

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GARY HEFLER, et al.,  
Plaintiffs,  
v.  
WELLS FARGO & COMPANY, et al.,  
Defendants.

Case No. 16-cv-05479-JST

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTIONS TO  
DISMISS**

Re: ECF Nos. 135, 138, 139, 142, 143, 145,  
147, 153, 156, 158

Pending before the Court Are the Motions to Dismiss the Consolidated Class Action Complaint (“Complaint”) for Violations of the Federal Securities Laws filed by defendants Wells Fargo & Company (“Wells Fargo Motion”), ECF 135; Carrie L. Tolstedt, ECF No. 138; Michael J. Loughlin, ECF No. 139; David M. Carroll, ECF No. 142; James M. Strother, ECF No. 143; David Julian and Avid Modjtabai, ECF No. 145; John D. Baker III, John S. Chen, Lloyd H. Dean, Elizabeth A. Duke, Susan E. Engel, Enrique Hernandez, Jr., Donald M. James, Cynthia H. Milligan, Federico F. Pena, James H. Quigley, Judith M. Runstad, Stephen W. Sanger, Susan G. Swenson, Suzanne M. Vautrino (collectively, “Independent Directors”)<sup>1</sup>, ECF 147; John G. Stumpf, ECF No. 153; and Hope Hardison , ECF No. 158. The Court will grant the motions in part and deny them in part.

**I. RELATED CASE ORDER**

On October 4, 2017, this Court filed an Order Granting in Part and Denying In Part Motions to Dismiss in a related case. In re Wells Fargo & Company Shareholder Derivative Litigation, No. 16-cv-05541 JST, ECF No. 174 (N.D. Cal. Oct. 4, 2017) (“Derivative Litigation

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<sup>1</sup> Various of the defendants joined in all or part of each other’s motions. ECF Nos. 155, 156, 158, 159, and 165.

1 Order”). The complaint in the derivative action contains many claims that are substantially  
 2 similar, and in some cases identical, to those in the Complaint here. Accordingly, the Court refers  
 3 to the Derivative Litigation Order when that order sets forth the Court’s reasoning as to a  
 4 particular claim or argument.

## 5 **II. BACKGROUND**

6 This is a securities fraud class action brought on behalf of all persons who purchased Wells  
 7 Fargo stock between February 26, 2014 and September 20, 2016, against certain current and  
 8 former Wells Fargo officers and directors. ECF No. 72, Consolidated Class Action Complaint for  
 9 Violations of the Federal Securities Laws (“Compl.”) ¶ 2.

10 In addition to Wells Fargo itself, the Complaint names two groups of defendants: “Officer  
 11 Defendants” and “Director Defendants.” The Officer Defendants include John Stumpf (Chairman  
 12 of the Board and Chief Executive Officer during the entirety of the Class Period); John  
 13 Shrewsbury (Chief Financial Officer during part of the Class Period); Carrie Tolstedt (Senior  
 14 Executive Vice President of Community Banking during the Class Period until her resignation on  
 15 July 31, 2016); Timothy Sloan (Chief Financial Officer, Chief Operating Officer, and head of  
 16 Wholesale Banking during different points of the Class Period); David Carroll (Senior Executive  
 17 Vice President in charge of the Wealth, Brokerage and Retirement Group during the Class Period);  
 18 David Julian (Company’s Chief Auditor during the Class Period); Hope Hardison (Senior  
 19 Executive Vice President and Human Resources Director during the Class Period); Michael  
 20 Loughlin (Senior Executive Vice President and Chief Risk Officer during the Class Period); Avid  
 21 Modjtabai (Head of Consumer Lending during the Class Period), and James Strother (Company’s  
 22 General Counsel during the Class Period). Compl. ¶¶ 51-61. The Director Defendants were  
 23 members of the Wells Fargo Board of Directors and various committees during the Class Period.  
 24 They include John Baker, John Chen, Lloyd Dean, Elizabeth Duke, Susan Engel, Enrique  
 25 Hernandez, Donald James, Cynthia Milligan, Federico Peña, James Quigley, Judith Runstad,  
 26 Stephen Sanger, Susan Swenson, and Suzanna Vautrinot.<sup>2</sup> Id. ¶¶ 62-76. Wells Fargo is also a  
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28 <sup>2</sup> Defendant Stumpf is also considered a Director Defendant. Compl. ¶ 76.

1 defendant. *Id.* ¶ 5.

2 The gist of the Complaint is that Wells Fargo made repeated “misrepresentations and  
3 omissions about a core element of Wells Fargo’s business: its acclaimed ‘cross-selling’ business  
4 model” in which Wells Fargo emphasized the sale of multiple Wells Fargo products to existing  
5 customers. *Id.* ¶ 3.<sup>3</sup> Throughout the class period, Wells Fargo allegedly touted its cross-selling  
6 model as the reason for its financial success, when in fact Wells Fargo and the individual  
7 defendants knew that many of the purported “sales” to existing customers never took place –  
8 because Wells Fargo had instead secretly opened new deposit and credit card accounts for those  
9 customers without their knowledge or permission. *Id.* ¶¶ 3-5. Plaintiffs note that the government  
10 found – and Wells Fargo executives have admitted – that Wells Fargo opened unauthorized  
11 accounts for existing customers and transferred funds to those accounts without the customers’  
12 knowledge or consent; submitted applications for credit cards in customers’ names without their  
13 consent; enrolled customers in online banking services they did not request; and ordered and  
14 activated debit cards using customer information without customers’ consent. *Id.* Plaintiffs allege  
15 that Wells Fargo employees resorted to committing fraud because of a “toxic, high-pressure sales  
16 culture and ill-conceived compensation plan” and “[r]uthless pressure” exerted from the top down.  
17 *Id.* ¶¶ 7-8. Plaintiffs further allege that Wells Fargo has been aware of these practices since at  
18 least 2011, and the Company’s highest executives and Board of Directors have been aware of  
19 them since 2013. *Id.* ¶ 8. As summarized by the Plaintiffs:

20 [A]s the problem persisted and as investigations mounted,  
21 Defendants continued their aggressive sales and incentive programs,  
22 and consistently touted the successes of cross-sell to investors. The  
23 price of Wells Fargo stock increased in lockstep and, although faced  
with investigations and with knowledge that the problem was of a  
significant magnitude, certain of the Defendants sold or disposed of  
massive amounts of personal holdings of Company stock.

24 *Id.* ¶ 10.

25 Plaintiffs allege that when the truth about this conduct was revealed over a period of days  
26 in September 2016, Wells Fargo’s stock price fell from \$49.90 to \$45.83 per share. *E.g., id.* ¶ 187,

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28 <sup>3</sup> For purposes of this order, the Court accepts the facts alleged in the Complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

1 190, 223 (“When the truth began to be disclosed in September 2016, Wells Fargo’s stock price  
2 suffered significant declines, as the artificial inflation was removed from the stock price.”). “On  
3 September 16, 2016, a Reuters article discussed the 7.5% stock price decline caused by the  
4 surprise revelations that the Company had created millions of bank accounts and applied for credit  
5 cards without account holders’ permission.” Id. ¶ 193. And “after the Class Period, on September  
6 26, 2016, CNNMoney published a report titled ‘Wells Fargo stock sinks to 2-1/2 year low’  
7 attributing the recent price declines to the fake account scandal and settlement disclosed in  
8 September 2016.” Id. ¶ 239.

9 Based on the misconduct described above, several related lawsuits were filed against Wells  
10 Fargo. ECF Nos. 8, 12, 14, 18, 47, 55. On January 5, 2017, this Court granted Plaintiff Union  
11 Asset Management Holding’s motion to consolidate Hefler v. Wells Fargo & Co., Case No. 16-cv-  
12 5479 with Klein v. Wells Fargo & Co., Case No. 16-cv-5513 and to appoint Union as Lead  
13 Plaintiff. ECF No. 58 at 1. Plaintiffs filed their Consolidated Class Action Complaint for  
14 violations of the Federal Securities Laws on March 6, 2017. ECF No. 72. In the Complaint,  
15 Plaintiffs assert three causes of action: (1) Violations of Section 10(b) of the Securities Exchange  
16 Act of 1934 (“1934 Act”) and SEC Rule 10b-5; (2) Violations of Section 20A of the 1934 Act;  
17 and (3) Violations of Section 20(a) of the 1934 Act. Defendants filed Motions to Dismiss on  
18 June 19, 2017. See ECF Nos. 135, 138, 139, 142, 143, 145, 147, 153, 156, 158.

### 19 **III. REQUEST FOR JUDICIAL NOTICE**

20 Before addressing Plaintiffs’ claims, the Court considers the four requests for judicial  
21 notice filed by Defendants, ECF Nos. 135-4, 144, 154, 188 and the request filed by Plaintiffs, ECF  
22 No. 177.

23 While the scope of review on a motion to dismiss is generally limited to the contents of the  
24 complaint, under Federal Rule of Evidence 201(b), courts may take judicial notice of facts that are  
25 “not subject to reasonable dispute.” Courts also take notice of documents whose authenticity is  
26 not contested and on which the complaint necessarily relies, Lee v. City of Los Angeles, 250 F.3d  
27 668, 688 (9th Cir. 2001), publicly available financial documents such as SEC filings, Metzler Inv.  
28 GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049, 1064 n. 7 (9th Cir.2008), and publicly

1 available articles or other news releases of which the market was aware, Heliotrope Gen., Inc. v.  
2 Ford Motor Co., 189 F.3d 971, 981 n. 18 (9th Cir.1999).

3 Defendants request judicial notice of numerous reports, press releases, news articles,  
4 investor presentations, and other filings with the SEC, many of which Plaintiffs reference in the  
5 Complaint. See ECF Nos. 144, 154, 188. Plaintiffs do not object. The Court grants this request.

6 Plaintiffs request judicial notice of numerous reports, press releases, news articles, investor  
7 presentations, conference call transcripts and other filings with the SEC, many of which were  
8 incorporated by reference in the Complaint. See ECF No. 177. Defendants do not object. The  
9 Court grants this request also.

10 Defendants also request judicial notice of Wells Fargo's historical stock prices and trading  
11 volume during the class period. ECF Nos. 135-4 at 2; 144 at 4; 154 at 5. Plaintiffs do not object.  
12 "The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can  
13 be accurately and readily determined from sources whose accuracy cannot reasonably be  
14 questioned." Fed. R. Evid. 201(b). The Court grants this request as well.

15 The Court takes judicial notice of all the requested exhibits in ECF Nos. 135-4, 144, 154,  
16 177 and 188. The Court does not take notice of any disputed facts contained within those  
17 documents. Lee, 250 F.3d at 689-90.

#### 18 **IV. LEGAL STANDARD**

##### 19 **A. The Dual Pleading Requirements**

20 Section 10(b) of the Securities Exchange Act of 1934 prohibits any act or omission  
21 resulting in fraud or deceit in connection with the purchase or sale of any security. To establish a  
22 violation of Section 10(b), a plaintiff must plead: (1) a material misrepresentation or omission  
23 made by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission  
24 and the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. See  
25 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 157 (2008).

26 On a motion to dismiss, the Court accepts the material facts alleged in the complaint,  
27 together with reasonable inferences to be drawn from those facts, as true. Navarro v. Block, 250  
28 F.3d 729, 732 (9th Cir. 2001). However, "the tenet that a court must accept a complaint's

1 allegations as true is inapplicable to threadbare recitals of a cause of action’s elements, supported  
2 by mere conclusory statements.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Moreover, while a  
3 plaintiff generally need only plead “enough facts to state a claim to relief that is plausible on its  
4 face” to survive a motion to dismiss, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007),  
5 “[s]ecurities fraud class actions must meet the higher, exacting pleading standards of Federal Rule  
6 of Civil Procedure 9(b) and the Private Securities Litigation Reform Act (‘PSLRA’).” Oregon  
7 Pub. Employees Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 604 (9th Cir. 2014).

8 Under the PSLRA and Rule 9(b), a complaint must “state with particularity facts giving  
9 rise to a strong inference that the defendant acted with the required state of mind” with respect to  
10 each alleged false statement or omission, and a party must “state with particularity the  
11 circumstances constituting fraud or mistake.” 15 U.S.C. § 78u-4(b)(2)(A); Fed. R. Civ. P. 9(b);  
12 see also Oregon Pub. Employees Ret. Fund, 774 F.3d at 605. “In order to show a strong inference  
13 of deliberate recklessness, plaintiffs must state facts that come closer to demonstrating intent, as  
14 opposed to mere motive and opportunity.” In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970,  
15 974 (9th Cir. 1999), abrogated on other grounds by, S. Ferry LP, No. 2 v. Killinger, 542 F.3d 776,  
16 784 (9th Cir. 2008). If the complaint does not satisfy the PSLRA’s pleading requirements, the  
17 Court must grant a motion to dismiss the complaint. 15 U.S.C. § 78u-4(b)(3)(A).

#### 18 **B. Falsity and Materiality**

19 The PSLRA provides that “the complaint shall specify each statement alleged to have been  
20 misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding  
21 the statement or omission is made on information and belief, the complaint shall state with  
22 particularity all facts on which that belief is formed.” 15 U.S.C. § 78u-4(b)(1)(B). For statements  
23 to be actionable under the PSLRA, they must be both false or misleading and material. A  
24 statement or omission is misleading under the PSLRA and Section 10(b) of the Exchange Act “if  
25 it would give a reasonable investor the impression of a state of affairs that differs in a material way  
26 from the one that actually exists.” Berson v. Applied Signal Tech., Inc., 527 F.3d 982, 985 (9th  
27 Cir. 2008).

28 A false or misleading statement or omission is material if there is a “substantial likelihood

1 that the disclosure of the omitted fact would have been viewed by the reasonable investor as  
 2 having significantly altered the ‘total mix’ of information made available.” TSC Indus., Inc. v.  
 3 Northway, Inc., 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976). “To plead materiality,  
 4 the complaint’s allegations must ‘suffice to raise a reasonable expectation that discovery will  
 5 reveal evidence satisfying the materiality requirement, and to allow the court to draw the  
 6 reasonable inference that the defendant is liable.’” Reese v. Malone, 747 F.3d 557, 568 (9th Cir.  
 7 2014) (quoting Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 131 (2011)). “‘Although  
 8 determining materiality in securities fraud cases should ordinarily be left to the trier of fact,  
 9 conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to  
 10 dismiss for failure to state a claim.’” Id. (quoting In re Cutera Sec. Litig., 610 F.3d 1103, 1108  
 11 (9th Cir. 2010)).

### 12 C. Scienter

13 The required state of mind under the PSLRA is a “mental state embracing intent to  
 14 deceive, manipulate, or defraud.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193–94 n.12 (1976).  
 15 In order to adequately establish scienter, the complaint must “state with particularity facts giving  
 16 rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. §  
 17 78u-4(b)(2)(A).

18 The “strong inference” required by the PSLRA “must be more than merely ‘reasonable’ or  
 19 ‘permissible’ – it must be cogent and compelling, thus strong in light of other explanations.”  
 20 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007). “A court must compare  
 21 the malicious and innocent references cognizable from the facts pled in the complaint, and only  
 22 allow the complaint to survive a motion to dismiss if the malicious inference is at least as  
 23 compelling as any opposing innocent inference.” Zucco Partners, LLC v. Digimarc Corp., 552  
 24 F.3d 981, 991 (9th Cir. 2009). In evaluating whether a complaint satisfies the “strong inference”  
 25 requirement, courts must consider the allegations and other relevant material holistically, not  
 26 “scrutinized in isolation.” In re VeriFone Holdings, 704 F.3d 694, 701 (9th Cir. 2012).

27 Deliberate or conscious recklessness constitutes intentional conduct sufficient to satisfy the  
 28 scienter requirement. “An actor is deliberately reckless if he had reasonable grounds to believe



1 material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose  
2 such facts although he could have done so without extraordinary effort.” Reese, 747 F.3d at 569  
3 (quoting In re Oracle Corp. Sec. Litig., 627 F.3d 376, 390 (9th Cir. 2010) (internal alterations  
4 omitted)). “[T]he ultimate question is whether the defendant knew his or her statements were  
5 false, or was consciously reckless as to their truth or falsity.” Gebhart v. SEC, 595 F.3d 1034,  
6 1042 (9th Cir. 2010). “Facts showing mere recklessness or a motive to commit fraud and  
7 opportunity to do so provide some reasonable inference of intent, but are not independently  
8 sufficient.” Reese, 747 F.3d at 569 (quoting In re Silicon, 183 F.3d at 974).

9 **D. Loss Causation**

10 Loss causation, “i.e. a causal connection between the material misrepresentation and the  
11 loss” experienced by the plaintiff, is a necessary element of pleading a securities fraud claim under  
12 section 10(b) of the Exchange Act. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005). “A  
13 complaint fails to allege loss causation if it does not ‘provide[ ] [a defendant] with notice of what  
14 the relevant economic loss might be or of what the causal connection might be between that loss  
15 and the misrepresentation[.]’ Stated in the affirmative, the complaint must allege that the  
16 defendant’s share price fell significantly after the truth became known.” Meltzer Inv. GMBH v.  
17 Corinthian Colleges, Inc., 540 F.3d 1049, 1062 (9th Cir. 2008) (quoting Dura Pharm., 544 U.S. at  
18 347). “The burden of pleading loss causation is typically satisfied by allegations that the  
19 defendant revealed the truth through ‘corrective disclosures’ which ‘caused the company’s stock  
20 price to drop and investors to lose money.’” Lloyd v. CVB Fin. Corp., No. 13-56838, 2016 WL  
21 384773, at \*8 (9th Cir. Feb. 1, 2016) (citing Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct.  
22 2398, 2406 (2014)).

23 “Typically, ‘to satisfy the loss causation requirement, the plaintiff must show that the  
24 revelation of that misrepresentation or omission was a substantial factor in causing a decline in the  
25 security’s price, thus creating an actual economic loss for the plaintiff.’” Nuveen Mun. High  
26 Income Opportunity Fund v. City of Alameda, 730 F.3d 1111, 1119 (9th Cir. 2013) (quoting  
27 McCage v. Ernst & Young, LLP, 494 F.3d 418, 425-26 (3d. Cir. 2007)). However, “[t]he  
28 fundamental inquiry before the Court remains whether there is ‘a causal connection between the



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1 material misrepresentation and the loss.” Thomas v. Magnachip Semiconductor Corp., 167 F.  
2 Supp. 3d 1029, 1046 (N.D. Cal. 2016) (quoting Dura Pharm., 544 U.S. at 342).

3 **V. DISCUSSION**

4 Defendants move to dismiss Plaintiffs’ claims under Federal Rule of Civil Procedure  
5 12(b)(6). Defendants Wells Fargo, Carrie Tolstedt, Michael Loughlin, David Carroll, Avid  
6 Modjtabai, John Stumpf, John Shrewsberry, and Timothy Sloan move to dismiss Plaintiffs’ claims  
7 against them under Section 10(b) and Rule 10b5, Section 20A, and Section 20(a). Defendants  
8 James Strother, David Julian, Hope Hardison, and the Independent Directors move to dismiss the  
9 claims against them under Section 20(a).

10 **A. Claims Under Section 10(b) and Rule 10b5**

11 To survive a motion to dismiss under Section 10(b) and Rule 10b5, Plaintiffs must  
12 plausibly allege: (1) a material misrepresentation or omission made by the defendant; (2) scienter;  
13 (3) a connection between the misrepresentation or omission and the purchase or sale of a security;  
14 (4) reliance; (5) economic law; and (6) loss causation. Stoneridge Inv. Partners, LLC, 552 U.S. at  
15 157. Plaintiffs brought claims under §10(b) of the 1934 Act and SEC Rule 10b5 against Wells  
16 Fargo and the Speaking Defendants.<sup>4</sup> ECF No. 72 at 122. Defendants generally challenge  
17 whether the Complaint adequately alleges material misrepresentations or omissions made by them;  
18 scienter; and loss causation. See ECF Nos. 135 at 9; 138 at 3; 139 at 2-3; 142 at 6; 145 at 6; 153  
19 at 1; 156 at 2; 159 at 2.

20 **1. Material and Misleading Statements**

21 Defendants generally argue that Plaintiffs neither identify the specific statements that  
22 allegedly constitute actionable misrepresentations nor include specific facts indicating why those  
23 statements were false, misleading, or material. ECF No. 135 at 15-16.

24 **a. Defendants Stumpf, Sloan, Shrewsberry, and Wells**  
25 **Fargo**

26 This Court has previously held that many of the statements identified in the Complaint are

27 \_\_\_\_\_  
28 <sup>4</sup> Speaking Defendants include Stumpf, Sloan, Tolsted, Carroll, Modjtabai, Loughlin, and  
Shrewsberry. ECF 72 at 133 n.211.

1 sufficient to plead a material and misleading statement. See Derivative Litigation Order at 15-24.  
 2 In the Derivative Litigation Order, the Court found that Plaintiffs plausibly alleged that  
 3 Defendants “made material and misleading statements through their participation in and approval  
 4 of Wells Fargo’s public filings.” Id. at 18. The Court noted that Defendants knew that Wells  
 5 Fargo accounts were being improperly created, but nonetheless made disclosures in SEC filings  
 6 that they knew were false or misleading at the time they were made. Id. The Plaintiffs in the  
 7 derivative action identified “specific statements in the SEC filings that they allege to be false or  
 8 misleading –namely, the cross-selling metrics that were reported in all quarterly and annual filings  
 9 and statements in those filings regarding Wells Fargo’s success at cross-selling and its risk  
 10 management controls.” Id.

11 Here, the Plaintiffs identify many identical and similar statements, including the cross-  
 12 selling metrics reported in quarterly and annual filings. See e.g. Compl. ¶¶ 101, 111, 120, 125.  
 13 They allege that Wells Fargo attributed its financial success to its cross-selling strategy. The  
 14 Complaint lists statements in Wells Fargo’s Annual Report, Form 10-Q and Form 10-k, touting  
 15 the success of Wells Fargo’s cross-selling metrics and risk management controls. See Id. ¶¶ 88-  
 16 179; see also ECF No. 175-1.<sup>5</sup> For example, Wells Fargo made statements that its success rested  
 17 on having “achieved record cross-sell across the Company,” Compl. ¶ 88, “[c]ross-sell of our  
 18 products is an important part of our strategy to achieve our vision to satisfy all our customers’  
 19 financial needs,” id. ¶ 89, and “[o]ur “cross-selling” efforts to increase the number of products our  
 20 customers buy from us . . . is a key part of our growth strategy,” id. ¶ 90. The May 7, 2014 and  
 21 the August 6, 2014 Form 10-Q stated that the “cross-sell strategy, diversified business model and  
 22 the breadth of our geographic reach facilitate growth in both strong and weak economic cycles.”  
 23 Id. ¶ 101, 114.<sup>6</sup> Wells Fargo also frequently went on to specify the number of products per

24 \_\_\_\_\_  
 25 <sup>5</sup> ECF No. 175-1 is an appendix to the Plaintiffs’ opposition brief listing the alleged  
 26 misrepresentations and omissions of Wells Fargo and the individual defendants. Ordinarily, the  
 27 Court frowns on appendices that serve to inflate a brief’s size while keeping it technically within  
 28 page limits. Wells Fargo did the same thing, however, and the Court has considered both  
 29 appendices. ECF No. 135 at 36-54. Future readers of this order should not assume that the Court  
 30 condones the practice or that its decision to consider these materials sets a precedent.

<sup>6</sup> The May 7, 2014 Form 10-Q contained certifications signed by Defendants Stumpf and Sloan  
 under the Sarbanes-Oxley (SOX) Act of 2002 that the financial information contained in the

1 customer or customer household as a measure of the strategy's success. See, e.g., id. ¶¶ 89, 96,  
2 106.

3 The Complaint also alleges why these statements were false and misleading. See id. ¶¶  
4 110, 155, 179. Plaintiffs allege that when Defendants made these statements, they “knew or  
5 deliberately disregarded that Wells Fargo materially and artificially inflated the cross-sell metrics  
6 that it reported to investors by including millions of accounts in those metrics that Wells Fargo  
7 either fabricated completely, or created by engaging in serious, pervasive sales misconduct.” Id.  
8 ¶¶ 110(b), 155(a). The conduct of which Defendants were aware also included “the creation of  
9 fake personal identification or PIN numbers to open fake debit cards, and the use of phony email  
10 addresses to enroll customers in additional services that customers did not request via forgery or  
11 other illegal means – all culminating in fraudulent conduct that occurred on a massive scale.” Id. ¶  
12 179. “Defendants [also] further knew or deliberately disregarded that the credit card penetration  
13 rates and growth metrics that they touted to investors rested, in part, on illusory credit cards and  
14 unsustainable growth that cross-selling misconduct generated.” Id. The allegedly false statements  
15 were either made or signed by Defendants Stumpf, Sloan, and/or Shrewsberry. ECF No. 175-1.

16 Thus, the Court finds that Plaintiffs have plausibly alleged that Defendants Stumpf, Sloan,  
17 and Shrewsberry made material and misleading statements through their participation in and  
18 approval of Wells Fargo's public filings. See Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061-  
19 63 (9th Cir. 2000). The Court also finds that Plaintiffs have plausibly alleged Wells Fargo's  
20 public filings contain material, misleading statements.

21 **b. Defendant Tolstedt**

22 Defendant Carrie Tolstedt notes that the Complaint alleges that she made only two  
23 purported misstatements. ECF No. 138 at 7 (“The Complaint attributes only two purported  
24 misstatements to her, and neither is actionable.”).

25 The Complaint alleges: (1) during Wells Fargo's May 20, 2014 Investor Day conference,  
26

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27 filings was true and did not omit material facts, and that the Company's internal disclosures were  
28 effective. The August 6, 2014 10-Q Form contained substantially identical SOX certification  
signed by Defendants Stumpf and Shrewsberry. Compl. ¶ 115.

1 Tolstedt stated that “[f]or example, we saw outstanding growth in our credit card business with  
2 retail bank credit card penetration up 30%,” Compl. ¶104; during the same conference, Tolstedt  
3 stated, “the density and cross-sell model[s] drive revenue,” *id.*; and (2) during a May 24, 2016  
4 Investor Day conference, Tolstedt represented that the cross-sell strategy was meant to “satisfy[]  
5 customers’ needs and help[] them succeed financially.” Compl. ¶¶ 104, 166. Tolstedt argues that  
6 these are corporate “puffing” and are not actionable misrepresentations. ECF No. 138 at 12.

7 As the Court noted in the derivative order, “the line between puffery and a misleading  
8 statement is often indistinct, and requires an analysis of the context in which the statements were  
9 made.” Derivative Litigation Order at 22; *Mulligan v. Impax Labs., Inc.*, 36 F. Supp. 3d 966  
10 (N.D. Cal. 2014). “Even a statement of opinion or an expression of corporate optimism may be  
11 deemed actionable in certain circumstances because ‘there is a difference between enthusiastic  
12 statements amounting to general puffery and opinion-based statements that are anchored in  
13 ‘misrepresentations of existing facts.’” *Id.* (quoting *In re Bank of Am. Corp. Sec., Derivative, &*  
14 *ERISA Litig.*, 757 F. Supp. 2d 260, 310 (S.D.N.Y. 2010)).

15 In the Derivative Litigation Order, the Court considered Tolstedt’s statements at the 2014  
16 and 2016 Investor Day conferences to find that Plaintiffs adequately alleged that Tolstedt’s  
17 statements were materially false or misleading when made. The Court reaches the same  
18 conclusion here. Tolstedt’s representations must be considered in the context of Wells Fargo  
19 statements that described cross-selling as “the core of [its] vision-based strategy.” *Id.* ¶ 13.  
20 “Defendants touted [their cross-sell] strategy throughout the Class Period, despite knowing that  
21 the Company’s overly aggressive cross-sell targets, extreme sales environment and related  
22 incentive compensation programs were corrupting, rather than reinforcing, Wells Fargo’s  
23 purported corporate values and cross-selling business model.” *Id.* ¶ 3.

24 Plaintiffs allege that Tolstedt was, at all relevant times during the Class Period until her  
25 resignation, the Company’s Senior Executive Vice President of Community Banking, where the  
26 fraudulent sales practices were alleged to have taken place. *See* Compl. ¶ 53, 110(e)(ii). Tolstedt  
27 also served on the Operating Committee, which was responsible for risk management. *Id.* ¶ 85.  
28 Plaintiffs allege that Tolstedt learned of the cross-selling misconduct by 2011 and that Tolstedt’s

1 Community Banking unit “assembled a ‘task force’ to identify suspicious patterns in sales  
 2 practice” in 2011. Id. ¶¶ 110(e)(ii), 179(b). Plaintiffs allege that in 2012 Wells Fargo assigned  
 3 reports of unauthorized accounts to a risk management function in [Tolsted’s] Community  
 4 Banking business. Id. ¶ 110(e)(ii). Given this context, Plaintiffs adequately allege that Tolsted’s  
 5 statements about the success of Wells Fargo’s cross selling and its commitment to providing value  
 6 for customers were both material and false or misleading.

7 **c. Defendants Carroll, Modjtabai, and Loughlin**

8 Defendant David Carroll notes that Plaintiffs only identify three statements attributed to  
 9 him in the Complaint. ECF No. 142 at 10. First, Plaintiffs identify his statements at a 2014  
 10 Investor Day: “[T]he culture of this company of getting the customer to the right place to  
 11 the right product, it gives me huge optimism. I can’t think of anyone in our industry that converts  
 12 relationships to cross-sell to top-line revenue growth better than Wells Fargo.” Compl. ¶ 107.  
 13 Carroll is correct that this statement is inactionable opinion. “When valuing corporations,  
 14 investors do not rely on vague statements of optimism like ‘good,’ ‘well-regarded,’ or other feel  
 15 good monikers. This mildly optimistic, subjective assessment hardly amounts to a securities  
 16 violation.” Oregon Pub. Employees Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 606 (9th Cir.  
 17 2014) (quoting In re Cutera Sec. Litig., 610 F.3d 1103, 1111 (9th Cir. 2010)) (internal ellipses  
 18 omitted).

19 Next, Plaintiffs identify Carroll’s statements at a 2015 Investor Day Conference: “So I  
 20 would tell you I think it is harder to do cross sell and do it well and stay within the good graces of  
 21 the regulators which sort of gets to my comment on our focus on execution, doing things the right  
 22 way.” Compl. ¶ 123. The Court also finds this statement to be inactionable opinion. See Or. Pub.  
 23 Emps. Ret. Fund, 774 F.3d at 606 (finding statements beginning with “[w]e believe” are  
 24 subjective puffing and would not induce the reliance of a reasonable investor.”).

25 Finally, Plaintiffs point to Carroll’s statements at a 2015 conference: “And the question  
 26 that you may have been heading towards about any regulatory issues around sales practices or  
 27 cross-selling or those kinds of things, as long as we stick to that plan-based, we’ve had terrific  
 28 reaction from our regulators from a compliance standpoint on that.” Compl. ¶ 150. Plaintiffs

1 allege that Carroll is and was during the Class Period the Company’s Senior Executive Vice  
 2 President in charge of the Company’s Wealth, Brokerage and Retirement Group. Compl. ¶ 55.  
 3 Plaintiffs also allege that Carroll was a member of the Wells Fargo Operating Committee, which  
 4 “was responsible for setting the tone at the top of the Company and establishing and reinforcing  
 5 the Company’s risk management culture.” Id. Plaintiffs allege that the Operating Committee  
 6 discussed the improper sales activities at least by 2013. Id. ¶ 110(d). And, Plaintiffs allege that an  
 7 OCC investigation was active and notified in 2013, and that the OCC directed Wells Fargo to  
 8 address weaknesses in compliance risk in early 2014. Id. ¶110(e).

9 A reasonable investor would not consider an OCC investigation a “terrific reaction.” See  
 10 Berson, 527 F. 3d at 958 (“a statement is misleading if it would give a reasonable investor the  
 11 impression of a state of affairs that differs in a material way from the one that actually exists”)  
 12 (internal citations omitted). However, Carroll argues that this statement relates “to the WIM  
 13 Group which is not alleged to have misstated cross-sell metrics.” ECF No. 142 at 18 n.7. He  
 14 argues that Plaintiffs did not adequately allege that this statement “had anything to do with what  
 15 was happening in Community Banking (as opposed to the [Wealth and Investment Management  
 16 (“WIM”)] business he led).” ECF No. 184 at 8.

17 Wells Fargo operates in three segments: Wholesale Banking, Wealth and Investment  
 18 Management, and Community Banking. Compl. ¶ 50. Most of the fraudulent activity alleged in  
 19 the Complaint took place in the Community Banking segment. Id. at 175. Plaintiffs have not  
 20 adequately alleged that the OCC investigation or any other regulatory investigation concerned  
 21 Carroll’s group at the time of this statement. Alternatively, Plaintiffs have not adequately alleged  
 22 that Carroll’s statement concerned the Community Banking segment. Without additional  
 23 allegations, Plaintiffs have not alleged that this is a materially false or misleading statement under  
 24 the PSLRA’s heightened pleading standards.

25 Defendant Avid Modjtabei notes that Plaintiffs identified only one alleged material  
 26 misrepresentation – her statement at a May 2014 Investor Day Conference. ECF No. 145 at 8.  
 27 Modjtabei stated that Wells Fargo increased “cross-sell in the retail household base, as well as in  
 28 the consumer lending consumer base . . . . As a result, our portfolios grew . . . . It is important to

1 note that we did not get this growth by compromising the quality of our portfolio.” Compl. ¶ 105.  
2 Similarly, Plaintiffs allege that Modjtabai was Head of Consumer Lending at all relevant times  
3 during the Class Period, as well as a member of the Operating Committee, which was responsible  
4 for “reinforcing the Company’s risk management culture.” Id. ¶ 59. And, Plaintiffs allege that the  
5 Operating Committee discussed the improper sales activities at least by 2013. Id. ¶ 110(d).

6 On reply, Modjtabai argues that “[t]he very next sentence (omitted from the Complaint) of  
7 her statement indicates that Ms. Modjtabai was referring to the bank’s loan portfolio: ‘In fact, as  
8 you could see in the top part of this chart, our net charge-offs have been declining and they are  
9 now at or below pre-crisis levels for the majority – actually for all of our portfolios and new  
10 originations have been very strong’.” ECF No. 187 at 8-9 (citing Exhibit A at 22). Modjtabai  
11 further argues that Plaintiffs acknowledged that her comment concerned the bank’s loan portfolio  
12 in their opposition brief. ECF No. 187 at 9. See ECF No. 175 at 54 n.30. Modjtabai argues that  
13 this context is significant because “the various regulatory and congressional investigations,  
14 company statements, and testimony upon which Complaint is based concern the bank’s deposit  
15 and credit card accounts, not its loan portfolio.” ECF No. 187 at 9.

16 This Court generally disfavors arguments raised for the first time on reply. See, e.g., TPK  
17 Touch Solutions, Inc. v. Wintek Electro-Optics Corp., No. 13-cv-02218-JST, 2013 WL 5228101,  
18 at \*4 (N.D. Cal. Sept. 17, 2013) (“The Court does not consider new facts or argument made for the  
19 first time in a reply brief.”) (citing Ass’n of Irrigated Residents v. C & R Vanderham Dairy, 435 F.  
20 Supp. 2d 1078, 1089 (E.D. Cal. 2006)). Nevertheless, the Court finds that Plaintiffs did not  
21 adequately allege that this statement was materially false or misleading. However, the claims  
22 against Modjtabai under Section 10(b) will be dismissed without prejudice. If Plaintiffs wish to  
23 respond to this argument, they can amend their pleadings to include additional allegations.

24 Plaintiffs also argue that the Speaking Defendants, including Carroll, Modjtabai, and  
25 Loughlin<sup>7</sup>, are “liable for all of the alleged misstatements in the Complaint in Wells Fargo’s  
26 releases and SEC filings because Plaintiffs allege that they had ‘ultimate authority’ over their  
27

28 <sup>7</sup> The Court will address Michael Loughlin’s alleged statement in the following section.



1 contents. ECF No. 175. Plaintiffs cite Janus Capital Grp., Inc. v. First Derivative Traders, 564  
 2 U.S. 135 (2011). The Janus Court held:

3 For purposes of Rule 10b–5, the maker of a statement is the person  
 4 or entity with ultimate authority over the statement, including its  
 5 content and whether and how to communicate it. Without control, a  
 6 person or entity can merely suggest what to say, not “make” a  
 7 statement in its own right. One who prepares or publishes a  
 8 statement on behalf of another is not its maker. And in the ordinary  
 9 case, attribution within a statement or implicit from surrounding  
 10 circumstances is strong evidence that a statement was made by – and  
 11 only by – the party to whom it is attributed. This rule might best be  
 12 exemplified by the relationship between a speechwriter and a  
 13 speaker. Even when a speechwriter drafts a speech, the content is  
 14 entirely within the control of the person who delivers it. And it is the  
 15 speaker who takes credit—or blame—for what is ultimately said.

16 Janus, 564 U.S. at 142–43.

17 In the “ordinary case,” the alleged misstatements in Wells Fargo’s release and SEC filings  
 18 should be attributed to Wells Fargo as a company. See id. Plaintiffs must plead specific facts to  
 19 show the individual defendants’ ultimate authority over each of the alleged misstatements in Wells  
 20 Fargo’s releases and SEC filings. See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, &  
 21 Prod. Liab. Litig., No. 15-md-02672 , 2017 WL 66281, at \*18 (N.D. Cal. Jan. 4, 2017). Plaintiffs  
 22 allege that “because of their positions of control and authority as officers and/or directors  
 23 [Defendants] were able to and did control the content of various SEC filings, news releases, and  
 24 other public statements pertaining to the Company during the Class Period.” Compl. ¶ 80.  
 25 Plaintiffs allege that all the Officer Defendants, including Carroll, Modjtabai, and Loughlin, were  
 26 provided with the documents alleged to be misleading “prior to or shortly after their issuance  
 27 and/or had the ability and/or opportunity to prevent their issuance or cause them to be corrected.”  
 28 Compl. ¶ 80.

The Court does not find this sufficient to plead “specific facts” that Carroll, Modjtabai, and  
 Loughlin had ultimate authority over the alleged misstatements in Wells Fargo’s releases and SEC  
 filings. Plaintiffs do not allege that Carroll, Modjtabai, and Loughlin signed any SEC filings. Cf.  
Thomas, 167 F. Supp. 3d at 1047 (concluding that Plaintiffs adequately alleged that Defendants  
 made false statements under Janus because Defendants signed the 2011 and 2012 Form-10Ks filed

1 with the SEC, which included the allegedly false financial statements that ground Plaintiffs'  
 2 claims). Plaintiffs fail to show how Carroll, Modjtabi, and Loughlin had “ultimate authority” over  
 3 various SEC filings, news releases, and other public statements when they do not even clearly  
 4 allege that the defendants were even provided with all of these documents before their issuance.  
 5 Further, Plaintiffs do not include specific facts indicating that Carroll, Modjtabai, and Loughlin  
 6 were provided with ultimate authority over various SEC filings, news releases, and other public  
 7 statements, as opposed to more senior Wells Fargo leadership.<sup>8</sup>

8 Thus, the Court concludes that Plaintiffs adequately allege facts showing that Defendants  
 9 Stumpf, Sloan, Tolstedt, Shrewsbury and Wells Fargo each made materially false or misleading  
 10 statements. The Plaintiffs do not adequately allege a material false or misleading statement by  
 11 Defendants Carroll or Modjtabai. Accordingly, the court will dismiss Plaintiffs’ claims against  
 12 Carroll and Modjtabi under Section 10(b) without prejudice.

## 13 2. Scier

14 Under the core operations doctrine, “[a]llegations regarding management’s role may help  
 15 satisfy the PSLRA scier requirement in three circumstances:”

16 First, the allegations may be viewed holistically, along with other  
 17 allegations in the complaint, to raise a strong inference of scier  
 18 under the Tellabs standard. Second, the allegations “may  
 19 independently satisfy the PSLRA where they are particular and  
 20 suggest that defendants had actual access to the disputed  
 21 information.” . . . Third, in rare circumstances, such allegations  
 may be sufficient, without accompanying particularized allegations,  
 where the nature of the relevant fact is of such prominence that it  
 would be “absurd” to suggest that management was without  
 knowledge of the matter.

22 Reese, 747 F.3d at 575–76.

### 23 a. Defendant Stumpf

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 25  
 26 <sup>8</sup> The Janus Court declined to read into Rule 10b-5 “a theory of liability similar to—but broader in  
 27 application than” the Congressionally established liability in § 20(a) for “[e]very person who,  
 28 directly or indirectly, controls any person liable” for violations of the securities laws.  
Janus Capital, 564 U.S. at 146.



1 agencies, ‘it would be absurd to suggest that management was without knowledge of the matter.’  
 2 Derivative Litigation Order at 28 (citing Reese, 747 F.3d at 575-76).

3 As in the Derivative Order, the Court here finds that Plaintiffs have adequately alleged  
 4 facts showing a strong inference of scienter as to Defendants Sloan, Tolstedt, and Shrewsberry.<sup>9</sup>

5 **c. Defendant Wells Fargo**

6 “In most cases, the most straightforward way to raise [an inference of scienter] for a  
 7 corporate defendant will be to plead it for an individual defendant.” In re NVIDIA Corp. Sec.  
 8 Litig., 768 F.3d 1046, 1063 (9th Cir. 2014) (internal citations omitted). Here, Plaintiffs have  
 9 adequately alleged scienter for Defendants Stumpf, Sloan, Tolstedt, and Shrewsberry. These  
 10 allegations are sufficient to raise an inference of scienter as to Wells Fargo. See Glazer Capital  
 11 Mgmt., LP v. Magistri, 549 F.3d 736, 743 (9th Cir. 2008).

12 **d. Defendant Michael Loughlin**

13 Defendant Michael Loughlin notes that Plaintiffs only identified one alleged material  
 14 misrepresentation, his statement at a May 2014 Investor Day. ECF No. 139 at 14. Loughlin stated  
 15 that “[e]scalating problems has always been a core strength at Wells Fargo. The fastest way to lose  
 16 your job at Wells Fargo is failure to escalate a problem.” Compl. ¶ 109 n.14. Plaintiffs allege that  
 17 “it would later be revealed that the exact opposite was true because former employees reported  
 18 that escalating problems was a good way to get fired.” Id. ¶ 109 n.14. Plaintiffs direct attention to  
 19 examples of wrongful terminations that have come to light in a 2011 email to Stumpf from a  
 20 terminated employee, 2016 and 2017 articles and news stories about the wrongful terminations,  
 21 and Senate hearing testimony. See Id. ¶¶ 44, 206.

22 Loughlin argues that the Complaint “does not allege that at the time of the statement Mr.  
 23 Loughlin knew or believed that the statement was false.” ECF No. 139 at 15. The Court finds  
 24 that Plaintiffs have not adequately alleged that Loughlin knew or believed the statement was false.  
 25 See Tellabs, 551 U.S. at 324 (“The strong inference required by the PSLRA “must be more than  
 26

27 \_\_\_\_\_  
 28 <sup>9</sup> The Plaintiffs do not sufficiently allege that Defendants Carroll and Modjtabai made a false or  
 misleading statement. Therefore, it follows that Plaintiffs do not sufficiently allege scienter with  
 regard to these defendants.

1 merely ‘reasonable’ or ‘permissible’—it must be cogent and compelling, thus strong in light of  
 2 other explanations.”). The claims against Loughlin under Section 10(b) are dismissed because  
 3 Plaintiffs have not adequately alleged scienter.

### 4 3. Loss Causation

5 Defendants argue that Plaintiffs failed to show “that their losses were caused by disclosure  
 6 that any of Defendant’s previous alleged misstatements were false.” ECF No. 135 at 31.  
 7 Plaintiffs allege that on September 8, 2010, investors learned of three related settlements with  
 8 government entities imposing fines against Wells Fargo for previously undisclosed fraudulent  
 9 sales practices. Compl. ¶¶ 180-185. Plaintiffs also allege that on September 13, 2016, Wells  
 10 Fargo issued a news release that it would eliminate the sales goals and incentives that contributed  
 11 to the fraudulent conduct. Id. ¶ 189. And Plaintiffs allege that on September 14, 2016, it was  
 12 reported that the DOJ issued subpoenas to Wells Fargo regarding the fraudulent conduct. Id. ¶  
 13 191. Finally, Plaintiffs allege that on September 20, 2016, Congress held a public hearing where  
 14 CFPB’s director and Defendant Stumpf testified about the fraudulent conduct at Wells Fargo. Id.  
 15 ¶¶ 194-96. Plaintiffs argue that Wells Fargo stock experienced a statistically significant drop after  
 16 each of these disclosures. Id. 226, 229, 234, 238. These allegations are sufficient to plead a claim.  
 17 See In re Daou, 411 F.3d at 1026 (finding allegations that “Daou’s stock fell precipitously after  
 18 defendants began to reveal figures showing the company’s true financial condition” sufficiently  
 19 pled loss causation).

### 20 B. Claims Under Section 20A Insider Trading

21 Plaintiffs assert claims under Section 20A of the 1934 Act against Defendants Carroll,  
 22 Loughlin, Modjtabei, Sloan, Stumpf and Tolstedt. Compl. ¶ 267. Plaintiffs generally allege that  
 23 these Defendants profited by selling Wells Fargo common stock while in possession of adverse,  
 24 material non-public information about Wells Fargo. Id. ¶ 268.

25 “Section 20A of the Exchange Act creates a private cause of action for ‘contemporaneous’  
 26 insider trading. To satisfy §20A, a plaintiff must plead (i) a predicate violation of the securities  
 27 laws; and (2) facts showing that the trading activity of plaintiffs and defendants occur  
 28 ‘contemporaneously.’” In re Countrywide Financial Corp. Sec. Litig., 588 F.Supp.2d 1132, 1074-

1 75 (C.D.Cal.2008) (internal quotation marks and citations omitted). Defendants argue that  
 2 Plaintiffs have failed to adequately plead an underlying violation. ECF No. 135 at 33. The Court  
 3 already concluded that Plaintiffs adequately alleged an underlying violation for Defendants Sloan,  
 4 Stumpf, and Tolstedt so the Section 20A claims are not subject to dismissal on this basis.<sup>10</sup> The  
 5 Court has concluded that Plaintiffs have not adequately alleged an underlying violation for  
 6 Defendants Carroll, Modjtabai, and Loughlin. Therefore, Plaintiffs' claims against Carroll,  
 7 Modjtabai, and Loughlin under Section 20A are dismissed without prejudice.

8 Defendants argue that the Section 20A claims fail for Carroll, Modjtabai, Stumpf, and  
 9 Tolstedt because "the Complaint does not adequately plead any contemporaneous trades." ECF  
 10 No. 135 at 33. Defendants Modjtabai and Stumpf sold Wells Fargo stock the trading day before  
 11 Lead Plaintiff's purchase and Defendants Carroll and Tolstedt sold four and five trading days  
 12 before Lead Plaintiff's purchases.<sup>11</sup> Compl. ¶ 269. Defendants concede there is presently "not a  
 13 consensus in the Ninth Circuit regarding the contours of what constitutes a "contemporaneous"  
 14 trade under Section 20A." ECF No. 135 at 34. However, Defendants urge the court to adopt a  
 15 same-day trading requirement "because in an active market, one who did not trade on the same  
 16 day as an insider could not have traded with the insider." ECF No. 135 and 34. Plaintiffs ask the  
 17 Court to follow other courts in the Ninth Circuit who "have found that a plaintiff's purchases of  
 18 securities occurring over a week after a defendant's sales are contemporaneous." ECF No. 175 at  
 19 92.

20 This Court adopts the approach taken in Countrywide: trading on the same day or the day  
 21 after is "contemporaneous." 554 F. Supp. 2d at 120. See also Thomas v. Magnachip

22  
 23 <sup>10</sup> Defendants also argue that the Section 20A claims fail because Plaintiffs have not alleged any  
 24 facts with particularity "to show that any of the Defendants possessed material, non-public  
 25 information at the time they traded or that they traded on that information." ECF No. 135 at 33.  
 26 As Plaintiffs have adequately pleaded scienter for their Section 10(b) and Rule 10b-5 claims, the  
 27 Section 20A claims are not subject to dismissal on this basis. See In re VeriFone Holdings, Inc.  
 28 Sec. Litig., 704 F.3d 694, 711 (9th Cir. 2012).

<sup>11</sup> Plaintiffs argue that Defendant Carroll sold five trading days before Lead Plaintiff's purchases  
 but April 18, 2014 was a New York Stock Exchange Holiday. See Diane Adler, Why the Stock  
 Market Is Closed on Good Friday, WallStreetExaminer.com (April 17, 2014),  
<http://wallstreetexaminer.com/2014/04/stock-market-closed-good-friday/> (last visited October 30,  
 2017).



1 Semiconductor Corp., 167 F. Supp. 3d at 1049. Therefore, Defendant Stumpf's Section 20A  
2 claims are not subject to dismissal under this argument.

3 Defendant Tolstedt's Section 20A claims would be subject to dismissal because the  
4 Complaint fails to plead any contemporaneous trades. However, Plaintiffs argue that "the  
5 Complaint has alleged that unnamed class members purchased shares contemporaneously with  
6 Defendants' insider sales" and that "[s]uch allegations are sufficient in a class action context,  
7 where numerous unnamed class members certainly traded on each of the days Defendants made  
8 their insider sales." ECF No. 175 at 92. Plaintiffs rely on In re Openware Sys. Sec. Litig., 528 F.  
9 Supp. 2d 236, 255-56 (S.D.N.Y. 2007) where the district court held that Plaintiffs adequately  
10 alleged contemporaneous trading because the Complaint alleged that members of the putative class  
11 traded stock contemporaneously with the defendants. Defendants point to other courts in the  
12 Ninth Circuit who have rejected this argument. See ECF Nos. 180 at 7; 184 at 13; 187 at 18. This  
13 Court agrees with another court in this district that "the best way to proceed, for the purposes of  
14 both Rule 23 class action requirements, and the contemporaneous trading requirement of Section  
15 10(b) and Section 20A, is for plaintiffs to amend the Complaint to allege a subclass of plaintiffs  
16 who traded contemporaneously" with Tolstedt. In re Connetics Corp. Sec. Litig., No. C 07-  
17 02940-SI, 2008 WL 3842938, at \*14 (N.D. Cal. Aug. 14, 2008). Therefore, the Section 20A  
18 claims for insider trading are dismissed against Defendant Tolstedt, with leave to amend.

19 **C. Section 20(a) Control Person Liability**

20 Section 20(a) of the Exchange Act extends liability for 10(b) violations to those who are  
21 "controlling persons" of the alleged violations. See Hollinger v. Titan Capital Corp., 914 F.2d  
22 1564, 1572 (9th Cir. 1990). In order to prove a prima facie case under section 20(a), a plaintiff  
23 must prove: (1) a primary violation of federal securities laws, and (2) that the defendant exercised  
24 "actual power or control" over the primary violator. Howard, 228 F.3d at 1065. "Whether [the  
25 defendant] is a controlling person is an intensely factual question, involving scrutiny of the  
26 defendant's participation in the day-to-day affairs of the corporation and the defendant's power to  
27 control corporate actions." Id. at 1065 (quoting Kaplan v. Rose, 49 F.3d 1363, 1382 (9th Cir.  
28 1994)). "Although a person's being an officer or director does not create any presumption of



1 control, it is a sort of red light.” Paracor Finance, Inc. v. General Elec. Capital Corp., 96 F.3d  
2 1151, 1163 (9th Cir. 1996) (internal quotation marks and citations omitted).

3 Since Howard, “[c]ourts have found general allegations concerning an individual’s title and  
4 responsibilities to be sufficient to establish control at the motion to dismiss stage. In re Energy  
5 Recovery Inc. Sec. Litig., No. 15-CV-00265-EMC, 2016 WL 324150, at \*25 (N.D. Cal. Jan. 27,  
6 2016) (internal citations and quotation marks omitted). See also In re Cylink Sec. Litig., 178 F.  
7 Supp. 2d 1077, 1089 (N.D. Cal. 2001) (finding Plaintiffs sufficiently alleged control with  
8 allegations that the individual defendants “by virtue of their executive and managerial positions  
9 had the power to control and influence”).

10 Plaintiffs bring Section 20(a) claims against all Defendants. Plaintiffs allege that  
11 Defendant Stumpf, the other Officer Defendants, and the other Director Defendants acted as  
12 controlling persons over Wells Fargo within the meaning of Section 20(a) of the 1934 Act. Compl.  
13 ¶¶ 273-275. Plaintiffs also allege that Wells Fargo controlled Stumpf and the other Officer and  
14 Director Defendants, and is a controlling person of those defendants within the meaning of §20(a)  
15 of the 1934 Act. Compl. ¶ 276.

### 16 1. Defendant Stumpf

17 Defendant Stumpf challenges the 20(a) claims on the ground that Plaintiffs failed to plead  
18 a Section 10(b) claim. ECF No. 134 at 34; ECF No. 153 at 21. Stumpf does not challenge his  
19 status as a controlling person.<sup>12</sup> Id. The Court has already addressed Stumpf’s arguments that  
20 Plaintiffs have failed to plead a primary violation. Thus, the motion to dismiss Section 20(a)  
21 claims against Stumpf is denied.

### 22 2. Defendant Wells Fargo

23 Wells Fargo does not challenge that it exercised actual power or control over Stumpf and  
24 the Officer and Director Defendants. See ECF No. 135 at 34. The Court has already addressed  
25

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26 <sup>12</sup> In Wells Fargo’s Motion to Dismiss, it argued that “Plaintiffs also fail to plead the requisite  
27 control, as explained in the motions to dismiss filed by the individual defendants.” ECF No. 135 at 34  
28 n.6. However, in the individual motion to dismiss filed by Stumpf, he only argues that “[p]laintiffs’  
failure to plead a Section 10(b) claim necessarily compels dismissal of Plaintiffs’ claims against Mr.  
Stumpf under Sections 20A and 20(a) of the Exchange Act.” ECF No. 153 at 21.

1 Wells Fargo's argument that Plaintiffs failed to allege any primary violation of the securities laws  
2 under Section 10(b). Thus, the motion to dismiss Section 20(a) claims against Wells Fargo is  
3 denied.

### 4 3. The Remaining Defendants

5 The Court has already addressed the argument that Plaintiffs failed to allege any primary  
6 violation of securities law under Section 10(b). Thus, the Court will only consider whether the  
7 remaining Defendants exercised "actual power or control" over Wells Fargo. Among other things,  
8 Plaintiffs allege that "the Officer and Director Defendants participated in the drafting, preparation  
9 and/or approval of the various SEC filings, shareholder and investor reports and other publicly  
10 disseminated communications complained of herein." Compl. ¶ 80. Plaintiffs further allege that  
11 "[t]he Director Defendants, in particular, due to their membership on Board committee(s) whose  
12 charge was to oversee the implementation of controls over risk, compensation, human resources  
13 and governance, had the power and ability to control the Company's conduct, reputation and  
14 disclosures by virtue of the charters governing each committee." *Id.* ¶ 82. And, that through their  
15 participation in the Operating Committee, the Officer Defendants "met every Monday,"  
16 "reportedly managed all of the Company's business lines" and were responsible for "setting the  
17 tone at the top with regard to the Company's risk management culture, promoting proactive risk  
18 management, and ongoing risk training." *Id.* ¶ 85.

19 Plaintiffs argue that "Rule 8(a)'s notice pleading standard applies to the "control" element  
20 of Plaintiffs' claim." ECF No. 175 at 93. Defendants argue that "both elements of Plaintiffs'  
21 Section 20(a) claim are governed by the stringent pleading standards of Federal Rule of Civil  
22 Procedure ("Rule") 9(b)." ECF No. 147 at 9.

23 Control person liability exists "irrespective of the control person's scienter." *Id.* See  
24 Hollinger, 914 F.2d at 1575 ("[W]e hold that a plaintiff is not required to show 'culpable  
25 participation' to establish that a broker-dealer was a controlling person . . . . The statute does not  
26 place such a burden on the plaintiff."). However, there is a split of authority among the courts in  
27 the Ninth Circuit, and within the Northern District of California, on whether Plaintiffs must plead  
28 actual power or control over the primary violator under Federal Rule of Civil Procedure 8 or

United States District Court  
Northern District of California

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Federal Rule of Civil Procedure 9(b). Compare Howard v. Hui, No. C 92-3742-CRB, 2001 WL 1159780, at \*4 (N.D. Cal. Sept. 24, 2001) (“Plaintiff’s section 20(a) claim is an allegation of fraud. Allegations of fraud must be pled with particularity.”) with Jackson v. Fischer, 931 F. Supp. 2d 1049, 1073 (N.D. Cal. 2013) (“pleading § 20 claims in conformance with Rule 8 is sufficient”).

This Court agrees with the view that Rule 9(b) “requires only that circumstances constituting fraud . . . shall be stated with particularity. The control exerted by [defendants] is not a circumstance that constitutes fraud. Plaintiff is only required to assert fraud with particularity as to the primary violations.” Siemers v. Wells Fargo & Co., No. C 05-04518 WHA, 2006 WL 2355411, at \*14 (N.D. Cal. Aug. 14, 2006).

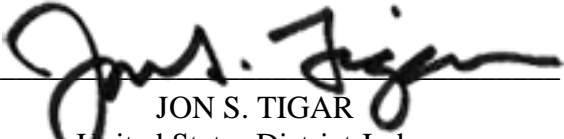
Therefore, the Court finds that the Plaintiffs have adequately pleaded control under Rule 8’s lower pleading standards. Plaintiffs adequately allege that Defendants had the power to control and influence by virtue of their executive and managerial positions.

**CONCLUSION**

Plaintiffs’ claims against Defendants Carroll, Modjtabei, and Loughlin under Section 10(b) and 20A, and Plaintiffs’ claims against Defendant Tolstedt under Section 20A, are dismissed without prejudice. In all other respects, the motions are denied. Plaintiffs may amend their complaint by March 21, 2018 to cure the deficiencies identified in this Order. If no amended complaint is filed, the Court will proceed on the remaining claims.

**IT IS SO ORDERED.**

Dated: February 27, 2018

  
\_\_\_\_\_  
JON S. TIGAR  
United States District Judge