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NOV 10 2009

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

7 Attorneys for Plaintiffs  
and the proposed class

8  
 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA

11 THEODORE KAGAN, JAMES  
 AVEN, LAURA JACOBS, JOSEPH  
 12 SOFFA, and ALBERKRACK  
 FAMILY LIMITED PARTNERSHIP,  
 13 on behalf of themselves and all others  
 similarly situated,

Case No.

CLASS ACTION COMPLAINT

14 Plaintiff,

JURY TRIAL DEMANDED

15 vs.

16 WACHOVIA SECURITIES, L.L.C., a  
 17 North Carolina limited liability  
 company; WACHOVIA  
 18 SECURITIES FINANCIAL  
 NETWORK, L.L.C., a North Carolina  
 19 limited liability company;  
 WACHOVIA CAPITAL MARKETS,  
 20 L.L.C., a North Carolina limited  
 liability company; WELLS FARGO  
 21 ADVISORS, L.L.C., a Delaware  
 limited liability company; WELLS  
 22 FARGO ADVISORS FINANCIAL  
 NETWORK, L.L.C., a Delaware  
 23 limited liability company; WELLS  
 FARGO SECURITIES, L.L.C., a  
 24 Delaware limited liability  
 company; WELLS FARGO &  
 25 COMPANY, a Delaware corporation;  
 and DOES 1 through 10, inclusive,

26 Defendants.

1  
2 Plaintiffs, THEODORE KAGAN, JAMES AVEN, LAURA JACOBS,  
3 JOSEPH SOFFA, and ALBERKRACK FAMILY LIMITED PARTNERSHIP  
4 ("Plaintiffs"), individually and on behalf of the Class described below, by their  
5 attorneys, make the following allegations based upon information and belief,  
6 except as to allegations specifically pertaining to Plaintiffs and their counsel,  
7 which are based on personal knowledge. Plaintiffs bring this action for damages  
8 against Defendants, demanding a trial by jury.

9  
10 **NATURE OF THE ACTION**

11 1. Plaintiffs bring this class action against Defendants WACHOVIA  
12 SECURITIES, L.L.C., WACHOVIA SECURITIES FINANCIAL NETWORK,  
13 L.L.C., WACHOVIA CAPITAL MARKETS, L.L.C., WELLS FARGO  
14 ADVISORS, L.L.C., WELLS FARGO ADVISORS FINANCIAL NETWORK,  
15 L.L.C., WELLS FARGO SECURITIES, L.L.C., and WELLS FARGO &  
16 COMPANY ("Wachovia") to recover damages and other relief available at law  
17 and in equity on behalf of themselves as well as on behalf of the members of the  
18 following class:

19 *All individuals and entities who were members of the*  
20 *Asia Pulp & Paper Securities Litigation Settlement Class*  
21 *and who were the beneficial owners of Asia Pulp &*  
22 *Paper securities held by Wachovia.*

23 2. In August 2001, Asia Pulp and Paper Company, Ltd. was sued in the  
24 United States District Court for the Southern District of New York for making  
25 materially false and misleading statements in violation of Sections 10(b) and 20(a)  
26 of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, and  
27 Sections 11, 12(A)(2) and 15 of the Securities Act of 1933. The parties to the  
28 litigation reached a class settlement which was preliminarily approved by the

1 District Court on October 18, 2005.

2 3. This action arises from the fact that Wachovia, as the nominee  
3 purchaser, failed to give notice to the beneficial owners of Asia Pulp & Paper  
4 securities, as ordered by the District Court in its Order preliminarily approving the  
5 class settlement. This failure resulted in the beneficial owners losing any chance  
6 of recovery under the settlement agreement.

7

8

### THE PARTIES

9 2. Plaintiff Theodore Kagan ("Plaintiff Kagan") is a resident of Marin  
10 County, California. He was the beneficial owner of Asia Pulp & Paper securities  
11 held by Wachovia.

12 3. Plaintiff James Aven ("Plaintiff Aven") is a resident of Bristol  
13 County, Massachusetts. He was the beneficial owner of Asia Pulp & Paper  
14 securities held by Wachovia.

15 4. Plaintiff Laura Jacobs ("Plaintiff Jacobs") is a resident of Tulare  
16 County, California. She was the beneficial owner of Asia Pulp & Paper securities  
17 held by Wachovia.

18 5. Plaintiff Joseph Soffa ("Plaintiff Soffa") is a resident of Clark County,  
19 Nevada. He was the beneficial owner of Asia Pulp & Paper securities held by  
20 Wachovia.

21 6. Plaintiff Alberkrack Family Limited Partnership ("Plaintiff  
22 Alberkrack Family LP") is a Nevada limited partnership. It was the beneficial  
23 owner of Asia Pulp & Paper securities held by Wachovia.

24 7. Plaintiffs are informed and believe and thereon allege that defendant  
25 Wachovia Securities, L.L.C. is a North Carolina limited liability company doing  
26 business in the State of California. Wachovia Securities, L.L.C.'s principal place  
27 of business is located in Virginia.

28 8. Plaintiffs are informed and believe and thereon allege that defendant

1 Wachovia Securities Financial Network, L.L.C. is a North Carolina limited  
2 liability company doing business in the State of California. Wachovia Securities  
3 Financial Network, L.L.C.'s principal place of business is located in Virginia.

4 9. Plaintiffs are informed and believe and thereon allege that defendant  
5 Wachovia Capital Markets, L.L.C. is a North Carolina limited liability company  
6 doing business in the State of California. Wachovia Securities Capital Markets,  
7 L.L.C.'s principal place of business is located in North Carolina.

8 10. Plaintiffs are informed and believe and thereon allege that defendant  
9 Wells Fargo Advisors, L.L.C. is a Delaware limited liability company doing  
10 business in the State of California. Wells Fargo Advisors, L.L.C.'s principal place  
11 of business is located in Virginia.

12 11. Plaintiffs are informed and believe and thereon allege that defendant  
13 Wells Fargo Advisors Financial Network, L.L.C. is a Delaware limited liability  
14 company doing business in the State of California. Wells Fargo Advisors  
15 Financial Network, L.L.C.'s principal place of business is located in Virginia.

16 12. Plaintiffs are informed and believe and thereon allege that defendant  
17 Wells Fargo Securities, L.L.C. is a Delaware limited liability company doing  
18 business in the State of California. Wells Fargo Securities, L.L.C.'s principal place  
19 of business is located in North Carolina.

20 13. Plaintiffs are informed and believe and thereon allege that defendant  
21 Wells Fargo & Company is a Delaware corporation doing business in the State of  
22 California. Wells Fargo & Company's principal place of business is located in San  
23 Francisco, California.

24 14. Plaintiffs do not know the true names or capacities of the persons or  
25 entities sued herein as DOES 1 to 10, inclusive, and therefore sues such defendants  
26 by such fictitious names. Plaintiffs are informed and believe and thereon allege  
27 that each of the DOE defendants is in some manner legally responsible for the  
28 damages suffered by plaintiff and the members of the class as alleged herein.

1 Plaintiff will amend this complaint to set forth the true names and capacities of  
2 these defendants when they have been ascertained, along with appropriate charging  
3 allegations, as may be necessary.

#### 4 5 **JURISDICTION AND VENUE**

6 15. This Court has original jurisdiction over the claims asserted herein  
7 individually and on behalf of the class pursuant to 28 U.S.C. section 1332, as  
8 amended in February 2005 by the Class Action Fairness Act. Jurisdiction is proper  
9 because: (1) the amount in controversy in this class action exceeds five million  
10 dollars, exclusive of interest and costs; (2) the defendants have purposefully  
11 availed themselves of the privilege of conducting business activities within the  
12 State of California; and (3) a substantial number of the members of the proposed  
13 class are citizens of a state different from that of defendants.

14 16. Venue is proper in this judicial district pursuant to 28 U.S.C. section  
15 1391, as a substantial part of the events giving rise to the claims asserted herein  
16 occurred in the Northern District of California.

#### 17 18 **FACTUAL BACKGROUND**

19 17. Under common industry practice, most publicly traded stock is held in  
20 the "street name" of brokerage houses for the benefit of their customers. Only  
21 brokerage houses or other "record owners" appear on official corporate transfer  
22 records. The actual interest in the stock (and consequently, the interest in any  
23 lawsuit relating to the stock) is that of the beneficial owner.

24 18. On August 8, 2001, Asia Pulp & Paper Company, Ltd. ("APP") was  
25 sued in the United States District Court for the Southern District of New York.  
26 The case was entitled *Hertzberg, et al. v. Asia Pulp & Paper Company, Ltd., et al.*,  
27 No. 01 Civ. 7351 (LAK). The case was eventually consolidated with 11 other  
28 cases under the caption *In re Asia Pulp & Paper Securities Litigation*, Master File

1 No. 00 Civ. 7351 (LAK) ("APP Litigation"). The consolidated complaint alleged  
2 that the plaintiffs and other members of the class purchased or acquired publicly  
3 traded securities of APP at artificially inflated prices as a result of APP's  
4 dissemination of materially false and misleading statements in violation of  
5 Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, Rule 10b-5  
6 promulgated thereunder, and Sections 11, 12(A)(2) and 15 of the Securities Act of  
7 1933.

8 19. After more than three years of litigation, the parties to the APP  
9 Litigation reached a settlement agreement. The parties entered into a Stipulation of  
10 Settlement on October 11, 2005 and the District Court preliminarily approved the  
11 settlement on October 18, 2005.

12 20. The October 18, 2005 Order preliminarily approving the settlement  
13 included the following provision:

14 The Claims Administrator shall use reasonable efforts to  
15 give notice to nominee owners such as brokerage firms  
16 and other persons or entities who purchased APP  
17 Instruments during the Class Period as record owners but  
18 not as beneficial owners. *Such nominee purchasers are*  
19 *directed, within seven (7) days of receipt of the Notice,*  
20 *to either forward copies of the Notice and Proof of*  
21 *Claim to their beneficial owners, or to provide the*  
22 *Claims Administrator with lists of the names and*  
23 *address of the beneficial owners, and the Claims*  
24 *Administrator is ordered to send the Notice and Proof*  
25 *of Claim promptly to such identified beneficial owners.*

26 [Exhibit A (emphasis added).]  
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21. The Notice of Pendency of Class Action and Proposed Settlement (“Official Notice”), as approved by the District Court and dated November 30, 2005, contained the following:

**SPECIAL NOTICE TO SECURITIES BROKERS  
AND OTHER NOMINEES**

If you purchased any of the APP Instruments (as specified in response to question 1 on page 4 hereinabove) of Asia Pulp & Paper Company, Ltd. (“APP”) and its subsidiaries during the period between August 28, 1998 and April 4, 2001, inclusive, for the beneficial interest of a person or organization other than yourself, the Court has directed that, WITHIN SEVEN (7) DAYS OF YOUR RECEIPT OF THIS NOTICE, you either (a) provide to the Claims Administrator the name and last known address of each person or organization for whom or which you purchased such stock during such time period or (b) request additional copies of this Notice and the Proof of Claim form, which will be provided to you free of charge, and within seven (7) days mail the Notice and Proof of Claim form directly to the beneficial owners of the securities referred to herein. If you choose to follow alternative procedure (b), the Court has directed that, upon such mailing, you send a statement to the Claims Administrator confirming that the mailing was made as directed. You are entitled to reimbursement

1 from the Settlement Fund of your reasonable expenses  
2 actually incurred in connection with the foregoing,  
3 including reimbursement of postage expense and the cost  
4 of ascertaining the names and addresses of beneficial  
5 owners. Those expenses will be paid upon request and  
6 submission of appropriate supporting documentation.

7 [Exhibit B.]

8 22. Wachovia, as the nominal owner of APP securities for Plaintiffs and  
9 the Class, had a duty to comply with the court ordered notice provisions of the  
10 APP Litigation settlement.

11 23. Wachovia failed to either forward notice of the APP Litigation  
12 settlement to Plaintiffs and the Class or to identify Plaintiffs and the Class so that  
13 notice could have been sent by the settlement administrator.

14 24. Plaintiff Kagan was the beneficial owner of APP securities held by  
15 Wachovia. Plaintiff Kagan never received notice of the APP Litigation settlement.  
16 Plaintiff Kagan would have submitted a claim for and obtained a recovery under  
17 the APP Litigation settlement had Wachovia complied with the notice procedure  
18 ordered by the District Court.

19 25. Plaintiff Aven was the beneficial owner of APP securities held by  
20 Wachovia. Plaintiff Aven never received notice of the APP Litigation settlement.  
21 Plaintiff Aven would have submitted a claim for and obtained a recovery under the  
22 APP Litigation settlement had Wachovia complied with the notice procedure  
23 ordered by the District Court.

24 26. Plaintiff Jacobs was the beneficial owner of APP securities held by  
25 Wachovia. Plaintiff Jacobs never received notice of the APP Litigation settlement.  
26 Plaintiff Jacobs would have submitted a claim for and obtained a recovery under  
27 the APP Litigation settlement had Wachovia complied with the notice procedure  
28 ordered by the District Court.



1 Federal Rules of Civil Procedure.

2 33. Numerosity: The proposed Class is so numerous that individual  
3 joinder of all its members is impracticable. The total number of Class members is  
4 at least in the thousands and members of the class are geographically dispersed  
5 across the United States. While the exact number and identities of the Class  
6 members are unknown at this time, such information can be ascertained through  
7 appropriate investigation and discovery. The disposition of the claims of the Class  
8 members in a single class action will provide substantial benefits to all parties and  
9 to the Court.

10 34. Common Questions of Law and Fact Predominate: There are  
11 questions of law and fact common to the representative Plaintiffs and the Class,  
12 and those questions substantially predominate over any questions that may affect  
13 individual Class members. Common questions of fact and law include, but are not  
14 limited to, the following:

15 a. Whether Wachovia was negligent by failing to comply with the  
16 notice procedure ordered under the APP Litigation settlement;

17 b. Whether Wachovia breach its fiduciary duties to Plaintiffs and  
18 the Class by failing to comply with the notice procedure ordered under the  
19 APP Litigation settlement;

20 c. Whether Wachovia breached its contract with Plaintiffs and the  
21 Class by failing to comply with the notice procedure ordered under the APP  
22 Litigation settlement; and

23 d. Whether the failure to comply with the notice procedure  
24 ordered under the APP Litigation settlement caused Plaintiffs' and the Class'  
25 damages.

26 35. Typicality: Plaintiffs' claims are typical of the claims of the  
27 members of the class. Plaintiffs and all members of the class have been similarly  
28 affected by Defendants' common course of conduct since their printers acted in

1 exactly the same way.

2 36. Adequacy of Representation: Plaintiffs will fairly and adequately  
3 represent and protect the interests of the Class. Plaintiffs have retained counsel  
4 with substantial experience in prosecuting complex and class action litigation.  
5 Plaintiffs and their counsel are committed to vigorously prosecuting this action on  
6 behalf of the Class, and have the financial resources to do so. Neither Plaintiffs  
7 nor their counsel have any interests adverse to those of the Class.

8 37. Superiority of a Class Action: Plaintiffs and the members of the  
9 Class suffered, and will continue to suffer, harm as a result of Defendants'  
10 unlawful and wrongful conduct. A class action is superior to other available  
11 methods for the fair and efficient adjudication of the present controversy.  
12 Individual joinder of all members of the class is impractical. Even if individual  
13 class members had the resources to pursue individual litigation, it would be unduly  
14 burdensome to the courts in which the individual litigation would proceed.  
15 Individual litigation magnifies the delay and expense to all parties in the court  
16 system of resolving the controversies engendered by Defendants' common course  
17 of conduct. The class action device allows a single court to provide the benefits of  
18 unitary adjudication, judicial economy, and the fair and equitable handling of all  
19 class members' claims in a single forum. The conduct of this action as a class  
20 action conserves the resources of the parties and of the judicial system, and  
21 protects the rights of the class member. Furthermore, for many, if not most, class  
22 members, a class action is the only feasible mechanism that allows therein an  
23 opportunity for legal redress and justice.

24 38. Adjudication of individual class members' claims with respect to the  
25 Defendants would, as a practical matter, be dispositive of the interests of other  
26 members not parties to the adjudication, and could substantially impair or impede  
27 the ability of other class members to protect their interests.

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**FIRST CAUSE OF ACTION**

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**NEGLIGENCE**

5

39. Plaintiffs reallege the preceding paragraphs as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative.

7

40. Defendants were the nominal owners of APP securities for Plaintiffs and the Class.

9

41. Defendants had the duty, pursuant to an order of the District Court, to follow the notice procedure outlined in the Official Notice of the settlement of the APP Litigation.

12

42. Defendants breached that duty by failing to either forward Official Notice of the APP Litigation settlement to Plaintiffs and the Class or to identify Plaintiffs and the Class so that Official Notice could have been sent by the settlement administrator.

16

43. As a direct and proximate cause of Defendants failure to comply with the notice requirements of the APP Litigation settlement, Plaintiffs and the Class have been damaged in an amount to be shown at trial.

19

WHEREFORE, Plaintiffs and the Class pray for relief as set forth below.

20

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**SECOND CAUSE OF ACTION**

22

**BREACH OF FIDUCIARY DUTY**

23

44. Plaintiffs reallege the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative.

25

45. Defendants were the nominal owners of APP securities.

26

46. Defendants held the APP securities for the benefit of Plaintiffs and the Class.

27

28

47. On the basis of this relationship, Defendants owed Plaintiffs and the

1 Class the fiduciary duty of due care.

2 48. Defendants breached the fiduciary duty owed to Plaintiffs and the  
3 Class by failing to either forward Official Notice of the APP Litigation settlement  
4 to Plaintiffs and the Class or to identify Plaintiffs and the Class so that Official  
5 Notice could have been sent by the settlement administrator.

6 49. As a direct and proximate cause of Defendants failure to comply with  
7 the notice requirements of the APP Litigation settlement, Plaintiffs and the Class  
8 have been damaged in an amount to be shown at trial.

9 WHEREFORE, Plaintiffs and the Class pray for relief as set forth below.

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### THIRD CAUSE OF ACTION

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### BREACH OF CONTRACT

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14 50. Plaintiffs reallege the preceding paragraphs as if fully set forth herein  
and, to the extent necessary, pleads this cause of action in the alternative.

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16 51. Plaintiffs and the Class entered into a contract with Defendants for  
brokerage services.

17

18 52. The contract contained an implied covenant of good faith and fair  
dealing that Defendants would not do anything that would have the effect of  
19 injuring the rights of Plaintiffs and the Class to receive the benefits of the contract.

20

21 53. Defendants breached its contracts with Plaintiffs and the Class by  
failing to either forward Official Notice of the APP Litigation settlement to  
22 Plaintiffs and the Class or to identify Plaintiffs and the Class so that Official Notice  
23 could have been sent by the settlement administrator.

24

25 54. As a direct and proximate cause of Defendants failure to comply with  
the notice requirements of the APP Litigation settlement, Plaintiffs and the Class  
26 have been damaged in an amount to be shown at trial.

27

WHEREFORE, Plaintiffs and the Class pray for relief as set forth below.

28

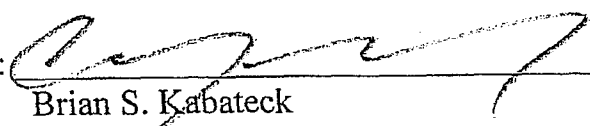
**PRAYER FOR RELIEF**

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WHEREFORE, Plaintiffs and members of the Class request that the Court enter an order or judgment against the Defendant as follows:

- 1. Certification of the proposed class and notice thereto to be paid by Defendants;
- 2. Adjudge and decree that Defendants has engaged in the conduct alleged herein;
- 3. For restitution and disgorgement on certain causes of action;
- 4. For compensatory and general damages according to proof on certain causes of action;
- 5. For special damages according to proof on certain causes of action;
- 6. For both pre and post-judgment interest at the maximum allowable rate on any amounts awarded;
- 7. Costs of the proceedings herein;
- 8. Reasonable attorneys fees as allowed by statute; and
- 9. Any and all such other and further relief that this Court may deem just and proper.

DATED: November 10, 2009 **KABATECK BROWN KELLNER LLP**

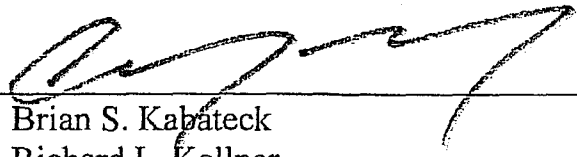
By:   
 Brian S. Kabateck  
 Richard L. Kellner  
 Alfredo Torrijos  
*Counsel for Plaintiffs and the proposed class*

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**DEMAND FOR JURY TRIAL**

Plaintiffs hereby demand a trial by jury in the instant action.

DATED: November 10, 2009 **KABATECK BROWN KELLNER LLP**

By:   
\_\_\_\_\_  
Brian S. Kabateck  
Richard L. Kellner  
Alfredo Torrijos  
*Counsel for Plaintiffs and the proposed class*