IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

WILLIAM TENNISON, individually, et al. and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 01-L-000457
MARION BASS SECURITIES CORPORATION, et al.,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

I. INTRODUCTION 5

II. BACKGROUND OF THE LITIGATION 6

III. TERMS OF THE SETTLEMENT 10

IV. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL 11

A. The Standard for Preliminary Approval 11

B. The Factors Considered When Granting Final Approval Support Preliminary Approval of the Proposed Settlement 12

1. The Strength of Plaintiffs' Case Balanced Against the Settlement 13

2. Wells Fargo's Ability to Pay 15

3. The Complexity, Length, and Expense of Continued Litigation 15

4. The Amount of Opposition to the Settlement and Reaction of Class Members 15

5. The Absence of Collusion 16

6. The Opinion of Competent Counsel 16

7. The Stage of the Proceedings and Amount of Discovery Completed 17

V. THE SETTLEMENT CLASS SHOULD BE PRELIMINARILY CERTIFIED 17

VI. THE PROPOSED NOTICE PROGRAM IS APPROPRIATE 19

VII. PROPOSED SCHEDULE OF EVENTS 21

VIII. CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 18

Armstrong v. Board of School Directors. of the City of Milwaukee,
616 F.2d 305 (7th Cir. 1980) 16

Bovay v. Sears, Roebuck and Co.,
994 N.E.2d 665, 373 Ill. Dec. 896 (Ill. App. Ct. 1st Dist. 2013) 20

Brundidge v. Glendale Federal Bank,
659 N.E.2d 909 (1st Dist. 1995) 11

Carrao v. Health Care Service Corp.,
118 Ill. App. 3d 417 (1st Dist. 1983) 18

City of Chicago v. Korshak,
206 Ill.App.3d 968, 151 Ill. Dec. 797, 565 N.E.2d 68 (1990) 12, 13, 15

GMAC Mortgage Corp. of Pennsylvania v. Stapleton,
326 Ill. App. 3d 486 (1992) 15

Hubbard v. BankAtlantic Bancorp, Inc.,
688 F.3d 713 (11th Cir. 2012) 15

In re Apollo Group, Inc. Securities Litigation,
No. CV 04-2147-PHX-JAT, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008) 15

In re BankAtlantic Bancorp, Inc. Securities Litigation,
No. 07-61542-CIV, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011) 15

In re Crocs, Inc. Securities Litigation,
306 F.R.D. 672 (D. Colo. Sept. 18, 2014) 13

In re Domestic Air Transportation Antitrust Litigation,
148 F.R.D. 297 (N.D. Ga. 1993) 14

In re Merrill Lynch Tyco Research Securities Litigation,
249 F.R.D. 124 (S.D.N.Y. 2008) 14

Kaufman v. American Express Travel Services Co., Inc.,
264 F.R.D. 438 (N.D. Ill. 2009) 20

Koerner v. Copenhaver,
No. 12-1091, 2014 WL 5544051 (C.D. Ill. Nov. 3, 2014) 17

Kulins v. Malco, A Microdot Co., Inc.,
121 Ill. App. 3d 520 (1st Dist. 1984) 18

Langendorf v. Irving Trust Co.,
614 N.E.2d 23 (1st Dist. 1992) 11, 13

Mirfasihi v. Fleet Mortgage Corp., 359 F.3d 781 (7th Cir. 2004) 21

Mullane v. Central Hanover Trust Co.,
339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) 20

Steinberg v. System Software Associates, Inc.,
306 Ill. App. 3d 157, 713 N.E.2d 709 (1999) 12, 13

Strube v. American Equity Investment Life Insurance Co.,
226 F.R.D. 688 (M.D. Fla. 2005) 14

Tassan v. United Development Co.,
88 Ill. App. 3d 581 (1st Dist. 1980) 18

The People ex. rel. v. Wilcox,
61 Ill. 2d at 319 14

STATUTES

735 ILCS 5/2 20

OTHER AUTHORITIES

James Wm. Moore, Moore's Federal Practice §23.83[1] (3d ed. 2002) 12

Manual for Complex Litigation § 30.41 (3d ed. 1995) 12

Manual for Complex Litigation 21.632 (4th ed. 2004) 12

Newberg on Class Actions, §11.25 (4th Ed. 2002) 11

I. INTRODUCTION

Plaintiff William Tennison, individually and on behalf of all others similarly situated, by and through his undersigned counsel ("Plaintiffs") respectfully submit this memorandum of law in support of their joint motion with Defendant Wells Fargo Bank, N.A. ("Wells Fargo") for preliminary approval to the proposed settlement (the "Settlement") between Plaintiffs and Wells Fargo as set forth in the Class Action Settlement Agreement (the "Agreement") dated as of October 17, 2016.[1]

After more than fifteen years of hard-fought litigation including extensive merits discovery, class certification, summary judgment, previous settlements with other defendants, and preparations on the eve of trial, Plaintiffs and Wells Fargo, the last remaining defendant in this case, have reached the proposed Settlement, which provides for the creation of a $7,825,000 Gross Settlement Fund for the benefit of the Class.

The Settlement is the result of well-informed and extensive arm's-length negotiations between and among highly experienced counsel in the midst of complex and vigorously contested litigation, mediated by Richard P. Sher, a professional mediator. Plaintiffs have assessed the strengths and weaknesses of the claims and defenses asserted; the considerable expense, delay, and risks posed by continued litigation against Wells Fargo; and the benefits of the guaranteed monetary recovery offered by the Settlement. As a result, Plaintiffs believe that the Settlement is fair, reasonable, and adequate and provides an excellent result for the Class. The Settlement falls within the range of reasonableness necessary for preliminary approval and represents a substantial

[1] Unless otherwise noted, all capitalized terms used herein are defined in the Settlement Agreement and have the same meanings as set forth therein. The Settlement Agreement is annexed as Exhibit 1 to the accompanying Declaration of William S. Norton ("Norton Decl.") dated as of October 17, 2016.

recovery of the principal of the bonds at issue in this case that compares favorably with average recoveries in securities class actions.

Plaintiffs therefore ask the Court to enter the [Proposed] Order Granting Provisional Class Certification and Preliminarily Approving Class Action Settlement (the "Preliminary Approval Order," attached as Exhibit 4 to the Settlement Agreement). The Preliminary Approval Order will (1) grant Plaintiffs' motion for leave to file the Fourth Amended Class Action Complaint; (2) preliminarily approve the terms of the Settlement as set forth in the Settlement Agreement; (3) approve the form and method for providing the Settlement Class with the mailed Notice of Class Action Settlement (the "Class Notice") (attached as Exhibit 2 to the Settlement Agreement), together with the Proof of Claim Form (attached as Exhibit 6 to the Settlement Agreement) which eligible Class Members will complete and return in order to share in the proposed Settlement recovery; (4) approve and authorize publication of the Publication Notice of Class Action Settlement (the "Publication Notice") (attached as Exhibit 3 to the Settlement Agreement); and (5) schedule a Final Hearing at which the Court will consider the fairness of the request for final approval of (a) the Settlement set forth in the Settlement Agreement, (b) the Distribution Plan (attached as Exhibit 5 to the Settlement Agreement) to allocate the settlement proceeds among Class Members, and (c) Class Counsel's applications for (i) a "Fee and Expense Award" for all services and expenses incurred in representing the Class, (ii) three "Incentive Awards" to compensate the current and former named plaintiffs for their efforts and expenses in serving as class representatives, and (iii) payment of all "Settlement Costs" incurred in administering the Settlement following entry of the Preliminary Approval Order.

II. BACKGROUND OF THE LITIGATION

This lawsuit ("the Litigation") was originally brought by, and on behalf of, the following

class: "All of those persons who purchased (or otherwise acquired) tax-free revenue bonds (between February 1, 1996 and December 11, 1998) in the bond issues of: Lawrence, Indiana; Princeton, Wisconsin; Manitowoc, Wisconsin; Gillett, Wisconsin; Wautoma, Wisconsin; Riverview, Michigan; Bangor, Michigan; and Redford, Michigan." The relevant bond issues (the "Bonds") in the Litigation are as follows:

- On February 1, 1996, the City of Lawrence, Indiana, issued $5,925,000 in Series 1996A Bonds and $425,000 in Taxable Series 1996B Bonds, with a total principal value of $6,350,000, in order to fund the purchase of four nursing homes in Lawrence, Indiana.

- On June 1, 1996, the Wisconsin Health & Education Facilities Authority ("WHEFA") issued $2,700,000 in Revenue Bonds, Series 1996A, and $230,000 in Taxable Revenue Bonds, Series 1996B, with a total principal value of $2,930,000, in order to fund the purchase of a nursing home in Princeton, Wisconsin.

- On October 1, 1996, WHEFA issued $5,020,000 in Revenue Bonds, Series 1996A, and $480,000 in Taxable Revenue Bonds, Series 1996B, with a total principal value of $5,500,000, in order to fund the purchase of a nursing home in Manitowoc, Wisconsin.

- On February 1, 1997, WHEFA issued $4,030,000 in Revenue Bonds, Series 1997A, and $350,000 in Taxable Revenue Bonds, Series 1997B, with a total principal value of $4,380,000, in order to fund the purchase of two nursing homes in Gillett, Wisconsin and Wautoma, Wisconsin.

- On May 15, 1998, the Economic Development Corporation ("EDC") of the Charter Township of Bangor, Michigan, issued $10,445,000 in Limited Obligation Revenue Bonds, Series 1998A, and $625,000 in Limited Obligation Taxable Revenue Bonds, Series 1998B, in order to fund the purchase of a nursing home in Bangor, Michigan.

- Also on May 15, 1998, the EDC of City of Riverview, Michigan, issued $3,650,000 in Limited Obligation Revenue Bonds, Series 1998A, and $215,000 in Limited Obligation Taxable Revenue Bonds, Series 1998B, in order to fund the purchase of a nursing home in Riverview, Michigan.

- Also on May 15, 1998, the EDC of the Charter Township of Redford, Michigan, issued $6,095,000 in Limited Obligation Revenue Bonds, Series 1998A, and $360,000 in Limited Obligation Taxable Revenue Bonds, Series 1998B, in order to fund the purchase of a nursing home in Redford, Michigan.

All Bonds were underwritten and marketed by Defendant Marion Bass Securities Corporation. The proceeds were used by Defendant The Malachi Corporation, Inc., a 501(c)(3)

Illinois corporation, to purchase (and in one case build) the eleven above-listed nursing homes in Indiana, Wisconsin, and Michigan.

Defendant Peoples Bank & Trust Company (later acquired by Fifth Third Bank) served as indenture trustee in connection with the Lawrence, Indiana Bonds. Norwest Bank Wisconsin, N.A. (later acquired by Wells Fargo) served as indenture trustee in connection with the other Bond issuances. Defendant Blue & Company, an accounting firm, audited certain financial statements of Malachi Corporation in connection with the Bonds, and Defendant Gilmore & Bell, a law firm, served as Bond counsel in connection with the first four of the above Bond issuances.

In December 1998, each of the seven Bond issuances failed to make required interest payments on the Bonds. The indenture trustees notified bondholders, via written notice, that a default had occurred. Subsequently, several corporate entities affiliated with the ownership and management of the nursing homes filed for bankruptcy.

In March 1999, Wells Fargo, in its capacity as indenture trustee for the Wisconsin and Michigan Bonds, initiated receivership proceedings with respect to those Bonds in the U.S. District Court for the Eastern District of Michigan, Cause No. 99-40146 ("the Receivership Action"). In September 2011, the federal court presiding over the Receivership Action ("the Federal Court") entered orders directing how Wells Fargo was to distribute the funds or payments it subsequently held and/or received, as indenture trustee, for the benefit of the Bondholders.

On March 2, 2001, Plaintiffs filed their Class Action Complaint against numerous defendants, alleging that the Bonds defaulted due to defendants' claimed errors and mistakes. Plaintiffs subsequently filed a Second Amended Complaint on August 20, 2003 and a Third Amended Complaint on July 12, 2004. Plaintiffs asserted claims of negligence, Illinois Securities Act violations, common law fraud, fraudulent concealment, conspiracy to defraud, and (as to

defendants other than Wells Fargo) piercing the corporate veil.

Between 2001 and 2006, the Court granted and denied various motions to dismiss filed by different defendants, and allowed Plaintiffs to proceed with their claims against Fifth Third Bank, Blue & Company, Gilmore & Bell, and Wells Fargo. The parties conducted extensive discovery, including the production of documents by Plaintiffs and Defendants, depositions of each of the named Plaintiffs, and depositions of representatives of each Defendant. The parties also filed numerous motions with the Court, including motions for summary judgment filed by Defendants and a motion for class certification filed by Plaintiffs.

On November 29, 2010, the Court granted Defendants' motions for summary judgment against all claims asserted by Plaintiffs except for the claim of negligence. On the same date, the Court granted Plaintiffs' motion for class certification as to the negligence claim.

Following additional discovery and motions, Plaintiffs reached settlements with defendants Fifth Third Bank, Gilmore & Bell, and Blue & Company in 2013 and 2014. The Court gave final approval to those settlements on May 28, 2015, leaving Wells Fargo as the only remaining defendant. Plaintiffs' settlements with Fifth Third Bank, Gilmore & Bell, and Blue & Company provided that these defendants would pay a combined sum of $525,000 ("the Additional Defendants' Contribution") into a settlement fund to collect interest until Plaintiffs' ongoing claims against Wells Fargo were fully resolved and all recoveries could be distributed efficiently and as approved by the Court.

On November 12, 2015, the Court scheduled trial of Plaintiffs' negligence claim against Wells Fargo to begin on May 16, 2016. The parties thereafter filed additional motions, exchanged further discovery, and took additional depositions, including depositions of expert witnesses retained by both sides. Following extensive negotiations including a formal mediation undertaken

with the assistance of professional mediator Richard P. Sher, Plaintiffs and Wells Fargo reached a tentative settlement in April 2016. Thereafter, Plaintiffs and Wells Fargo continued to negotiate the terms of the proposed Settlement now submitted to the Court for preliminary approval.

III. TERMS OF THE SETTLEMENT

In exchange for a complete release of all claims against it relating to the Bonds, and the dismissal of the Litigation with prejudice, Wells Fargo has agreed to pay or distribute, subject to the Court's final approval, a total of $7,300,000 into a "Gross Settlement Fund." Class Counsel will concurrently transfer the previously-paid $525,000 Additional Defendants' Contribution into the same Fund. The Gross Settlement Fund will therefore total $7,825,000, consisting of three components: (1) a $6,500,000 payment by Wells Fargo ("the WF Contribution"); (2) $800,000 in funds previously collected by Wells Fargo, in its capacity as indenture trustee, for the benefit of the bondholders, net of Wells Fargo's expenses and fees ("the Previously Collected Funds"); and (3) the $525,000 Additional Defendants' Contribution.

Plaintiffs request that the Court, in its Preliminary Approval Order, direct that $30,000 of the WF Contribution ("the Initial Costs Advance") be applied to pay for the costs of providing notice of the Settlement to Class Members, as well as various other settlement administration costs ("Settlement Costs"). In addition, at the upcoming Final Hearing, Class Counsel will apply to the Court for (1) a Fee and Expense Award of no more than 25% of the Gross Settlement Fund plus reimbursement of out-of-pocket litigation expenses of no more than $785,000 which includes consulting fees of $40,000 to a potential Settlement Class member for more than 15 years of services during the Litigation; (2) Incentive Awards of $5,000 each to William Tennison, the Estate of Lillard Hedden, and the Estate of Al Kellerman (the current and former class representatives), and (3) payment of any additional Settlement Costs incurred after preliminary

approval. If the Court grants final approval to the Settlement, and once all Settlement Costs, the Fee and Expense Award, and the Incentive Awards have been paid from the Gross Settlement Fund, the remaining funds ("the Net Settlement Fund") will be available for distribution to eligible Class Members.

The Net Settlement Fund will be distributed as follows. First, the Previously Collected Funds will, in accordance with the Receivership Order entered by the Federal Court in the Receivership Action, be distributed to holders of Bonds of record as of the date the Court enters its Final Approval Order. Second, the remaining unpaid portion of the WF Contribution (less the previously-paid Initial Costs Advance) and the Additional Defendants' Contribution will be distributed to eligible Class Members pursuant to a Distribution Plan proposed by Class Counsel, if approved by the Court.

IV. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

A. The Standard for Preliminary Approval

"A settlement compromising conflicting positions in class action litigation serves the public interest." *Langendorf v. Irving Trust Co.*, 614 N.E.2d 23, 28 (1st Dist. 1992), abrogated on other grounds by, *Brundidge v. Glendale Fed. Bank*, 659 N.E.2d 909 (1st Dist. 1995). Section 2-806 of the Code of Civil Procedure requires Court approval for any "[d]ismissal or compromise of class cases." The procedure for review of a proposed class action settlement is well-established two-stage process. *See Langendorf*, 614 N.E.2d at 26. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." Newberg on Class Actions, §11.25, at 38-39 (4th Ed. 2002) (quoting Manual for Complex Litigation, §30.41 (3rd Ed.)). This hearing is not a fairness hearing; its purpose, rather,