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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

THE CITY OF FARMINGTON HILLS,  
EMPLOYEES RETIREMENT  
SYSTEM, Individually and On Behalf of  
All Others Similarly Situated,

Plaintiff,

v.

WELLS FARGO BANK, N.A.,

Defendant.

Civil No. 10-4372 JNE/SRN

**JOINT RULE 26(f) REPORT**

Date: December 21, 2010  
Time: 4:00 p.m.  
Hon. Susan Richard Nelson

The parties' counsel identified below participated in a meeting on November 30, 2010 as required by Rule 26(f) of the Federal Rules of Civil Procedure and the Court's Notice of Pretrial Conference, and have prepared the following joint report.

The pretrial conference in this matter is scheduled for December 21, 2010, at 4:00 p.m. before United States Magistrate Judge Susan Richard Nelson in Room 9E, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.

**1. Date and Place of the Meeting; Identification of the Parties and Their Attorneys; Agenda of Matters for Pretrial Conference.**

**a. The date and place at which the meeting was held.**

The Rule 26(f) meeting was held on November 30, 2010, 2:00 p.m. Central Time, at the offices of Zelle Hofmann Voelbel & Mason LLP.

**b. Name, address and occupation or business of each party, together with the name, address and telephone number of the attorneys who represented each party at the meeting.**

The plaintiff is The City of Farmington Hills, Employees Retirement System ("CFHERS"), located at 31555 W. Eleven Mile Road, Farmington Hills, Michigan 48336. CFHERS is a single-employer defined benefit pension plan that is administered by the City of Farmington Hills Employees' Retirement System Pension Board. CFHERS benefits accrue to all general, court, police, and fire employees who qualify under the plan. CFHERS provides retirement and disability benefits to plan members and their beneficiaries.

The defendant Wells Fargo Bank, N.A. ("Wells Fargo"), is a National Banking Association and its primary Minnesota offices are located at 90 South Seventh Street, Minneapolis, Minnesota 55402.

Present at the meeting were: Kirsten D. Hedberg for the plaintiff and James Reece, Michael Cashman, Michael Jacobs and Rory Zamansky for the defendant.

Christopher D. Kaye and Andy Sohrn for the plaintiff and Lawrence T. Hofmann and Richard M. Hagstrom for the defendant attended by teleconference. Full counsel information is provided below.

**c. Name of insurance carriers that may be liable for the defense or payment of any damage award.**

Superior Guaranty Insurance Company.

**d. An agenda of matters to be discussed at the Pretrial Conference.**

1. Whether discovery will be phased with class certification discovery first and merits discovery to take place after the Court's Order on Plaintiff's motion for class certification.

2. Dates for pretrial activities.

**2. Description of the case**

**a. A concise statement of the jurisdictional basis of the case, giving statutory citation and a brief narrative description.**

According to Wells Fargo, this Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) in that CFHERS is a citizen of the State of Michigan and Wells Fargo is not a citizen of the state of Michigan at the time the action was filed and the amount in controversy exceeds the sum of \$75,000, exclusive of costs. Moreover, according to Wells Fargo, this Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) in that: the action is brought on behalf of a putative class; it is between citizens of different states; and the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. Wells Fargo therefore removed this action from Hennepin County District Court on October 26, 2010.<sup>1</sup>

**b. A brief narrative of the facts giving rise to the lawsuit, including a description of legal claims and defenses.**

**(i) Concise Factual Summary of Plaintiff's Claims**

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<sup>1</sup>Plaintiff does not waive the right to challenge this Court's jurisdiction.

Plaintiff brings this action against Wells Fargo to recover damages it and other similarly situated parties incurred through participation in Defendant's securities lending program. In the financial community, securities lending or stock lending refers to the lending of securities by one party to another. The terms of the loan are governed by a "Securities Lending Agreement," under which the borrower provides the lender with collateral, in the form of cash, government securities, or a letter of credit of value equal to or greater than the loaned securities. In essence, investors, in exchange for a fee, contract with Wells Fargo to safeguard their securities. Wells Fargo, in turn, lends its clients' securities to third parties.

Plaintiff and the other members of the putative class were parties to a substantially similar securities lending agreement ("SLA") with Wells Fargo. Pursuant to a SLA, Wells Fargo loaned securities owned by Plaintiff to third-party borrowers in return for cash collateral. Then, Wells Fargo invested, at its sole discretion, the cash collateral in order to earn an investment return in excess of the rebate paid to the third-party borrowers. In return, Defendant received as compensation a percentage of the revenues generated for each Class member. If the cash collateral investments lost money, which they did, then Wells Fargo claims the right to require the Class members to compensate Wells Fargo for such losses.

Plaintiff filed this Action against Defendant Wells Fargo, on behalf of participants in Wells Fargo's securities lending program who were damaged thereby (the "Class"). Plaintiff alleges that Wells Fargo's actions, specifically investing Plaintiff's assets in risky investments, constituted a breach of its: (a) fiduciary and common law duties; (b) contractual obligations; and (c) duties as set forth in the Securities Lending Agreement between the parties. Plaintiff alleges that as a direct result of Wells Fargo's breaches, Plaintiff suffered significant

damages.

**(ii) Concise Factual Summary of Defendant's Claims/Defenses**

Wells Fargo denies CFHERS' characterization of the facts and law, and denies that it is liable to CFHERS (or any putative class member) in any respect.

This lawsuit arises from a contractual relationship between CFHERS and Wells Fargo regarding securities lending and unspecified losses that CFHERS claims to have sustained as a participant in the Wells Fargo securities lending program. Securities lending is a transaction in which an owner (here, CFHERS) loans its securities to a borrower with the objective of generating additional investment revenue. The lending is normally facilitated by an intermediary (in this case, Wells Fargo). During the loan period, the borrower provides collateral – usually 102% of the value of domestic securities loaned – to mitigate default risk or the failure to return the borrowed securities. The lender then invests that collateral. At the end of the loan, the borrower returns the same type and quantity of securities to the lender (through the intermediary), and the lender simultaneously must repay the cash collateral (plus any negotiated interest or “rebate” amount), through the intermediary, to the borrower. If the value of the investments made with the collateral declines, a sale of those investments would not generate sufficient proceeds to repay all of the borrowers in full absent an infusion of cash to cover the “collateral shortfall.” After credit markets suddenly froze in August 2007, the value of some collateral assets declined.

Various agreements, not just the SLA, established and define CFHERS' securities lending relationship with Wells Fargo. Those agreements include: (a) the custody agreements that created CFHERS' custody account at Wells Fargo; and (b) the SLA that CFHERS signed to participate in the securities lending program at Wells Fargo. The obligations owed by CFHERS to the borrowers are

governed by the Borrowers Securities Loan Agreements.

Some, but not all, securities lending participants elected to invest the collateral received from borrowers in one or more series of the Wells Fargo Trust for Securities Lending, a Maryland business trust (“Business Trust”). CFHERS was invested in “two... Funds,” Compl. at ¶ 37, of the Business Trust. CFHERS’s participation, as shareholder in the Business Trust, is governed by (a) the subscription agreement that it signed to become a shareholder which contains numerous representations about CFHERS’s knowledge, sophistication and ability to withstand investment losses; and (b) the Declaration of Trust for the Business Trust. Additionally the Investment Guidelines, promulgated under the Declaration of Trust, set forth a description of eligible investments for the Business Trust. Before becoming a shareholder of the Business Trust, CFHERS was given Confidential (Private Placement) Memoranda, which provided numerous disclosures about the “two... Funds.”

Any harm alleged by CFHERS ultimately would trace back to the “collateral shortfall” that resulted from the valuation of collateral investments in the Business Trust. Wells Fargo has not claimed that CFHERS (or any putative class member) compensate Wells Fargo for collateral shortfalls; rather, CFHERS explicitly agreed that it would be responsible for collateral shortfalls owed to borrowers. All of the investments made by Wells Fargo in its capacity as Trustee of the Business Trust complied with its contractual obligations and were proper under the relevant investment guidelines. Moreover, any losses were not the result of “bad faith, gross negligence, willful misconduct or reckless disregard,” which is the prerequisite standard required for establishing the potential for liability for investment losses under the Declaration of Trust.

With respect to CFHERS’s class allegations, Wells Fargo denies that class

certification is appropriate in this case. As CFHERS acknowledges, participants in the securities lending program are sophisticated “institutional investors.” CFHERS, like so many others, retained its own investment advisors. Each of these institutional investors entered securities lending at Wells Fargo at different times and under different circumstances since the program’s inception in 1982. Participants are located in numerous states. The knowledge and sophistication of each participant is unique and Wells Fargo had many individual communications with each participant. Also, from time to time, different participants requested and therefore received separate information about their participation, the collateral investments or other topics. Many participants owned some of the securities or types of securities that are being questioned in this matter in their own portfolios and so had additional information from their own sources. Some of these investors elected to become shareholders in one or more series of the Business Trust, while others did not. Following the credit crisis, these institutional investors adopted very individualized approaches in deciding whether to remain in securities lending or to exit, and if the latter, how that process would proceed. These decisions often were made after extensive discussion and meetings with Wells Fargo. To date, five participants have brought two separate lawsuits against Wells Fargo asserting their individual claims. A 6 week trial involving four of those participants with many days focused on testimony and exhibits specific to each of those four, concluded in June 2010. Trial involving the other participant, which is again focused in large part on facts specific to it, is scheduled for trial in federal court in Colorado for May 2011. Many differences exist with respect to just these five participants in the series of the Trust. These points are illustrative of how individual issues predominate with respect to the claims of participants in securities lending at Wells Fargo.

**c. A summary itemization of the dollar amount of each element of the alleged damages.**

**(i) Plaintiff's Statement**

CFHERS states that, at this stage of the litigation, the precise amount of class-wide damages is not known. However, through the course of litigation, CFHERS intends to determine the precise amount of class-wide damages, most likely with the aid of expert testimony.

**(ii) Wells Fargo's Statement**

Wells Fargo denies that its actions have caused any damages to CFHERS or any putative class member, but it asserts that CFHERS should be able to provide a summary itemization of the dollar amount of each element of any alleged damages that it claims to have suffered.

**3. Pleadings**

**a. A statement of whether the Complaint and all responsive pleadings have been filed, and whether any party proposes to amend its pleadings.**

Plaintiff has already filed the Complaint and Defendant has filed its Answer to the Complaint. While the Complaint and the responsive Answer have been filed at this juncture, Plaintiff reserves the right to amend the Complaint at a later point in the litigation. Defendant also reserves its right to amend the Answer at a later point in the litigation.

**b. The date by which all motions that seek to amend the pleadings or add parties will be filed.**

**(i) Plaintiff's Position**

The parties may amend the pleadings and/or add parties without leave of court on or before June 10, 2011.

**(ii) Defendant's Position**

Plaintiff must serve the Complaint upon which it will be moving for class certification by February 15, 2011. Defendant believes that deadlines for other

amendments should be determined as a part of a scheduling conference after this Court rules on Plaintiff's motion for class certification. See 4.c.ii.

**c. Whether a jury trial is available under the law, and whether a jury trial has been timely demanded.**

A jury trial is available under the law and Plaintiff has timely demanded a trial by jury.

**d. Class Certification Motion**

**(i) Plaintiff's Position**

Plaintiff shall file its motion for class certification on or before June 10, 2011. Defendant shall file its opposition papers, if any, on or before July 25, 2011. Plaintiff shall file its reply papers, if any, on or before August 25, 2011. The hearing on Plaintiff's motion for class certification will be on September 8, 2011, or at another date to be set by the Court.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's proposed schedule for a motion for class certification.

**4. Discovery Plan**

**a. Date by which the initial Rule 26(a)(1) disclosures of witnesses, documents, itemized damage computations and insurance will be completed.**

**(i) Plaintiff's Position**

The initial Rule 26(a)(1) disclosures shall be served on the respective parties on or before January 14, 2011.

**(ii) Defendant's Position**

Defendants propose that the initial Rule 26(a)(1) disclosures, which will pertain to class viability, will be served on the respective parties by February 4, 2011.

**b. Whether the parties wish to engage in any method of alternative dispute resolution following Rule 26(a)(1) disclosures but before formal discovery is commenced.**

While the parties do not wish to engage in any method of alternative dispute resolution prior to commencement of discovery, the parties may seek to engage in alternative dispute resolution subsequently.

**c. Whether discovery should be conducted in phases, or limited to or focused upon, particular issues.**

**(i) Plaintiff's Position**

Discovery should be focused upon all issues and not conducted in phases since this would delay litigation needlessly and waste judicial resources and time. Defendant proposes bifurcating discovery, with merits discovery postponed until after the Court has ruled on a motion for class certification. Splitting discovery is inefficient and unworkable from a practical standpoint, which is why it is not done as a matter of law. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 & n.12 (1978) (noting that “the class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action’” and that “[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims.”) (citation omitted); *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005) (“The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.”); *Gray v. First Winthrop Corporation*, 133 F.R.D. 39, 41 (N.D. Cal. 1990) (“Discovery relating to class certification is closely enmeshed with merits discovery, and in fact cannot be meaningfully developed without inquiry into the basic issues of the litigation.”) (citing Manual For

Complex Litigation (Second) § 30.12 (1985))<sup>2</sup>; *In re Gupta Sec. Litig.*, No. 94-1517 FMS (FSL), 1994 WL 675209, at \*4 (N.D. Cal. Sept. 24, 1994) (bifurcation was “unworkable” as “[p]laintiffs’ class certification discovery and merits discovery are inextricably intermeshed”). Bifurcating discovery would needlessly bog down the parties and the Court with duplicative discovery and needless motion practice to determine whether certain discovery requests are within the scope of a particular discovery phase. “Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.” Manual for Complex Litigation §21.14 (4th Ed.).

(ii) **Defendant’s Position**

Wells Fargo believes that initial discovery should be limited to discovery about the class action requirements of Fed. R. Civ. P. 23(a) (“Phase I Discovery”), including the requirements of numerosity, commonality, predominance and superiority and the requirements of Fed. R. Civ. P. 23(b)(3). Wells Fargo further believes that merits discovery (“Phase II Discovery”), including expert and fact discovery, should be deferred until after the Court’s ruling on class certification. Wells Fargo anticipates that the parties may raise issues with the Court concerning whether particular discovery requests are within the scope of Phase I Discovery. Phased discovery will be much more efficient and will conserve the resources and

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<sup>2</sup> Section 30.12 of the Manual for Complex Litigation, Third Edition (“MCL, Third”) provides that “[d]iscovery relating to class issues may overlap substantially with merits discovery. A key question in class certification may be the similarity or dissimilarity between the claims of the representative parties and those of the class members—an inquiry that may require discovery on the merits and development of basic issues.” *Id.* at pp. 215-16.

time of the Court because phased discovery can be targeted to whether Plaintiff can meet its burden of demonstrating the prerequisites for class treatment, whereas merits discovery will address the validity of Plaintiff's claims and Wells Fargo's defenses, which will constitute the bulk of discovery.

Wells Fargo believes that the class certification question is a threshold issue that should be decided first, as it will determine the scope of the case and help the parties and the Court manage the case most effectively and efficiently. *See* Fed. R. Civ. P. 23(c)(1) (stating that the court should decide certification “[a]t an early practicable time” after commencement of a case filed as a class action); *see also* Manual for Complex Litigation. § 21.14 (4<sup>th</sup> Ed.) (stating that “[c]ourts often bifurcate discovery between certification issues and those related to the merits of the allegations.”).

Wells Fargo proposes that the Court hold a further status conference following its decision on class certification. The parties and the Court could address at that conference the appropriate scope and extent of Phase II discovery in light of the class certification decision.

*At this time, Wells Fargo proposes the following discovery and schedule for the completion of Phase I Discovery:*

- The parties exchange Rule 26 initial disclosures, as referenced in section 4(a)(ii), by February 4, 2011.
- The parties may serve up to 15 interrogatories on each other.
- The parties may serve up to 15 document requests on each other.
- The parties may take up to 2 factual depositions, not including expert witness depositions.
- The parties may serve requests for admission on each other.

(1) **Phase I Fact Discovery**

All Phase I Discovery shall be completed by March 31, 2011.

(2) **Experts**

If either party intends to offer expert witnesses relating to class certification:

(A) The number of expert witnesses per party shall not exceed two.

(B) CFHERS shall identify its expert witness(es), if any, on class certification issues and provide Rule 26(a)(2)(B) reports for those experts by February 25, 2011. Wells Fargo shall complete depositions of such experts by March 31, 2011.

(C) Wells Fargo shall identify its expert witness(es), if any, on class certification issues and provide Rule 26(a)(2)(B) reports by March 15, 2011, and CFHERS shall complete depositions of such experts prior to March 31, 2011.

(D) The parties shall work in good faith to schedule fact and any expert depositions at mutually agreeable dates and times.

(3) **Class Certification Briefing**

(A) CFHERS shall file and serve its motion for class certification and brief in support and all supporting affidavits and other evidence relied upon by it in support of its motion for class certification by April 13, 2011.

(B) Wells Fargo shall file and serve its response to the class certification motion, together with all supporting affidavits and other evidence relied upon by it in opposition to class certification by May 13, 2011.

(C) CFHERS shall file and serve its reply brief in support of class certification, responding to the arguments and evidence of Wells Fargo by May 27, 2011.

(D) The Court will schedule a hearing on the class certification motion to take place after the conclusion of the parties' briefing.

(E) After the Court issues its ruling on certification, the Court will set a scheduling conference promptly thereafter to schedule deadlines for the completion of fact and expert discovery and a trial date.

**d. The date by which each party shall disclose the identity of expert witnesses and their reports under Rule 26(a)(2)(A) and (B).**

**(i) Plaintiff's Position**

Plaintiff shall disclose the identity of its expert witnesses and their reports under Rule 26(a)(2)(A) and (B) on or before March 26, 2012. Defendant shall complete the depositions of such experts on or before April 25, 2012.

Defendant shall disclose the identity of its expert witnesses and their reports under Rule 26(a)(2)(A) and (B) on or before April 25, 2012. Plaintiff shall complete the depositions of such experts on or before May 25, 2012.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased, and see 7.ii. for Defendant's proposed schedules.

**e. The number of interrogatories each party shall be permitted to serve.**

**(i) Plaintiff's Position**

Each party should be permitted to issue 25 interrogatories as provided for under the Federal Rules of Civil Procedure.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased. (However, Defendant is agreeable with 25 interrogatories per party for Phase II.)

**f. The number of depositions (excluding depositions of expert witnesses) each party shall be permitted to take.**

**(i) Plaintiff's Position**

Each party should be permitted to take up to 10 depositions, excluding depositions of expert witnesses, as provided by the Federal Rules of Civil Procedure.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased. (However, Defendant believes that limiting each party to 10 depositions on the merits during Phase II is a reasonable estimate in a case involving only CFHERS's claims. Defendant believes that there could be a need for a large number of additional depositions if a class were to be certified but that number is not reasonably estimable at this time.)

**g. The number of expert depositions each party shall be permitted to take.**

**(i) Plaintiff's Position**

CFHERS' position is that each party should be permitted to take the deposition of each expert designated by the other party.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased. (However, Defendant believes that the number of experts per party, not related to class certification, should not exceed three and Defendant does not object to expert depositions.)

**h. Electronic Discovery**

The parties will meet and confer regarding the format of retrieving any electronically stored information.

**i. Protective Order**

The parties will meet and confer and, as soon as practicable, propose a joint

protective order for submission to the Court.

**5. Close of Discovery and Non-Dispositive Motions**

**(i) Plaintiff's Position**

CFHERS proposes that fact discovery conclude on February 8, 2012 and that non-dispositive motions be filed on or before June 25, 2012.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased, and see 7.ii. for Defendant's proposed schedules.

**6. Dispositive Motions and Trial**

**a. Date by which all dispositive motions shall be served and filed.**

**(i) Plaintiff's Position**

CFHERS proposes that all dispositive motions shall be filed by August 17, 2012.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased, and see 7.ii. for Defendant's proposed schedules.

**b. Date by which case will be ready for trial.**

**(i) Plaintiff's Position**

CFHERS states that the case will be ready for trial by November 12, 2012. The final pretrial conference shall be held on November 5, 2012.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased, and see 7.ii. for Defendant's proposed schedules.

**c. The number of expert witnesses each party expects to call at trial.**

**(i) Plaintiff's Position**

The parties shall meet and confer at a later juncture to determine the number of expert witnesses to be called at trial.

**(ii) Defendant's Position**

See 4.c.ii. for Defendant's position that discovery should be phased. (However, Defendant agrees to meet and confer at a later juncture to determine the number of expert witnesses to be called at trial.)

**d. Estimated trial time (including jury selection and instructions, if applicable).**

**(i) Plaintiff's Position**

CFHERS estimates that the trial will last between 10 and 14 court days.

**(ii) Defendant's Position**

Wells Fargo estimates that a trial on CFHERS's individual claims will last between 10 and 14 trial days. If a trial were to involve a class, Defendant estimates that a trial will last approximately four months.

**7. Summary of Proposed Schedule**

**(i) Plaintiff's Proposed Schedule**

Initial Rule 26(a)(1) Disclosures	January 14, 2011
Deadline to Amend Pleadings/Add Parties	June 10, 2011
Plaintiff's Class Certification Motion	June 10, 2011
Opposition to Class Certification	July 25, 2011
Reply for Class Certification	August 25, 2011
Class Certification Hearing	September 8, 2011

Fact Discovery Cutoff	February 8, 2012
Plaintiff's Expert Reports	March 26, 2012
Defendant's Expert Reports	April 25, 2012
Expert Discovery Cutoff	May 25, 2012
Non-dispositive Motion Cutoff	June 25, 2012
Dispositive Motion Cutoff	August 17, 2012
Final Pretrial Conference	November 5, 2012
Trial	November 12, 2012

(ii) **Defendant's Proposed Schedule**

See attached chart which compares Plaintiff's Proposed Schedule set forth above and Defendant's Proposed Schedule for a trial on CFHERS's individual claims and alternatively Defendant's Proposed Schedule if a class were to be certified.

Dated: December 14, 2010

Respectfully submitted,

GLANCY BINKOW & GOLDBERG LLP

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Dated: December 14, 2010

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