010 WL 3743532, at *5 (N.D. Cal. Sep. 17, 2010)(quoting *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997)). "In assessing timeliness of the motion to intervene, the crucial date is when the proposed intervenor should have been aware that its interests would not be adequately protected by the existing parties." *Id.* (citing *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)). "'[A]ny substantial lapse of time weighs heavily against intervention.'" *Id.* (quoting *League of United Latin Am. Citizens*, 131 F.3d at 1302).

The first timeliness factor—stage of proceedings—weighs against intervention. "Substantial engagement by the district court with the issues in the case 'weighs heavily against allowing intervention as of right.'" *Smith*, 194 F.3d at 1051 (quoting *League of United Latin Am. Citizens*, 131 F.3d at 1303). "[I]f significant substantive rulings have been made, intervention may not be appropriate." *S. Yuba River Citizens League & Friends of the River v. Nat'l Marine Fisheries Serv.*, 2007 WL 3034887 (E.D. Cal. Oct. 16, 2007). In *Smith*, the Ninth Circuit upheld denial of a motion to intervene where the intervenors "were attempting to intervene at a late stage in the proceedings, after significant discovery had taken place and many substantive motions had been adjudicated." *Smith*, 194 F.3d at 1050; *see also*, *Harris*, 2010 WL 3743532, at *5 (stage of proceeding weighed against intervention where class certification brief was due in a few days and hearing was scheduled one month later). Like in *Smith* and *Harris*, the Intervenors are attempting to intervene in this action at a late stage—after Plaintiffs have survived two (2) motions to dismiss, propounded and received substantial discovery, prevailed in a discovery dispute before this Court, taken depositions related to class certification, including Plaintiffs' depositions, and fully briefed issues related to class certification.

The second timeliness factor—prejudice to other parties—also weighs heavily against intervention. Prejudice to the existing parties is "the most important consideration in deciding whether a motion for intervention is untimely." *United States v. State of Or.*, 745 F.2d at 552. In

*Smith*, the Ninth Circuit found that the district court properly denied intervention where intervenors "sought to inject new issues and matters . . . thus expanding the scope of the litigation and causing delay." *Smith*, 194 F.3d at 1051. Intervenors' Motion is designed to do just that—prejudice Plaintiffs' class certification motion and cause delay.

Finally, Intervenors fail to articulate an acceptable reason for the delay in filing their Motion. "A party seeking to intervene must act as soon as he knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." *United States v. State of Or.*, 913 F.2d at 589. As detailed above, Intervenors knew of this case since at least October, 2012. After Judges Spero and Chen denied their Motion to Relate Cases, Intervenors took no further action until the present Motion. Intervenors cannot show a good reason for delay where "the existing parties have held essentially the same legal positions for the entire duration of the lawsuit." *Natural Res. Def. Council v. Gutierrez*, 2007 WL 1518359, at *14 (N.D. Cal. May 22, 2007). Like in *Gutierrez*, "[t]he proposed intervenors fail to show how the existing parties' positions have changed, such that the proposed intervenors didn't need to become involved before, . . . but need to do so now." *Id.* at *15; *see also*, *Harris*, 2010 WL 3743532, at *6 ("intervenors failed to act with reasonable diligence in moving to intervene" where "intervenors [knew] of the lawsuit and [knew] of the potential inadequacy of [the named plaintiff] as a class representative" for several months.) Plaintiffs have not materially changed the issues in this case since the original Complaint, and Intervenors do not claim otherwise.[23]

Intervenors are really seeking to modify the Court's scheduling order and add parties after the deadline to do so has passed. As Judge Chen made clear in *Harris*, "Rule 16 is applicable when a proposed intervenor seeks to intervene." 2010 WL 3743532, at *1 (collecting cases). This Court applied Rule 16(b) in a similar context in *Briggs v. United States*, 2009 WL 1560005 (N.D. Cal. Jun. 1, 2009). "Once a district court has entered a scheduling order, subsequent amendments are not allowed without leave of the Court, and any such modification must be based on a showing of good cause." *Id.*; *see also*, Fed. R. Civ. P. 16(d)(4)("[a] schedule

[23] Plaintiffs added a new Plaintiff and a new claim earlier this year but alleged the same overarching theories, and their proposed class definition is substantively similar to that alleged in the original complaint.

may be modified only for good cause.") "Under Ninth Circuit law, a court focuses on the reasonable diligence of a moving party in deciding whether there is good cause to modify the scheduling order." *Harris*, 2010 WL 3743632, at *2 (citing *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1174 n. 6 (9th Cir. 2007)). Judge Chen concluded that the intervenors "failed to establish good cause for modification of the Court's case management order because they, as well as their counsel, did not act with reasonable diligence in filing the motion to intervene," where they were aware of the potential inadequacy of the representative plaintiff for over a year but waited until just before the plaintiff's deadline for filing a motion for class certification. *Id.* at *2–5. The same is true here. Intervenors knew of the pendency of this action since at least October 2012. They knew of the Court's case management order because they referenced it both in their Motion and in Judge Spero's Court in the *McKenzie* case, yet they failed to seek intervention until after Plaintiffs filed their Motion for Class Certification.

**4. The *Lane* Plaintiffs Adequately Represent Movants' Interests**

Where "existing parties adequately represent [the proposed intervenor's] interest," the Court need not permit intervention. Fed. R. Civ. P. 24(a)(2). "In evaluating the adequacy of representation, courts in the Ninth Circuit consider three factors: '(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.'" *Ctr. for Biological Diversity*, 2013 WL 1729573, at *6 (quoting *Citizens for Balanced Use v. Mont. Wilderness Ass'n,* 647 F.3d 893, 898 (9th Cir. 2011)). "'The 'most important factor' to determine whether a proposed intervenor is adequately represented by a present party to the action is 'how the [intervenor's] interest compares with the interests of the existing party.'" *Id.* (alterations in original)(quoting *Perry v. Proposition 8 Proponents*, 587 F.3d 947, 950 (9th Cir. 2009)). "'Where the party and the proposed intervenor share the same 'ultimate objective,' a presumption of adequacy of representation applies, and the intervenor can rebut that presumption only with a 'compelling showing' to the contrary.'" *Id.* (quoting *Perry*,

587 F.3d at 951); *accord In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 633308 (N.D. Cal. Feb. 11, 2011)(Alsup J.)("'When a proposed intervenor . . . has vested [his] claim for intervention entirely upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the applicant full-party status.'")(quoting *League of United Latin Am. Citizens*, 131 F.3d at 1306).

The *Lane* Plaintiffs will adequately protect Intervenors' interests because, as admitted by the Movants in their Motion to Relate cases, they share the same "ultimate objective" as the *McKenzie* and *Morris* plaintiffs with respect to the flood insurance claims. *McKenzie* Dkt. No. 69, Motion to Relate Cases. The only major difference—one that Intervenors neglect to mention—is that *Lane* involves both flood and hazard insurance claims, whereas *McKenzie* and *Morris* only involve flood insurance claims. Thus, while *McKenzie* and *Morris* comprise only 10% of the *Lane* claims and could not possibly protect the Lanes or the class they seek to represent, they are wholly protected by the *Lane* Plaintiffs' claims.

Intervenors' Motion focuses of Plaintiffs' *attorneys* and attacks their adequacy. Mot. at 21. This is not the proper standard.[24] Intervenors present no argument that the *parties* in *Lane* will not adequately protect their interests. Nor could they. Intervenors' Motion claims, in a footnote, that the *Lane* Plaintiffs' *counsel* are inadequate because "Movants and their counsel have asserted claims against WFI and WFB, have developed a full record on which to move for class certification, and have acted in the best interests of the class members at all times." Mot. at 21 n.15. Inclusion of WFI is a litigation strategy—counsel in *Lane* considered and decided against naming WFI as a party.[25] *See* page 2, n.3, *supra*. "[D]ifferences in litigation strategy do

[24] *Widjaja v. YUM! Brands, Inc.*, 2009 WL 3462040 (E.D. Cal. Oct. 22, 2009), the only case cited by Intervenors in support of their "inadequacy of attorneys" argument, does not support this argument. Although *Widjaja* did allow intervention, the decision did not address the adequacy of the plaintiffs' attorneys at all. The *Widjaja* court transferred a later-filed case after finding that a case management order in a first-filed action required consolidation.

[25] WFI is not a necessary party for establishing any of the Plaintiffs' claims. As alleged in Plaintiffs FAC, the majority of the commissions WFI collects are remitted to WFB in the form of "soft dollar transactions." FAC ¶¶ 36, 53, 152. And monies paid to a third party (here, WFI) give rise to a claim for restitution against a separate defendant (here, WFB), where that defendant's "unlawful business practice caused the plaintiff to pay that money." *See, Troyk v. Farmers Group, Inc*., 171 Cal.App.4th 1305, 1338 (2009); *Ferrington v. McAfee, Inc*., 2010 WL 3910169, at *7–8 (N.D. Cal. Oct. 5, 2010)."

not normally justify intervention." *Arakaki*, 324 F.3d at 1086. Intervenors' other claims are inaccurate, for the reasons stated above. *See* Sections II(A)-(C), II(F), *supra*.

**C. Permissive Intervention is Also Improper**

Rule 24(b), which governs permissive intervention, provides that "[o]n a timely motion, the court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "Under Rule 24(b), a district court may grant permissive intervention where the applicant demonstrates '(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action.'" *Golden Eagle*, 2013 WL 594283 (quoting *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 843 (9th Cir.2011). "Even if an applicant satisfies those requirements, the district court has discretion to deny permissive intervention." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir.1998).

"In exercising its discretion, a court 'must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.'" *Tech. & Intellectual Prop. Strategies Grp. PC v. Insperity, Inc.*, 2012 WL 6001098 (N.D. Cal. Nov. 29. 2012)(quoting Fed. R. Civ. P. 24(b)(3)). "Where intervention would undermine the efficiency of the litigation process, a petition for permissive intervention may be denied." *Golden Eagle Ins. Corp.*, 2013 WL 594283 (citing *United States v. Washington*, 86 F.3d 1499, 1504 (9th Cir.1996)). The Court may consider a number of factors, including: "the nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case[,] . . . whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena City Bd. of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977). None of these factors support intervention. The *Morris* and *McKenzie* plaintiffs only have standing to raise approximately 10% of the claims asserted in *Lane*; in contrast, the *Lane*

Plaintiffs adequately protect all interests asserted by Intervenors (except the financial interests of Intervenors' *attorneys*, of course); and intervention will only prejudice the existing parties and delay full resolution of this case.

"For both intervention by right and permissive intervention, an intervening party must show that the applicant's interest is inadequately represented by the parties to the action." *James Ambrose Johnson, Jr. 1999 Trust v. UMG Recordings*, 2011 WL 5192476 (N.D. Cal. Nov. 1, 2011))(citing *Wilderness Soc'y v. United States Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011)(en banc)(intervention as of right); *Spangler*, 552 F.2d at 1329 (permissive intervention)). Where the applicant "asserts claims 'parallel' to those already pending before the Court, [the applicant's] interests are already represented" in the present litigation. *Id.*; *see also*, *Bergman v. Thelen LLP*, 2009 WL 1308019, at *3 (N.D. Cal. May 11, 2009)("intervention would serve no purpose here because Applicants are already class members. . . . [P]ermitting members of existing classes to intervene in order to assert the same claims would be pointless."); *Perry*, 587 F.3d at 955 (where the intervenor's "interests are indistinguishable, . . . [i]t was well within the district court's discretion to find that the delay occasioned by intervention outweighed the value added by [the intervenor's] participation in the suit.")

"In the context of permissive intervention, [courts] analyze the timeliness element more strictly than . . . with intervention as of right." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997) (citing *United States v. State of Or.*, 745 F.2d at 552. Thus, "[a] finding that the motion for intervention as of right was not filed timely defeats a motion for permissive intervention." *U.S. E.E.O.C. v. ABM Indus. Inc.*, 2010 WL 744714, at *7 (E.D. Cal. Mar. 3, 2010)(citing *League of United Latin Am. Citizens*, 131 F.3d at 1308). For the reasons stated in Section III(B), *supra*, Intervenors' motion is untimely.

**D. Movants' Request to Stay Class Certification Proceedings in this Case on the Basis of the First-to-File Rule at the Eleventh Hour is Improper**

As an alternative argument—if they fail at their attempt to intervene—Movants argue that this Court should stay all class certification issues in this case indefinitely until they get a class certification ruling in both of their other cases. "The first-to-file rule is one grounded in judicial

discretion. It is not a 'rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration." *Dubee*, 2010 WL 3323808 (quoting *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1992)). The relevant factors are equitable in nature. *Id*. (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952). These factors are: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of issues. *Id.* The first-filed rule applies where there is "substantial overlap" between the actions. *PETA, Inc. v. Beyond the Frame, LTD.*, 2011 WL 686158 (C.D. Cal. 2011). In a class action, the classes, and not the class representatives, are compared. *Ross v. U.S. Nat'l Ass'n,* 542 F. Supp. 2d 1014, 1020 (N.D. Cal. 2008). The rule is not applied, however, in cases involving bad faith or forum shopping. *Greenline Indus., Inc. v. Agri-Process Innovations, Inc.*, 2008 WL 2951743 at *3 (N.D. CA 2008)(citing *Alltrade, Inc.*, 946 F.2d at 628). Movants fail to show how the first-filed rule applies here.

**1. The Parties and Issues in the Cases are not "Substantially Similar" and do not "Substantially Overlap."**

The classes and claims in *Morris* and *McKenzie* do not "substantially overlap" with the classes and claims asserted in this case. *See, PETA, Inc.*, 2011 WL 686158; *see also, Centocor, Inc. v. Medimmune, Inc.*, 2002 WL31465299 at *3 (N.D. Cal. 2002)("core issues" must "substantially overlap.") In *McKenzie* and *Morris*, Movants pursue class certification of claims related to force-placed flood insurance only and thus do *not* involve or include approximately 90% of the class members that Plaintiffs in this case seek to represent. The relevant definition of "substantial" is "being largely but not wholly that which is specified." http://www.merriam-webster.com/dictionary/substantial. This case is not "largely" about flood insurance.

Movants have also taken inconsistent opinions on these same issues in different judicial forums. Whereas here they claim that the *Lane* hazard and flood insurance case is substantially similar to the *McKenzie* and *Morris* flood insurance cases, in a brief filed with the Judicial Panel on Multidistrict Litigation on August 6, 2012, the *Morris* counsel opposed MDL centralization of all force-placed flood and hazard insurance in one federal district because "it improperly lumps flood insurance cases together with hazard insurance cases." **Exhibit 6**, Plaintiff Desiree

Morris's Mem. of Law in Opp. to Movants' Am. Motion for Transfer, at 7. Movants' counsel stated, in bold letters, underlined: **If there is one thing on which everyone agrees, it is that flood insurance is different than hazard insurance.**[26] *Id.* (emphasis in original). These same attorneys now change positions entirely, seeking to have this Court stay its proceedings regarding both hazard and flood LPI because the *Lane* hazard and flood claims "substantially overlap" with the *Morris* flood claims.

Judge Chen, in *Cannon*, Case No. 3:12-cv-1376, also agreed that this case (and *Cannon*) do not "substantially overlap" with *McKenzie* when he refused to relate these cases. Dkt. No. 20. Judge Chen's decision is highly instructive here, because *Cannon* is a flood-only case, and, as such, is more similar to *McKenzie* than this case. Movants have not filed *anything* in *Cannon* seeking to either intervene or stay based on the first-filed rule.

**2. Relief Based on the First-Filed Rule was not "Promptly Brought to the Attention of the District Court."**

Movants were aware that this action was pending no later than October 22, 2012, when they sought to have Judges Chen and Spero relate *Lane*, *McKenzie*, and *Cannon*. However, they waited seven months, until Plaintiffs defended and prevailed on two motions to dismiss, engaged in substantial discovery, attended several hearings (including a discovery hearing where Plaintiffs prevailed), took depositions in Minneapolis, Atlanta, and Washington D.C., reviewed documents and depositions from other cases, and fully briefed their class certification motion. Decl. of Steve Owings, ¶ 13. "If [Movants] are correct that [the first-to-file] rule was implicated in this case, then they have no excuse for not seeking [relief] as soon as they became aware of this action." *Lane v. Facebook*, 2009 WL 3458198 at *3, n 7. *See also, Church of Scientology of Cal. v. U.S. Dep't of the Army,* 611 F.2d 738, 750 (9th Cir. 1979)(first-filed rule should be "brought promptly to the attention of the district court"); *PETA, Inc.*, 2011 WL 686158, at *1; *Intersearch Worldwide, LTD v. Intersearch Group, Inc.*, 544 F. Supp. 2d 949, 957 (N.D. Cal. 2008).

[26] Movants' August 6, 2012 brief filed with the JPML goes on to argue as to why there are "significant variations in the issues, facts, and claims among the cases." *Id.* at 11. They argue that consolidation of the cases would be "inappropriate" "even on a bank by bank basis." *Id.*

**3. Movants Seek to Use the First-Filed Rule for an Improper Purpose**

Movants attempt to pervert the purpose of the first-to-file rule. The purpose of the first-filed rule is to preserve the jurisdiction of the court in the first-filed action. Movants have not done this. They have filed no motion in the first-filed action—*Morris* in the Western District of Pennsylvania. Nor have they filed motions in any other Wells Fargo LPI case other than this one. Instead, plaintiffs' attorneys in *Morris* and *McKenzie* have joined forces in an attempt to "squeeze" their *Morris* case (where no class certification motion is pending) into the *McKenzie* case in this District (where the plaintiffs filed a class certification motion six days ago). Then, Movants filed the present motion seeking to have this Court stay class certification proceedings. This is forum-shopping. *See Greenline Indus., Inc.*, 2008 WL 2951743 at *3 (first-filed rule does not apply to allow forum-shopping).

**4. The First-Filed Rule is Not Appropriate at this Procedural Stage**

When a "later filed action has progressed further, efficiency considerations disfavor application of the rule." *Guthy-Renker Fitness, L.L.C. v. Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 270 (C.D. Cal. 1998)(citing *Church of Scientology*, 611 F.2d at 750). Here, the parties have conducted all discovery related to class certification, fully briefed all class certification issues, and have scheduled the class certification hearing in two weeks. In *Morris*, no class certification motion is pending more than two years after the case was filed. *McKenzie* is not subject to the first-filed rule because (1) it is not a first-filed case, (2) it did not adequately allege kickbacks until November 29, 2012, and (3) it is pending in the same district as this case.[27] The *McKenzie* plaintiffs dawdled for a year and a half before filing their motion for class certification just six (6) days ago. It appears as though the *McKenzie* plaintiffs did not conduct their own discovery in connection with class certification, instead recently enlisting counsel from *Morris* and importing the discovery from *Morris* into *McKenzie*. Thus, even if the first-filed rule applies here, the interests of the parties and the Classes would be best served by the Court exercising its discretion

[27] The proper remedy for similar cases filed within the same federal district is a motion to relate cases. The *McKenzie* plaintiffs have already filed such a motion, which was denied by two (2) judges in this District.

by not staying this action.

Movants criticize Plaintiffs for acting in haste, calling Plaintiffs' compliance with this Court's scheduling order "an effort to leapfrog this case." Mot. at 21. Movants also criticize Plaintiffs for filing prompt class certification motions in cases in the Middle District of Florida where the local rules provide that the motion should be filed within ninety (90) days of filing the case. M.D. Fla. L.R. 4.04(b).[28] This Court, the courts in the Middle District of Florida, and Plaintiffs are merely following the plain language of Rule 23, which provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A).

On May 7, 2013, Judge Spero told the *McKenzie* plaintiffs that he was awaiting this Court's ruling on class certification before holding the next case management conference. Decl. of Sheri Kelly, ¶ 5. Yet Movants ask this Court for a stay of indefinite duration. This would not be fair to the Class Members or the individual Plaintiffs in this case. "A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979). A stay should not be granted in favor of the *McKenzie* case because it is *not* the first-filed action, and both Judges Chen and Spero have already ruled that it is not a related case.

## IV. CONCLUSION

For the foregoing reasons, this Court should deny Movants' Motion to Intervene.

**Dated:** June 6, 2013

Respectfully submitted,

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[28] Available at http://www.flmd.uscourts.gov/Forms/USDC-MDFL-LocalRules12-2009.pdf

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