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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

HELEN LOTSOFF and ASHLEIGH
HARTMAN, on behalf of themselves and all
others similarly situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., FCTI, INC.,
and DOES 1-50, inclusive

Defendants.

Case No : 37-2018-00026392-CU-CO-CTL

[E-FILE]

**FIRST AMENDED
CLASS ACTION COMPLAINT**

[DEMAND FOR JURY TRIAL]

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FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff Helen Lotsoff and Ashleigh Hartman (“Plaintiffs”), on behalf of themselves and all persons similarly situated, allege the following based on personal knowledge as to allegations regarding the Plaintiffs and on information and belief as to other allegations.

INTRODUCTION

1. Plaintiffs bring this action on behalf of themselves and classes of all similarly situated consumers against Defendant Wells Fargo Bank, N.A. (“Wells Fargo” or “Bank”), arising from their routine practices of (a) assessing OD Fees on transactions that did not actually overdraw the account; (b) charging both a non-sufficient funds fee (“NSF Fee”) and an overdraft fee (“OD Fee”) on a single transaction; and (c) assessing two or three out-of-network Automated Teller Machine (“ATM”) fees (“OON Fees”) on out-of-network ATM withdrawals immediately preceded by a purported “balance inquiry.”

2. Each practice violates the contractual agreement governing the relationship between Wells Fargo and its customers.

3. Moreover, Plaintiffs bring this action on behalf of themselves and a class of all similarly situated consumers against Defendant FCTI, Inc. (“FCTI”), arising from FCTI’s fraudulent scheme of misleading Plaintiffs and unsuspecting customers into engaging in checking account balance inquiries at FCTI independent, non-affiliated ATM machines. Specifically, FCTI utilizes deceptive screen prompts on its ATM machines to trick customers into engaging in balance inquiry transactions that the consumers would not otherwise purchase. As a result, consumers who make a single balance inquiry at an FCTI ATM are charged up to three fees.

4. The OON Fee claim against Wells Fargo and the claim against FCTI work in tandem. As set forth more fully below, in determining when and how to assess these fees, Wells Fargo relies solely on information and confirmation from FCTI as to when an out-of-network ATM transaction has occurred. Independent ATM providers, including FCTI, have run amuck in determining and communicating to Wells Fargo when an actual transaction has occurred, in many cases double billing consumers for one balance inquiry, and in almost all cases deceiving consumers into balance inquiry transactions that consumers do not know they will be charged for. At the same time, Wells Fargo sits

1 California. For all plans and decisions that originated at Wells Fargo business locations outside of San
2 Francisco, California, those plans and decision required approval from Wells Fargo & Co.'s San
3 Francisco, California headquarters, thereby providing Wells Fargo & Co. authority and control over the
4 actions complained about herein.

5 11. Defendant FCTI, Inc. is a California corporation with its principle place of business in
6 Los Angeles, California. FCTI regularly and systematically operates ATM machines throughout the
7 State of California, including in this County, and provides all ATM related services to its customers,
8 including members of the putative Class. As such, it is subject to the personal jurisdiction of this Court.

9 **JURISDICTION AND VENUE**

10 12. This Court has jurisdiction over this matter because the amount in controversy exceeds
11 \$25,000.

12 13. Venue is proper in this District pursuant to CCP § 395(b) because Plaintiffs are citizens
13 and residents of San Diego, California, which is located in this County.

14 14. Wells Fargo Bank, N.A. regularly and systematically provides retail banking services
15 throughout the State of California, including in this county, and provides retail banking services to its
16 customers, including members of the putative Class. As such, it is subject to the personal jurisdiction of
17 this Court.

18 15. FCTI, Inc. regularly and systematically operates ATM machines throughout the State of
19 California, including in this County, and provides all ATM related services to its customers, including
20 members of the putative Class. As such, it is subject to the personal jurisdiction of this Court.

21 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**
22 **AS TO WELLS FARGO**

23 **I. WELLS FARGO CHARGES OD FEES ON TRANSACTIONS THAT DO NOT**
ACTUALLY OVERDRAW THE ACCOUNT

24 **A. Overview of Claim**

25 16. Plaintiffs bring this cause of action challenging Wells Fargo's practice of charging
26 overdraft fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle
27 Negative Transactions," or "APPSN Transactions."
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1 17. Here's how it works. At the moment debit card transactions are authorized on an account
2 with positive funds to cover the transaction, Wells Fargo immediately reduces consumers' checking
3 accounts for the amount of the purchase, sets aside funds in a checking account to cover that
4 transaction, and as a result, the consumer's displayed "available balance" reflects that subtracted
5 amount. As a result, customers' accounts will always have sufficient available funds available to cover
6 these transactions because Wells Fargo has already sequestered these funds for payment.

7 18. However, Wells Fargo still assesses crippling \$35 OD Fee on many of these transactions,
8 in violation of its contractual promises not to do so.

9 19. Despite putting aside sufficient available funds for debit card transactions at the time
10 those transactions are authorized, Wells Fargo later assesses OD Fees on those same transactions when
11 they purportedly settle days later into a negative balance. These types of transactions are APPSN
12 transactions.

13 20. Wells Fargo maintains a running account balance in real time, tracking funds consumers
14 have for immediate use. This running account balance is adjusted, in real-time, to account for debit card
15 transactions at the precise instance they are made. When a customer makes a purchase with a debit card,
16 Wells Fargo sequesters the funds needed to pay the transaction, subtracting the dollar amount of the
17 transaction from the customer's available balance. Such funds are not available for any other use by the
18 accountholder, and such funds are specifically associated with a given debit card transaction.

19 21. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure
20 that there are enough funds in the account to pay the transaction when it settles, as discussed in the
21 Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act
22 regulations:

23 When a consumer uses a debit card to make a purchase, a hold may be placed on funds
24 in the consumer's account to ensure that the consumer has sufficient funds in the
25 account when the transaction is presented for settlement. This is commonly referred to
26 as a "debit hold." During the time the debit hold remains in place, which may be up to
three days after authorization, those funds may be unavailable for the consumer's use
for other transactions.

27 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration, Unfair
28 or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29, 2009).

1 22. That means when any *subsequent*, intervening transactions are initiated on a checking
2 account, they are compared against an account balance that has already been reduced to account for any
3 earlier debit card transactions. This means that many subsequent transactions incur OD Fees due to the
4 unavailability of the funds sequestered for those debit card transactions.

5 23. Still, despite keeping those held funds off-limits for other transactions, Wells Fargo
6 improperly charges OD Fees on those APPSN Transactions, although the APPSN transactions *always*
7 have sufficient available funds to be “covered.”

8 24. Indeed, the Consumer Financial Protection Bureau (“CFPB”) has expressed concern with
9 this very issue, flatly calling the practice “deceptive” when:

10 A financial institution authorized an electronic transaction, which reduced a customer’s
11 available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer’s
12 available balance and pushed the account into overdraft status; and when the original
13 electronic transaction was later presented for settlement, because of the intervening
14 transaction and overdraft fee, the electronic transaction also posted as an overdraft and
15 an additional overdraft fee was charged. Because such fees caused harm to consumers,
16 one or more supervised entities were found to have acted unfairly when they charged
17 fees in the manner described above. Consumers likely had no reason to anticipate this
18 practice, which was not appropriately disclosed. They therefore could not reasonably
19 avoid incurring the overdraft fees charged. Consistent with the deception findings
20 summarized above, examiners found that the failure to properly disclose the practice of
21 charging overdraft fees in these circumstances was deceptive. At one or more
22 institutions, examiners found deceptive practices relating to the disclosure of overdraft
23 processing logic for electronic transactions. Examiners noted that these disclosures
24 created a misimpression that the institutions would not charge an overdraft fee with
25 respect to an electronic transaction if the authorization of the transaction did not push
26 the customer’s available balance into overdraft status. But the institutions assessed
27 overdraft fees for electronic transactions in a manner inconsistent with the overall net
28 impression created by the disclosures. Examiners therefore concluded that the
disclosures were misleading or likely to mislead, and because such misimpressions
could be material to a reasonable consumer’s decision-making and actions, examiners
found the practice to be deceptive. Furthermore, because consumers were substantially
injured or likely to be so injured by overdraft fees assessed contrary to the overall net
impression created by the disclosures (in a manner not outweighed by countervailing
benefits to consumers or competition), and because consumers could not reasonably
avoid the fees (given the misimpressions created by the disclosures), the practice of
assessing fees under these circumstances was found to be unfair.

Consumer Financial Protection Bureau, Winter 2015 “Supervisory Highlights.”

25. There is no justification for these practices, other than to maximize Wells Fargo’s

1 overdraft fee revenue. APPSN Transactions only exist because intervening checking account
2 transactions supposedly reduce an account balance. But Wells Fargo is free to protect its interests and
3 either reject those intervening transactions or charge OD Fees on those intervening transactions—and it
4 does the latter to the tune of millions of dollars each year. But Wells Fargo was not content with these
5 millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

6 26. Besides being deceptive, unfair, and unconscionable, these practices breach contract
7 promises made in Wells Fargo’s adherence contracts—contracts which fundamentally misconstrue the
8 true nature of Wells Fargo’s processes and practices. These practices also exploit contractual discretion
9 to gouge consumers.

10 27. In plain, clear, and simple language, the checking account contract documents covering
11 overdraft fees promise that Wells Fargo will only charge overdraft fees on transactions that have
12 insufficient funds to “cover” that transaction.

13 28. In short, Wells Fargo is not authorized by contract to charge OD Fees on transactions
14 that have not overdrawn an account, but it has done so and continues to do so.

15 **B. Mechanics of a Debit Card Transaction**

16 29. A debit card transaction occurs in two parts. First, authorization for the purchase amount
17 is instantaneously obtained by the merchant from Wells Fargo. When a merchant physically or virtually
18 “swipes” a customer’s debit card, the credit card terminal connects, via an intermediary, to Wells Fargo,
19 which verifies that the customer’s account is valid and that sufficient available funds exist to “cover”
20 the transaction amount.

21 30. At this step, if the transaction is approved, Wells Fargo immediately decrements the
22 funds in a consumer’s account and sequesters funds in the amount of the transaction, but does not yet
23 transfer the funds to the merchant.

24 31. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure
25 that there are enough funds in the account to pay the transaction when it settles, as discussed in the
26 Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act
27 regulations:

28 When a consumer uses a debit card to make a purchase, a hold may be placed on funds

1 in the consumer's account to ensure that the consumer has sufficient funds in the
2 account when the transaction is presented for settlement. This is commonly referred to
3 as a "debit hold." During the time the debit hold remains in place, which may be up to
4 three days after authorization, those funds may be unavailable for the consumer's use
5 for other transactions.

6 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration, Unfair
7 or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29, 2009).

8 32. Sometime thereafter, the funds are actually transferred from the customer's account to
9 the merchant's account. This is referred to in the banking industry as "posting" or "settling"—
10 something which may occur several days after the transaction was initially initiated.

11 33. There is no change—no impact whatsoever—to the available funds in an account when
12 posting or payment of a transaction that settles in the same amount for which it authorized occurs. That
13 is because available funds amounts do not change for debit card transactions that settle in the same
14 amount for which they were authorized.

15 **C. Wells Fargo's Account Contract**

16 34. Plaintiff Ashleigh Hartman has a Wells Fargo checking account, which is governed by
17 Wells Fargo's standardized Consumer Account Agreement.

18 35. Wells Fargo's "What is Debit Card Overdraft Service" portion of the Consumer Account
19 Agreement dealing with overdraft fees contains the following relevant provisions.

20 36. The Consumer Account Agreement and relevant contract documents covering overdraft
21 fees provide that Wells Fargo will only charge OD Fees on transactions with insufficient funds to
22 "cover" a given transaction:

23 The [Debit Card Overdraft] service allows Wells Fargo to approve (at our discretion)
24 your ATM and everyday (one-time) debit card transaction if you do not have enough
25 money to cover your transaction in your checking account or in accounts linked for
26 Overdraft Protection.

27 Exhibit B, Consumer Account Agreement, p. 20.

28 37. The critical contract term "to cover" is never defined.

38. For APPSN Transactions, which are immediately deducted from a positive account
balance and held aside for payment of that same transaction, there are always funds to "cover" those

1 transactions—yet Wells Fargo assesses OD Fees on them anyway.

2 39. Moreover, Wells Fargo reaffirms that debit card transactions are authorized and
3 approved immediately in one fell swoop:

4 If you add this [Debit Card Overdraft] service, we may approve these transactions into
5 *overdraft* and allow you to continue with your ATM withdrawal or everyday debit card
6 transaction.

7 Exhibit B, Consumer Account Agreement, at p. 20.

8 40. This promise indicates that transactions are only overdraft transactions when they are
9 authorized and approved into a negative account balance. Of course, that is not true for APPSN
10 Transactions.

11 41. Lest there be any doubt, Wells Fargo also clarifies that authorization and payment are
12 linked and essentially a coterminous process—in other words, that authorization necessitates payment,
13 and account balances are deducted once for any given transaction:

14 Our standard overdraft coverage is when, at our discretion, we pay checks or automatic
15 payments (such as ACH payment) into *overdraft* rather than returning them unpaid.
16 ...

17 If you remove our standard overdraft coverage from your account, the following will
18 apply if you do not have enough money in your account or accounts linked for Overdraft
19 Protection to cover a transaction:
20 ...

21 We will not authorize transactions such as ATM withdrawals or everyday debit card
22 purchases into *overdraft*.

23 Exhibit B, Consumer Account Agreement, p. 20.

24 42. In fact, Wells Fargo actually “authorizes” transactions on positive funds, sets those funds
25 aside on hold, then fails to use those same funds to “pay” those same transactions when they settle.
26 Instead, it uses a secret posting process described below.

27 43. All these representations and contractual promises are untrue. In fact, Wells Fargo
28 charges OD Fees even when sufficient funds exist to “cover” transactions that are “authorized and
approved” into a positive balance. No express language in any document states that Wells Fargo may
impose overdraft fees on any APPSN Transactions.

1 44. The Consumer Account Agreement misconstrues Wells Fargo’s true debit card
2 processing and overdraft practices.

3 45. First, and most fundamentally, Wells Fargo charges overdraft fees on debit card
4 transactions for which there are sufficient funds available to “cover” the transactions. That is despite
5 contractual representations that Wells Fargo will only charge overdraft fees on transactions with
6 insufficient available funds to “cover” a given transaction.

7 46. Wells Fargo assesses OD Fees on APPSN Transactions that do have sufficient funds
8 available to “cover” them throughout their lifecycle.

9 47. Wells Fargo’s practice of charging OD Fees even when sufficient available funds exist to
10 “cover” a transaction violates a contractual promise not to do so. This discrepancy between Wells
11 Fargo’s actual practice and the contract causes consumers like Plaintiff to incur more overdraft fees
12 than they should.

13 48. Next, sufficient funds for APPSN Transactions are actually debited from the account
14 immediately, consistent with standard industry practice.

15 49. Because these withdrawals take place upon initiation, they cannot be re-debited later. But
16 that is what Wells Fargo does when it re-debits the account during a secret batching posting process.

17 50. In reality, Wells Fargo’s actual practice is to assay the same debit card transaction twice
18 to determine if the transaction overdraws an account—both at the time a transaction is authorized and
19 later at the time of settlement.

20 51. At the time of settlement, however, an available balance *does not change at all* for these
21 transactions previously authorized into good funds. As such, Wells Fargo cannot then charge an
22 overdraft fee on such transaction because the available balance has not been rendered insufficient due to
23 the pseudo-event of settlement.

24 52. Upon information and belief, something more is going on: at the moment a debit card
25 transaction is getting ready to settle, Wells Fargo does something new and unexpected, during the
26 middle of the night, during its nightly batch posting process. Specifically, Wells Fargo releases the hold
27 placed on funds for the transaction for a split second, putting money back into the account, then re-
28 debits the same transaction a second time.

1 53. This secret step allows it to charge overdraft fees on transactions that never should have
2 gotten them—transactions that were authorized into sufficient funds, and for which Wells Fargo
3 specifically set aside money to pay them.

4 54. This discrepancy between Wells Fargo’s actual practices and the contract causes
5 consumers to incur more overdraft fees than they should.

6 55. In sum, there is a huge gap between Wells Fargo’s practices as described in the account
7 documents and Wells Fargo’s practices in reality.

8 **D. Wells Fargo Abuses Contractual Discretion**

9 56. Wells Fargo’s treatment of debit card transactions to charge overdraft fees is not simply
10 a breach of the express terms of the numerous account documents. In addition, Wells Fargo exploits
11 contractual discretion to the detriment of accountholders when it uses these policies.

12 57. The term “to cover” a transaction is undefined. Wells Fargo uses its discretion to define
13 “to cover” in a manner contrary to any reasonable, common sense understanding of that term. In Wells
14 Fargo’s implied definition, a transaction is not “covered” even if Wells Fargo sequesters sufficient
15 available funds for that transaction.

16 58. Moreover, Wells Fargo uses its contractual discretion to cause APPSN Transactions to
17 incur overdraft fees by knowingly authorizing later transactions that it allows to consume available
18 funds previously sequestered for APPSN Transactions: “Our standard overdraft coverage is when, at
19 our discretion, we pay checks or automatic payments (such as ACH payment) into *overdraft* rather than
20 returning them unpaid . . . If you remove our standard overdraft coverage from your account, the
21 following will apply if you do not have enough money in your account or accounts linked for Overdraft
22 Protection to cover a transaction: . . . We will not authorize transactions such as ATM withdrawals or
23 everyday debit card purchases into *overdraft*.” Exhibit B, Consumer Account Agreement, at p. 20.

24 59. Wells Fargo uses all of these contractual discretion points unfairly to extract overdraft
25 fees on transactions that no reasonable consumer would believe could cause overdraft fees.

26 **E. Reasonable Consumers Understand Debit Card Transactions are Debited Immediately**

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1 60. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with
2 immediate withdrawal of funds for debit card transactions. That is because if funds are immediately
3 debited, they cannot be depleted by intervening transactions (and it is that subsequent depletion that is
4 the necessary condition of APPSN Transactions). If funds are immediately debited, then, they are
5 necessarily applied to the debit card transactions for which they are debited.

6 61. Wells Fargo was and is aware that this is precisely how accountholders reasonably
7 understand debit card transactions to work.

8 62. Wells Fargo knows that many consumers prefer debit cards for these very reasons.
9 Consumer research indicates that consumers prefer debit cards as a budgeting device; because they
10 don't allow debt like credit cards do; and because the money comes directly out of a checking account.

11 63. Consumer Action, a national nonprofit consumer education and advocacy
12 organization, advises consumers determining whether they should use a debit card that “[t]here is no
13 grace period on debit card purchases the way there is on credit card purchases; the money is
14 immediately deducted from your checking account. Also, when you use a debit card you lose the
15 one or two days of ‘float’ time that a check usually takes to clear.” *See*
16 [http://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_](http://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card)
17 [card](http://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card) (last visited June 8, 2016).

18 64. Further, Consumer Action informs consumers that “Debit cards offer the convenience of
19 paying with plastic without the risk of overspending. When you use a debit card, you do not get a
20 monthly bill. You also avoid the finance charges and debt that can come with a credit card if not paid
21 off in full.”

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1 65. That is a large part of the reason that debit cards have risen in popularity. The number of
2 terminals that accept debit cards in the United States has increased by approximately 1.4 million in the
3 last five years, and with that increasing ubiquity, consumers have (along with credit cards) viewed debit
4 cards “as a more convenient option than refilling their wallets with cash from an ATM.”¹

5 66. Not only have consumers increasingly substituted from cash to debit cards, but they
6 believe that a debit cards purchase is the fundamental equivalent to a cash purchase, with the swipe of a
7 card equating to handing over cash, permanently and irreversibly.

8 67. Wells Fargo was aware of a consumer perception that debit transactions reduce an
9 available balance *in a specified order*—namely, the order the transactions are actually initiated—and its
10 account agreement only supports this perception.

11 **F. Plaintiff Hartman’s Debit Card Transactions**

12 68. On November 18, 2015, Plaintiff Ashleigh Hartman was assessed two (2) overdraft fees
13 in the amount of \$35.00 each for two Uber transactions that settled that day—each was a debit card
14 transaction that was initiated on November 16, 2015—all despite the fact that positive funds were
15 deducted immediately for each transaction on which she was assessed overdraft fees.

16 69. Indeed, the only reason either of the two debit card transactions that settled on November
17 18 incurred overdraft fees was because of a \$550 cashed check that processed *after* the debit card
18 transactions had already been initiated.

19 70. Plaintiff does not dispute that Wells Fargo was within its right to charge an overdraft fee
20 on the cashed check transaction, because it was authorized into insufficient funds. Plaintiff disputes that
21 Wells Fargo was authorized to charge overdraft fees on the prior-in-time debit card transactions.

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26 ¹ Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*, MarketWatch, Mar. 23, 2016,
27 <http://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23>.

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2 **II. WELLS FARGO CHARGES NSF FEES AND OD FEES ON THE SAME**
3 **TRANSACTION AND MULTIPLE NSF FEES ON THE SAME TRANSACTION**

4 **A. Overview of Claim**

5 71. Plaintiffs bring this cause of action challenging Wells Fargo's imposition of NSF Fees
6 and OD Fees on the same transaction, and the assessment of more than one NSF Fee on the same
7 transaction.

8 72. Wells Fargo charges account holders a \$35 NSF Fee when there are insufficient funds to
9 pay a transaction and it rejects the charge. Wells Fargo charges account holders a \$35 OD Fee when
10 there are insufficient funds to pay a requested transaction and it accepts the charge.

11 73. Through the imposition of NSF and OD Fees, Wells Fargo makes several hundred
12 million dollars a year. These fees are by definition often assessed on consumers struggling to make
13 ends meet with minimal funds in their accounts.

14 74. In particular, an FDIC study has reported that OD and NSF fees often fall
15 disproportionately on racial and ethnic minorities, the elderly, and the young. Every additional OD or
16 NSF Fee Wells Fargo assesses can be devastating to those living at the economic margins of our
17 society. OD/NSF Fees must be assessed sparingly (and consistently with Wells Fargo's contracts), if
18 they are not to destroy the very accountholders on whom they are assessed.

19 75. Unfortunately, Wells Fargo undertakes to maximize OD/NSF Fees with a deceptive
20 practice which also violates its contracts.

21 76. As discussed more fully below, it is a breach of the Bank's contract and of reasonable
22 consumers' expectations for the Bank to charge both a \$35 NSF *and* a \$35 OD Fee, or more than one
23 NSF Fee, on the *same transaction*, since the contract explicitly states—and reasonable consumers
24 understand—that the same transaction cannot incur both types of fees and in fact can only incur a single
25 fee.

26 **B. Plaintiff Lotsoff's Experience**

27 77. On October 24, 2016, Ms. Lotsoff attempted to make an online bill payment of \$152.31
28 through her Wells Fargo checking account. Because Ms. Lotsoff had insufficient funds in her account,

1 Wells Fargo rejected that payment request and charged Ms. Lotsoff a \$35 NSF Fee for doing so.
2 Unbeknownst to Plaintiff, that very same transaction was processed again by Wells Fargo seven days
3 later, on October 31, 2017, with Wells Fargo calling the transaction a “RETRY PAYMENT” on the
4 bank statement. This time, Wells Fargo paid the transaction and charged Plaintiff a \$35 OD Fee for
5 doing so. In sum, *Wells Fargo charged Plaintiff \$70 in fees to process a single bill payment.*

6 78. Ms. Lotsoff took no affirmative action to reinitiate or resubmit the transaction.

7 79. Plaintiff understood the bill payment to be a single transaction, capable at most of
8 receiving a single NSF *or* OD Fee. Wells Fargo itself also understood the transaction to be a single
9 transaction, and its systems categorized it as such. Indeed, on Ms. Lotsoff’s bank statements, Wells
10 Fargo described subsequent attempts to debit the transaction as “RETRY PAYMENT.”

11 80. Instead—and other of Wells’ major competitors such as JP Morgan Chase, which does
12 not charge multiple NSF or OD Fees on the same transaction—Wells Fargo charges more than one NSF
13 Fee on the same transaction and charges both NSF and OD Fees on the same transaction.

14 81. Wells Fargo can easily code transactions it considers “overdrawn” to not incur OD/NSF
15 Fees.

16 82. Upon information and belief, Wells Fargo’s systems are programmed to recognize a
17 single transaction featuring the same dollar amount and merchant when that single transaction is
18 submitted for payment multiple times.

19 **C. Relevant Account Documents**

20 83. The account documents promise that only one NSF Fee or OD Fee will be charged per
21 transaction.

22 84. According to the Online Banking Agreement, Wells Fargo promises that it will charge
23 either a single OD Fee or an NSF Fee on a given transaction:

24 If we receive a bill payment drawn against your checking account or a Command Asset
25 Program, and there are insufficient available funds in your Funding Account to cover
26 the payment, we may at our sole discretion: • Cover the payment by transferring
27 available credit or funds from an account you have linked for Overdraft Protection, or •
28 Pay the bill payment and create an overdraft on your account, or • Decline the bill
payment, or • Re-attempt the bill payment the following business day (until this second
attempt is completed, the payment is pending and cannot be canceled).

1 “Online Access Agreement”, attached as Ex. A, p. 6 (“Online Banking Agreement”).

2 85. The Consumer Account Agreement supports these promises, especially when it defines
3 “Item” as:

4 An item is an order, instruction, or authorization to withdraw or pay funds or money
5 from an account. Examples include a check, draft, and an electronic transaction
6 (including Automated Clearing House (ACH), an ATM withdrawal, and a purchase
7 using a card to access an account). An item also includes a purported order, instruction,
or authorization to withdraw or pay funds or money from an account, unless otherwise
prohibited by law or regulation.

8 “Consumer Account Agreement, Important legal information, disclosures, and terms you need to
9 know,” attached as Ex. B, p. 1 (“Consumer Account Agreement”).

10 86. Wells Fargo’s simple checking account disclosure, which is both a contract document
11 and used by Wells Fargo for marketing to consumers, states:

12 Overdraft and returned item \$35 per item (non-sufficient funds/NSF) fees Note: • No
13 overdraft fee will be assessed on ATM and everyday debit card transactions
14 (transactions may be declined) unless Debit Card Overdraft Service is added to the
15 account. See the “Debit Card Overdraft Service” section for more information. • No
16 more than three overdraft and/or returned item fees will be charged on any business day
17 • No overdraft or returned item fees on transactions \$5 or less • No overdraft fees if at
18 the end of our nightly processing, both your ending daily account balance and your
available balance are overdrawn by \$5 or less and there are no items returned for non-
sufficient funds after all transactions have posted • No extended or continuous overdraft
fee.

19 “A guide to your common checking account fees,” attached as Ex. C (the “Guide”).

20 87. Using the same term—“item”—the Guide states that a maximum of \$35 in fees will be
21 charged for any given item or transaction.

22 88. The Consumer Account Agreement also states:

23 Then, decide whether to pay your transaction into overdraft or return it unpaid: At our
24 discretion, **we may pay a check or automatic payment into overdraft, rather than**
25 **returning it unpaid.** This is our standard overdraft coverage. If we pay the transaction
26 into overdraft, it may help you avoid additional fees that may be assessed by the
27 merchant. Debit card transactions presented to us for payment (whether previously
28 approved by us or not) will be paid into overdraft and will not be returned unpaid, even
if you do not have sufficient funds in your account.

1 **Our standard overdraft coverage is when, at our discretion, we pay checks or**
2 **automatic payments (such as ACH payment) into overdraft rather than returning**
3 **them unpaid.** You can request to remove our standard overdraft coverage from your
4 account by speaking to a banker.

5 Important: If you remove our standard overdraft coverage from your account, the
6 following will apply if you do not have enough money in your account or accounts
7 linked for Overdraft Protection to cover a transaction: • **We will return your checks**
8 **and automatic payments (such as ACH payments) and assess a non-sufficient funds**
9 **(NSF) returned item fee and you could be assessed additional fees by merchants.**

10 Ex. B, pp. 19–20.

11 89. All these provisions indicate that one of two things will occur: payment or rejection; and
12 a single OD Fee or NSF Fee.

13 **D. Wells Fargo May Not Charge Both OD and NSF Fees on a Single Transaction,**
14 **or More Than One NSF Fees on a Single Transaction**

15 90. Consistent with express representations in the contract, reasonable consumers understand
16 any given instruction for payment to be one, singular transaction and one “item” as that term is used in
17 Wells Fargo’s contract documents.

18 91. As discussed herein, the Bank has this same understanding in practice, since its systems
19 code transactions in a way that alerts the Bank when the same item or transaction is being re-submitted
20 for payment.

21 92. The contract documents bar Wells Fargo from assessing both an NSF and an OD Fee on
22 the same item or transaction, from assessing more than one NSF Fee on the same item.

23 93. “Item” is defined in the Consumer Account Agreement as one or multiple iterations of
24 the same payment attempt.

25 94. Both the Consumer Account Agreement and Online Banking Agreement state that a
26 given transaction can be paid or declined, but not both.

27 95. Wells Fargo states that it will charge a fee whether it pays or rejects an item, and it
28 expressly states it will only charge one.

 96. The Consumer Account Agreement states more than once that “We will return your
 checks and automatic payments (such as ACH payments) and assess a non-sufficient funds (NSF)

1 returned item fee and you could be assessed additional fees by merchants.” Ex. B, p. 20. This reiterates
2 the Bank’s promise that it will charge either an OD Fee or an NSF Fee, but not both, on the same item.
3 Moreover, the statement that “you could be assessed additional fees by merchants” indicates that the
4 rejection of a transaction is final. *See id.*

5 97. The Consumer Account Agreement makes similar representations. It defines “item” to
6 encompass all submissions for payment of the same transaction. “Item” cannot mean each re-
7 submission of the same transaction because it is defined to mean each “order, instruction, or
8 authorization,” and Plaintiff only gave one “order, instruction, or authorization” for the transaction at
9 issue. It is simply another attempt at Plaintiff’s original order or instruction. Ex. B, p. 1.

10 98. In sum, the Consumer Account Agreement, the Guide, and Online Banking Agreement
11 provide Wells Fargo the authority to charge only one NSF or OD Fee per “item.” The terms of those
12 agreements are starkly binary: for a given transaction, the Bank may pay or return it, but it cannot do
13 both for the same transaction, and it cannot do the same thing more than once.

14 99. This abusive practice is not universal in the banking industry. Indeed, major banks like
15 Chase—the largest consumer bank in the country—do not undertake the practice of charging more than
16 one NSF or OD Fee on the same item when it is submitted for payment multiple times.

17 100. Banks like Defendant know how to plainly and clearly disclose this abusive practice.
18 Indeed, other banks that do engage in this abusive practice disclose it expressly to their
19 accountholders—something Defendant here never did.

20 101. For example, First Citizens Bank, a major institution in the Carolinas, engages in the
21 same abusive practice as Wells, but at least expressly states:

22 Because we may charge a service fee for an NSF item each time it is presented, we may
23 charge you more than one service fee for any given item. All fees are charged during
24 evening posting. When we charge a fee for NSF items, the charge reduces the available
25 balance in your account and may put your account into (or further into) overdraft.

26 102. First Hawaiian Bank engages in the same abusive practices as Defendant, but at least
27 currently discloses it in its online banking agreement, in all capital letters, as follows:

28 YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO SUBMIT A
RETURNED ITEM FOR PAYMENT AND THAT MULTIPLE FEES MAY BE

1 CHARGED TO YOU AS A RESULT OF A RETURNED ITEM AND
2 RESUBMISSION.

3 103. Klein Bank similarly states in its Online Banking Agreement:

4 [W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment (electronic or
5 check) is submitted to us for payment from your Bill Payment Account when, at the
6 time of posting, your Bill Payment Account is overdrawn, would be overdrawn if we
7 paid the item (whether or not we in fact pay it) or does not have sufficient available
8 funds; or (2) we return, reverse, or decline to pay an item for any other reason
9 authorized by the terms and conditions governing your Bill Payment Account. We will
10 charge an NSF/Overdraft Fee as provided in this section regardless of the number of
11 times an item is submitted or resubmitted to us for payment, and regardless of whether
12 we pay the item or return, reverse, or decline to pay the bill payment.

13 104. Wells Fargo intentionally provides no such disclosure, in an effort to deceive its
14 accountholders.

15 **E. Wells Fargo Abuses Contractual Discretion**

16 105. To the extent the account documents do not explicitly bar the policies described above,
17 Wells Fargo exploits contractual discretion to the detriment of accountholders and breaches good faith
18 and fair dealing when it uses these policies.

19 106. First, Wells Fargo engages in a pattern of rejecting, then approving, the same items in
20 order to maximize fee revenue. Wells Fargo initially denies, then approves, the same item in order to
21 increase fee revenue.

22 107. For example, Wells Fargo rejected payment on the first iteration of the \$152 bill
23 payment because Plaintiff purportedly had a negative balance on her account. But it approved the
24 second iteration of the same transaction even though Plaintiff still purportedly had a negative balance
25 and was in fundamentally the same financial position.

26 108. The reject-then-approve pattern used by Wells Fargo has one purpose: to maximize fee
27 revenue for the Bank.

28 109. Second, the Bank uses its discretion to define the meaning of "item" in an unreasonable
way that violates common sense and reasonable consumer expectations. Wells Fargo uses its
contractual discretion to set the meaning of that term to choose a meaning that directly causes more
NSF Fees or OD Fees.

1 110. Third, the Bank maintains a huge amount of discretion not to charge or “deduct” NSF
2 Fees on given transactions. By charging more than one NSF Fee on a given transaction, Wells Fargo
3 engages in bad faith and contradicts reasonable consumer expectations.

4
5 **III. ATM CLAIMS**

6 111. In recent years, there has been significant consumer and political outcry over the
7 business practices of the ATM industry. Consumer advocates, commentators and politicians have railed
8 against “usurious” fees charged by ATM operators. Almost all of the focus has concerned the high cost
9 of surcharge fees, or the fees that an ATM operator charges directly to consumers for engaging in cash
10 withdrawal transactions, which range from \$3-\$5 per transaction. This litigation does not concern those
11 fees.

12 112. There is also a second fee that consumers using out-of-network ATMs are hit with—the
13 OON Fee, which is charged by their own bank for using an ATM not owned by their bank. This fee,
14 ranging from \$2-\$3 is charged to the consumer in addition to the surcharges assessed by the ATM
15 owners, which means that Americans are now paying between \$5-\$8 for every out of network ATM
16 withdrawal they undertake. This litigation does not concern this second type of fee either.

17 113. Rather, there is a third fee that has gone unnoticed, and it involves so-called “balance
18 inquiries” undertaken at out-of-network ATMs. In addition to collecting surcharges on ATM cash
19 withdrawals, the ATM operators and banks profit by receiving kickbacks, in the form of “interchange
20 fees,” from their customers’ banks for providing so-called “balance inquiries” at their ATMs.
21 Unbeknownst to consumers, they can be charged one or two fees by their banks for supposedly
22 performing balance inquiries in addition to the surcharge from the ATM owner and the first OON Fee
23 from their own bank for the cash withdrawal.

24 114. An accountholder who unsuspectingly checks his available balance as part of a cash
25 withdrawal transaction at a Cardtronics, FCTI or Cash Depot ATM machine can expect to pay the
26 following fees: 1) the customer will pay the ATM defendants a surcharge for the withdrawal; 2) the
27 customer also pays his/her own bank a OON Fee for making an out of network cash withdrawal; 3) the
28 customer will also pay his/her bank another OON Fee for supposedly undertaking one or more balance

1 inquiries during the cash withdrawal (and in the case of a withdrawal at a FCTI ATM machine, the
2 customer will pay an additional, “phantom” fee for yet another balance inquiry). A single \$20.00
3 withdrawal can generate between \$7.00 and \$11.00 in fees, which Wells Fargo and the ATM operators
4 hungrily divide up.

5 115. Because the provision of balance inquiries are essentially cost-free to ATM owners, and
6 because they are hugely profitable, ATM owners have placed a great emphasis in recent years on
7 increasing the number of supposed balance inquiries undertaken at their machines—by any means
8 necessary.

9 116. In the last decade, the revolution of mobile banking applications and increasing
10 legislative scrutiny on the punitive nature of independent ATM machine withdrawal surcharges has
11 forced the ATM operators to seek other sources of revenue. The 2015 Independent ATM deployer
12 survey sponsored by Kahuna ATM Solutions and the ATM Industry Association found that declining
13 interchange rates were one of the top concerns for Independent ATM operators². The ATM operators
14 shared this concern. For example, Cardtronics repeatedly voiced this concern in its financial disclosures,
15 most recently stating:

16 “In addition to the impact of the net interchange rate decrease, we saw certain
17 financial institutions migrate their volume away from some networks to take
18 advantage of the lower pricing offered by other networks, resulting in lower net
19 interchange rates per transaction to us. If financial institutions move to take further
20 advantage of lower interchange rates, or if networks reduce the interchange rates they
21 currently pay to ATM deployers or increase their network fees, our future revenues
22 and gross profits could be negatively impacted.” *See* Cardtronics, Inc. SEC Form 10-
23 Q, April 30, 2018. Available at: <http://ir.cardtronics.com/node/18341/html> (Last
24 Viewed July 11, 2018).

25 117. Feeling the financial pressure of declining interchange rates, the ATM operators sought
26 to increase revenue in other ways.
27
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² *See* 2015 IAD Poll at <https://www.atmmarketplace.com/news/2015-iad-poll-reveals-growing-attention-on-emv-shrinking-focus-on-mobile/> Last Viewed June 11, 2018.

1 118. They turned to balance inquiries to drive revenue. But they had a problem: very few
2 consumers seek them out and are willing to pay for them.

3 119. Americans, in short, use ATMs for the service of withdrawing cash, not to perform
4 balance inquiries and transfers that are now commonly performed online or on mobile devices for free.

5 120. ATM operators and banks have known for years that the vast majority of customers who
6 come to use their ATM machines are there to perform only a cash withdrawal.

7 121. This makes perfect sense. Due to the availability of cost-free alternatives, like checking
8 a balance on a mobile app, phone banking, or online access, paying for a balance inquiry at an ATM is
9 not a rational act for the vast majority of consumers. Moreover, the shelf-life of the information
10 obtained through a balance inquiry is extremely short. With checking accounts having numerous
11 transactions that post throughout the day, as well as scheduled withdrawals that occur overnight, the
12 viability of the information received through a balance inquiry at an ATM is only even arguably
13 beneficial for the immediate business at hand, *i.e. the cash withdrawal*.

14 122. Moreover, because consumers are entitled to receive, as part of their cash withdrawal, a
15 printed receipt at the conclusion of their transaction, they already have free access to their account
16 balances without having to engage in a separate balance inquiry.

17 123. Therefore, when a consumer uses an ATM for a balance inquiry, it is almost always *in*
18 *conjunction* with a cash withdrawal transaction.

19 124. For all these reasons, historically only a tiny percentage of ATM transactions were for
20 balance inquiries. Very few consumers need this information badly enough to pay for it.

21 125. But ATM operators had a solution: lure consumers into balance inquiries via trickery
22 and deception in order to increase balance inquiries from those customers who otherwise do not need
23 them or would not be willing to pay for them as part of a cash withdrawal. The ATM operators have
24 embraced a number of tactics to increase the number of balance inquiries supposedly performed at their
25 ATM machines.

26 **A. Balance Inquiry At Start**

27 126. The first and most widespread of those tactics is commonly referred to in the
28 independent ATM operator segment as “Balance Inquiry At Start.”

1 127. “Balance Inquiry At Start” refers to the reordering of ATM machine screen prompts so
2 that the first screen a customer encounters, following PIN entry, is an immediate prompt to view their
3 available account balance.

4 128. Prior to the adoption of “Balance Inquiry at Start” by certain ATM owners, the first
5 screen prompt after PIN entry would show a menu of available options. These options typically include:
6 1) Fast Cash; 2) Withdrawal; 3) Transfer; and 4) Balance Inquiry – among others. In the typical
7 scenario, a customer who wished to perform a “Balance Inquiry,” would have to affirmatively seek out
8 and select that option. But as discussed above, very few consumers did that.

9 129. The adoption of “Balance Inquiry at Start” resulted in a significant increase in balance
10 inquiries made at the beginning of every transaction, prior to the actual cash withdrawal. Indeed,
11 consumers began to understand such balance inquiries were part and parcel of the cash withdrawal they
12 intended to make when they walked up to the ATM.

13 130. The new approach was adopted by ATM operators for one reason: to increase revenue.
14 The increase in balance inquiries would mean an increase in their payments from the banks in the form
15 of interchange fees. Several industry forums have touted the financial benefits to Independent ATM
16 deployers (IADs) of utilizing Balance Inquiry at Start. For example:

17 “Many IADs do not include balance inquiries as an option during a transaction.
18 Although the ATM doesn’t charge the customer, **IADs can derive significant
19 interchange revenue from these transactions. ATMs that are set to suggest
20 balance inquiries at the start of transactions can expect a significant increase in
21 the number of balance inquiries** performed by the machine”. See ATM Atom, at
<http://www.atmatom.com/5-ways-to-boost-atm-portfolio-profitability/> (last viewed
22 July 11, 2018) (emphasis added).

23 “Enable “balance inquiry at start” on Every ATM—an easy step to make, **‘Balance
24 Inquiry at Start’ can increase your balance inquiries 20 to 30 percent**—at
25 minimal cost. By making this slight adjustment in programming, the incremental
26 revenue it produces can make quite a difference. See ATM Marketplace at
<https://www.atmmarketplace.com/blogs/five-ways-to-increase-atm-profitability/> (last
27 viewed July 11, 2018) (emphasis added).

28 “Once Balance Inquiry At Start is enabled, **deployers can expect between 20-30
percent of their transactions to be balance inquiries**, whereas before such
transactions might have been 10 percent or less.” See Slawsky, Richard, *Five Ways to
Boost the Profitability of an ATM Portfolio*, ATM Marketplace White Paper, 2011, at
2 available at:

1 <http://www.grantvictor.com/pdfs/Five%20Ways%20to%20Boost%20ATM%20Profit>
2 [ability.pdf](http://www.grantvictor.com/pdfs/Five%20Ways%20to%20Boost%20ATM%20Profit) (last viewed July 11, 2018) (emphasis added).

3 **B. “Balance Inquiry At Start” is a deceptive business practice designed to increase**
4 **balance inquiries from customers who would not otherwise purchase or engage in**
5 **them.**

6 131. “Balance Inquiry at Start” increases supposed balance inquiries by creating consumer
7 confusion. It does so by catching unsuspecting customers off guard and tricking them into believing the
8 service is free and an integral part of a cash withdrawal transaction. This consumer confusion is the
9 product of two factors.

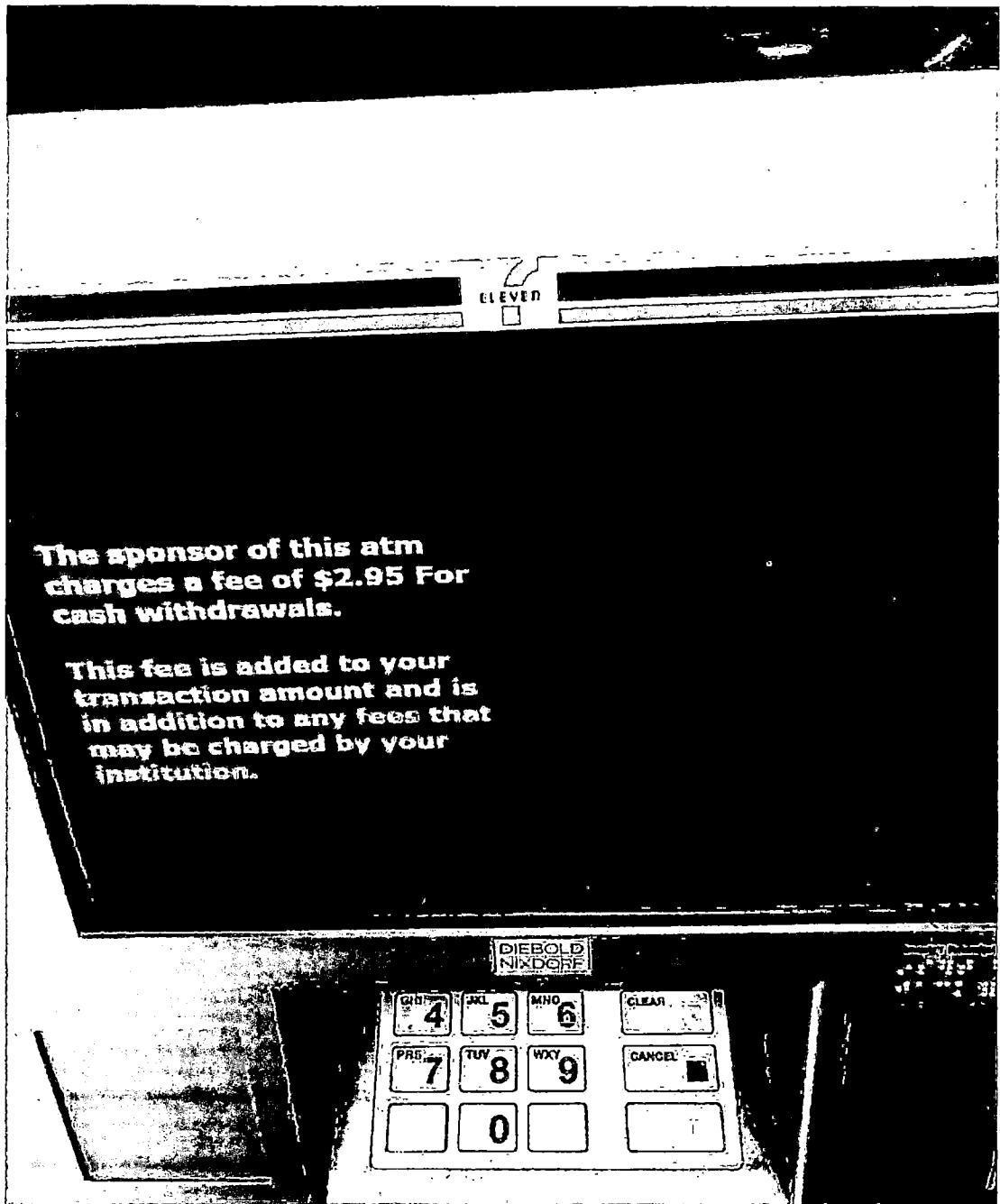
10 132. First, when consumers use ATMs not owned by their own bank, federal law requires the
11 owners of those Out-of-Network ATMs to inform users of the amount of the usage fees charged by the
12 ATM owner.

13 133. Thus, it is standard at ATMs in the United States that when a consumer uses an ATM not
14 owned by her home bank, a message is displayed on the screen stating that usage of the ATM will cost
15 a specified amount (“Surcharge”) to proceed with a withdrawal of funds, and that such a fee is in
16 addition to a fee that may be assessed by a consumer’s financial institution for use of the ATM.

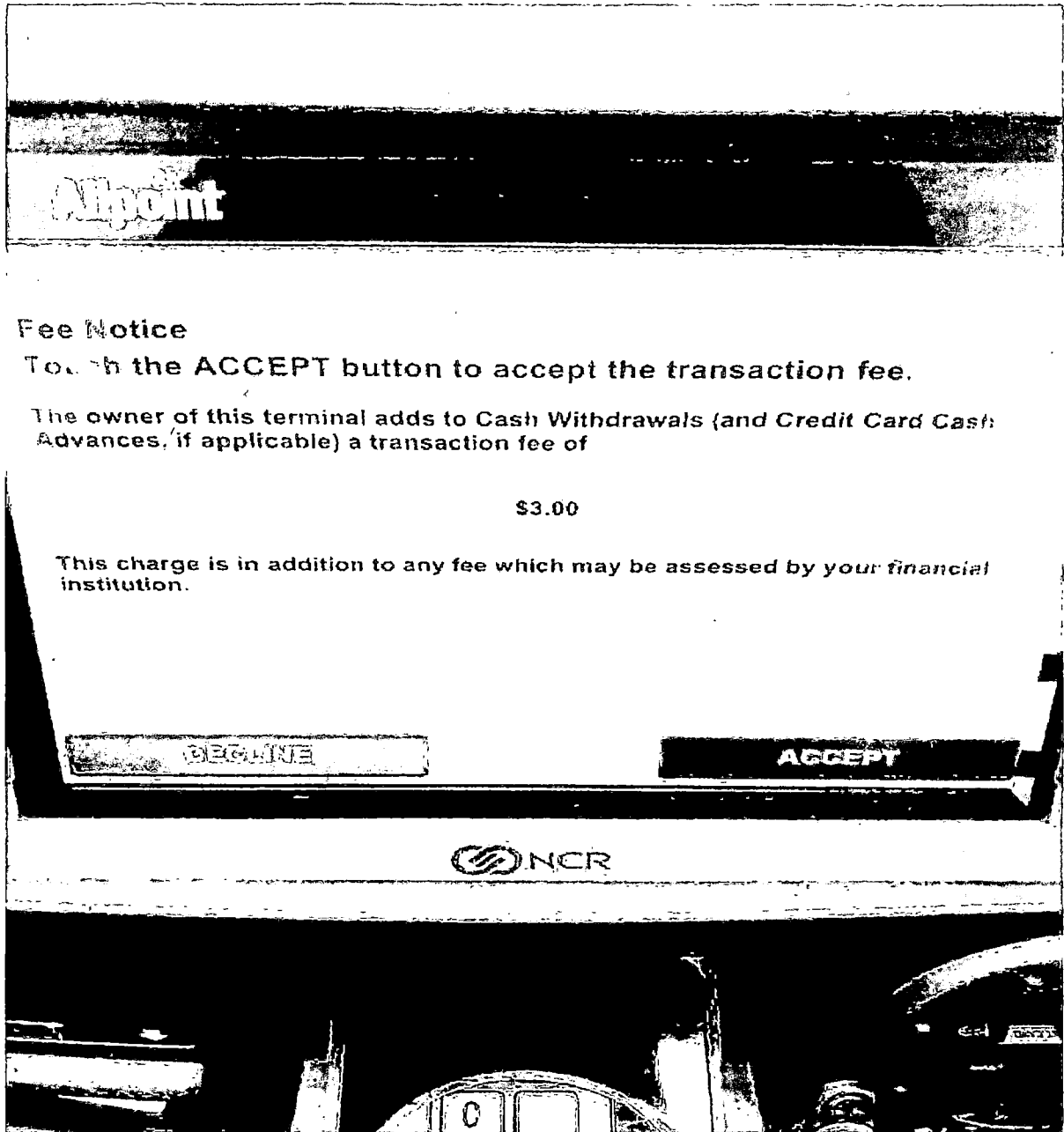
17 134. That message appears only after a user has decided to perform a cash withdrawal and
18 entered the amount of cash she would like to withdraw.

19 135. By way of example, set forth below is a fee notice presented to every customer prior to
20 making a cash withdrawal at ATMs operated by FCTI:
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136. By way of further example, Cardtronics provides the same notice:



22 137. Through repeated exposure to such fee warning messages, consumers are accustomed to
23 being warned of fee assessments at out of network ATMs, and to being provided with the opportunity to
24 decide whether the fees charged are reasonable—before proceeding with their cash withdrawal. But
25 there is no warning whatsoever at an ATM that any form of balance inquiry could be an event worthy of
26 a fee, either from the ATM owner or from the consumer’s bank.
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1 138. Without such a notice, a balance inquiry appears to be nothing more than an
2 unremarkable, free lead-in to a cash withdrawal to reasonable, diligent consumers. The ATM
3 defendants capitalize on this known consumer confusion to lure consumers into inadvertently requesting
4 hundreds of thousands of balance inquiries each year that consumers have no desire or intention to pay
5 for.

6 139. Second, many ATM operators use intentionally deceptive on-screen prompts to exploit
7 and add to the consumer confusion resulting from a lack of an on-screen fee notice. While varying in
8 certain ways, the intention and effect is the same: to trick American consumers into repeatedly paying
9 more for a single ATM usage by increasing purported balance inquiries. Each is discussed in turn
10 below.

11 **C. ATM Operators Have Profited Enormously From Deceptively Pushing Balance**
12 **Inquiries**

13 140. Using practices like those described above, ATM operators have vastly increased the
14 number of balance inquiries purportedly undertaken by US consumers.

15 141. Take the largest independent ATM operator, Cardtronics, which sought to increase the
16 revenue its ATM machines were earning. The solution it hit upon was to drive up the number of
17 balance inquiries massively, virtually overnight. How did it do this? By designing a confusing series of
18 on-screen prompts that turned its interactions with ATM users on their head: rather than waiting for a
19 consumer to affirmatively request balance inquiries, Cardtronics defaulted consumers into balance
20 inquires and forced them to jump through hoops to opt-out of them.

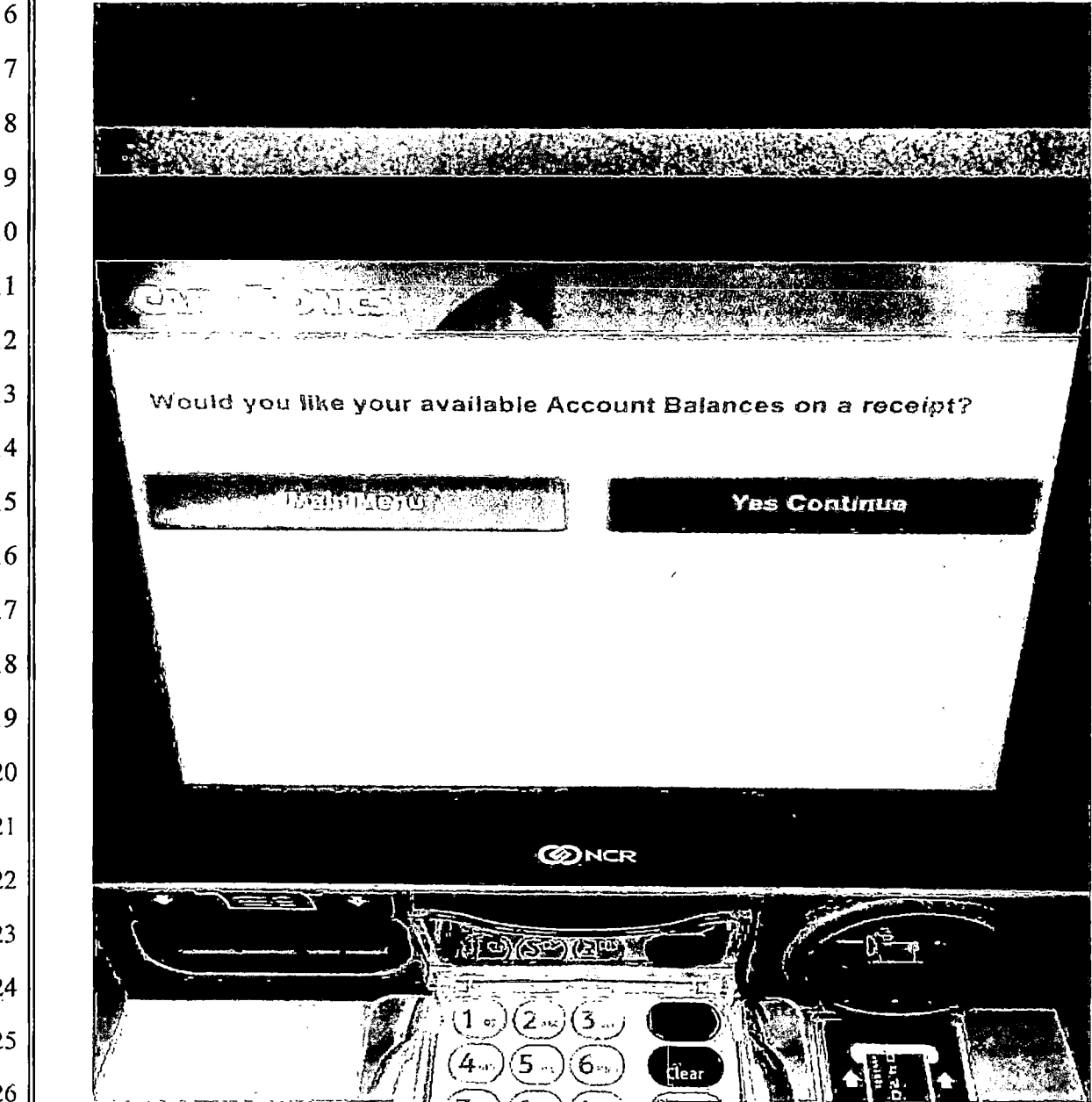
21 142. In short, Cardtronics' Balance Inquiry Screen prompt forces every consumer using an
22 ATM to effectively **opt-out** of a balance inquiry, as opposed to affirmatively selecting to **opt-in**.
23 Cardtronics' on-screen prompts force consumers to successfully navigate numerous balance inquiry
24 screen prompts in order to get to their desired cash withdrawal transaction.

25 143. By building an opt-out process into a very quick consumer interaction, where transaction
26 time is minimal and the displayed language is confusing, Cardtronics manages systematized, automatic
27 consumer exploitation.

28

1 144. Worse, Cardtronics machines never even ask their users whether they would like to
2 check their balances or not. Instead, they use language that no reasonable consumer understands to be a
3 request for a balance inquiry.

4 145. Upon successfully entering a PIN number, the very first screen presented to a user of a
5 Cardtronics ATM is as follows (*See Cardtronics ATM Screen Prompts; Screen Prompt No. 2*):



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1 146. Cardtronics' "Balance Inquiry At Start" screen prompt is woefully misleading. The first
2 question posed to the consumer is:

3 **Would you like your Available Balances on a receipt?**

4 147. Reasonable consumers like Plaintiffs simply have no idea that one of the two possible
5 responses to this question—"Main Menu" or "Yes Continue"—will be construed by Cardtronics and
6 their banks to be a request for a pre-withdrawal balance inquiry. Indeed, reasonable consumers
7 understand this question to be simply asking whether or not a consumer would like a printed receipt at
8 the end of the cash withdrawal transaction—a *receipt that is already required to be provided, free of*
9 *charge, by federal law. See Regulation E, § 205.9 et seq.*

10 148. But in seconds, with a fateful choice between two opaque and deceptive options, an
11 unsuspecting ATM user may have just committed himself to the first of three or four discrete fees for
12 using the Cardtronics ATM.

13 149. Receipts are typically given *after* transactions are performed, *i.e.* following a purchase or
14 in the context of an ATM transaction, *after* a cash withdrawal or deposit.

15 150. The colors and language used in the two on-screen "buttons" further have the effect of
16 defaulting consumers into balance inquiries they never wanted: "Yes Continue" (in a bright green
17 button) or "Main Menu" (in a bright red button).

18 151. The ATM user is never presented with the option of simply saying "No".

19 152. The ATM user is, indeed, never asked the simple question "Would you like to perform a
20 balance inquiry?" As discussed below, the term "balance inquiry" is uniformly used by the Wells Fargo
21 in their account disclosures, but notably not used by the ATM operators.

22 153. Moreover, the Green Button doesn't just say, "Yes" – it says, "Yes Continue" –
23 communicating to consumers that the only way or at least the most efficient way to get to their desired
24 cash withdrawal and "Continue" on with their intended transaction, is to select the Green Button. As is
25 commonly known, green is associated with continuing, "going," or proceeding. Cardtronics intended to
26 convey to consumers that the Green Button is the only choice to proceed with the desired cash
27 withdrawal transaction.

28

1 154. Customers reasonably believed that by selecting the Green Button, their transactions
2 would “Continue” and they would get to the cash withdrawal screen as quickly as possible. In contrast,
3 the Red Button appears to reasonable consumers as though the transaction will start over or end
4 altogether by sending the customer back to an undisclosed “Main Menu.”

5 155. Fourth, the confusion at the screen prompt is enhanced by the lack of fee notice.
6 Customers believe that the balance inquiry is being offered to them for free. Customers reasonably
7 believe that the Balance Inquiry at Start screen prompt is simply asking them if they want a printed
8 receipt. Absent any warning that a fee will be imposed by the customers’ financial institution for either
9 choice, the customer reasonably believes it is free.

10 156. Each of these subtle and not-so-subtle tricks has been designed by Cardtronics to exploit
11 consumers, the vast majority of whom are not at the ATM seeking to perform a balance inquiry, but
12 simply to make a cash withdrawal –as fast and conveniently as possible.

13 157. Plaintiffs were deceived by these misrepresentations and deceptive prompts, did not
14 intend to perform a balance inquiry, and certainly never intended to pay for one. *See* Exhibit No. 1,
15 Cardtronics Screen Prompts.

16 **ii. Cardtronics profits enormously from its deception**

17 158. There is no doubt that Cardtronics’ deceptive prompts have achieved their intended
18 effect: the creation of a new, massive stream of balance inquiry revenue almost overnight.
19 As discussed above, Cardtronics earns revenue on each balance inquiry. In 2012, Cardtronics disclosed
20 that it earned fifty cents on each balance inquiry from the user’s home bank.³

21 159. In turn, for each supposed balance inquiry that Cardtronics is able to wheedle from
22 unsuspecting users, the users’ home bank, including the Wells Fargo, assess an OON Fee—profiting
23 even more richly than Cardtronics.

24
25
26 ³ This figure appeared in a power point presentation prepared by Cardtronics for its shareholders.
27 Cardtronics, *ATM Interchange Comments*, December 2012, at 3, available at
[http://files.shareholder.com/downloads/CATM/0x0x622218/89e3c9a1-cf3e-4f53-bf25-
be8d1d11dd95/December-2012-investor-update.pdf](http://files.shareholder.com/downloads/CATM/0x0x622218/89e3c9a1-cf3e-4f53-bf25-be8d1d11dd95/December-2012-investor-update.pdf).

1 160. Assuming the ATM Marketplace’s projections are correct, *see* paragraph 43, *supra*,
2 Cardtronics’ adoption of a deceptive “balance inquiry at start” scheme increased the share of its
3 transaction volume resulting from balance inquiries by 10% to 20%. In 2016 alone, Cardtronics
4 processed 1,358,409,000 billion ATM transactions (it counts cash withdrawals and balance inquiries as
5 separate events)—meaning that the amount of *additional* balance inquiries experienced by Cardtronics
6 as a result of the adoption of its Balance Inquiry At Start scheme could be between *150-200 million*
7 *balance inquiries per year*. The likely cost to consumers is between \$70 and \$100 million dollars
8 annually.

9 161. In 2013, the U.S. Government Accountability Office did a study examining the issues
10 surrounding ATM fees.⁴ As part of the study, two independent ATM operators provided their
11 transactional data for the calendar year 2011.⁵ The count for “total ATM transactions” reported by the
12 two independent ATM owners was 146,404,805, with cash withdrawals comprising 140,634,638 of that
13 amount.⁶ **In other words, the percentage of “other ATM transactions” to “total ATM**
14 **transactions” for these two independent ATM operators in 2011 was 3.94%, as opposed to the**
15 **38.32% experienced by Cardtronics in that same year.**⁷ Since the balance inquiry and transfer
16 options offered by independent ATM operators are indistinguishable from those offered by Cardtronics,
17 it would stand to reason that the transactional ratios of these competing companies should be
18 comparable. In this case, they are not: Cardtronics is approximately 1,000% higher than its
19 competitors.

20 162. Second, the most dramatic spike in the ratio of “other ATM Transactions” to “total
21 ATM transactions” occurred during the 2006 to 2010 time period—the precise time period in which
22 _____

23 ⁴ *United States Government Accountability Office; AUTOMATED TELLER MACHINES – Some*
24 *Consumer Fees Have Increased, GAO-13-266 (April 2013), available at*
<http://www.gao.gov/assets/660/653723.pdf>. Attached hereto as Appendix D.

25 ⁵ *Id.* at p. 43.

26 ⁶ *Id.* at p. 43.

27 ⁷ *Id.* at p. 43 (Table 10).

1 Cardtronics rolled out its own “Balance-Inquiry-At-Start” screen prompts. The sudden growth in
2 balance inquiries during this time period is otherwise counterintuitive. With the proliferation of smart
3 phone use beginning in 2007, the demand on the part of consumers to engage in balance inquiries
4 and/or transfers at ATMs should have been significantly *diminished* since both can be accomplished on
5 a smart phone (or computer) for free. Instead of going down, the percentage of “other ATM
6 transactions” to “total ATM transactions” for Cardtronics rose enormously to approximately 50%.

7 163. The increase is directly attributable to Cardtronics adoption of its highly misleading
8 version of “Balance Inquiry At Start.”

9 164. The broad implementation of Balance Inquiry at Start was the reason for this increase as
10 it profited from the interchange fees it received from its customers’ banks, including the Wells Fargo.

11 **D. Overview of ATM Claim Against FCTI**

12 **i. Not Only Has FCTI Adopted a Deceptive Balance Inquiry at Start Scheme, But It** 13 **Also Systematically Double-Bills Users for the Same Purported Balance Inquiry.**

14 165. FCTI also sought to increase the revenue its ATM machines were earning, and its
15 solution was to devise a deceptive series of screen prompts to trick consumers into performing balance
16 inquiries they didn’t intend, and had no interest in paying for. But it went even further into the depths of
17 deception and unfairness: it decided to systematically double-bill users for the balance inquiries they
18 were duped into engaging in.

19 166. Put simply, FCTI is causing the Wells Fargo to *double-bill* customers who use their
20 ATM machines and conduct balance inquiries incidental to a cash withdrawal by systematically
21 communicating a second, additional, “Phantom Balance Inquiry” on every balance inquiry. The
22 customers are deceived into making one balance inquiry – and receive two OON Fees from their home
23 banks—in addition to the ATM operator’s surcharge and the bank’s OON Fee, for a total of four
24 discrete fees for a single, one minute interaction with a FCTI machine.

25 167. Every time a banking or credit union customer purportedly makes a balance inquiry at an
26 FCTI ATM machine, Wells Fargo charges *two* OON Fees.

1 168. Defendant FCTI has and continues to double-charge all retail banking and credit union
2 customers by communicating to the Wells Fargo that **two balance inquiries** were made during a **single**,
3 cash withdrawal transaction, when in fact, **only one balance inquiry was made** (and even then, as a
4 result of deception).

5 169. Suffice it to say, no reasonable consumer is knowingly or intentionally agreeing to
6 undertake two balance inquiries in a single cash withdrawal transaction—much less pay for two such
7 balance inquiries.

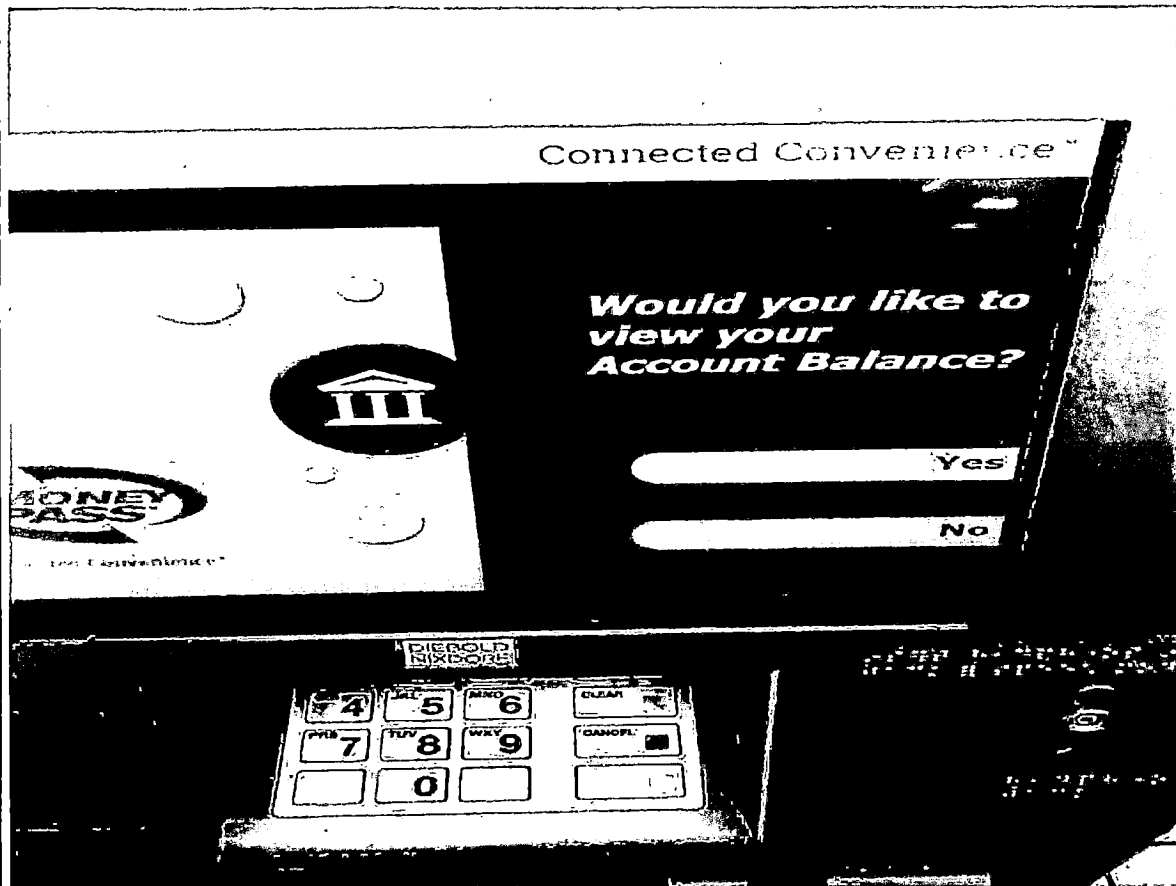
8 **ii. FCTI On-Screen Prompts Are Deceptive**

9 170. FCTI ATM machines are pre-programmed ATMs and uniformly present FCTI’s pre-set
10 screen prompt to customers. FCTI ATM users, including Covell, Garbark and Abdelsalam (the “FCTI
11 Plaintiffs”) entered a 7-Eleven convenience store and made what they understood to be a simple cash
12 withdrawal transaction.

13 171. Upon PIN entry, FCTI ATM users are immediately presented with FCTI’s version of a
14 “Balance Inquiry at Start” screen prompt *See* Exhibit, No. 2; FCTI Screen Prompts;
15 **(FCTI Screen No. 2):**

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172. As discussed above, "Balance Inquiry at Start" increases supposed balance inquiries by creating consumer confusion. It does so by catching unsuspecting customers off guard and tricking them into believing the service is free and an integral part of a cash withdrawal transaction.

173. Moreover, when consumers use ATMs not owned by their own bank, federal law requires the owners of those Out-of-Network ATMs to inform users of the amount of the usage fees charged by the ATM owner.

174. Thus, it is standard at ATMs in the United States that when a consumer uses an ATM not owned by her home bank, a message is displayed on the screen stating that usage of the ATM will cost a specified amount ("Surcharge") to proceed with a withdrawal of funds, and that such a fee is in addition to a fee that may be assessed by a consumer's financial institution for use of the ATM.

175. That message appears only after a user has decided to perform a cash withdrawal and entered the amount of cash she would like to withdraw.

1 176. Through repeated exposure to such fee warning messages, consumers are accustomed to
2 being warned of fee assessments at out of network ATMs, and to being provided with the opportunity to
3 decide whether the fees charged are reasonable—before proceeding with their cash withdrawal. But
4 there is no warning whatsoever at an ATM that any form of balance inquiry could be an event worthy of
5 a fee, either from the ATM owner or from the consumer’s bank.

6 177. Without such a notice, a balance inquiry appears to be nothing more than an
7 unremarkable, free lead-in to a cash withdrawal to reasonable, diligent consumers. Defendants
8 capitalize on this known consumer confusion to lure consumers into inadvertently requesting balance
9 inquiries each year that consumers have no desire or intention to pay for.

10 178. Unwitting customers, including each of the FCTI Plaintiffs, have no idea that answering
11 “Yes” at the FCTI ATM was an event that would cause a fee, both because they are never expressly
12 warned it will be the basis for a fee, and for several other reasons.

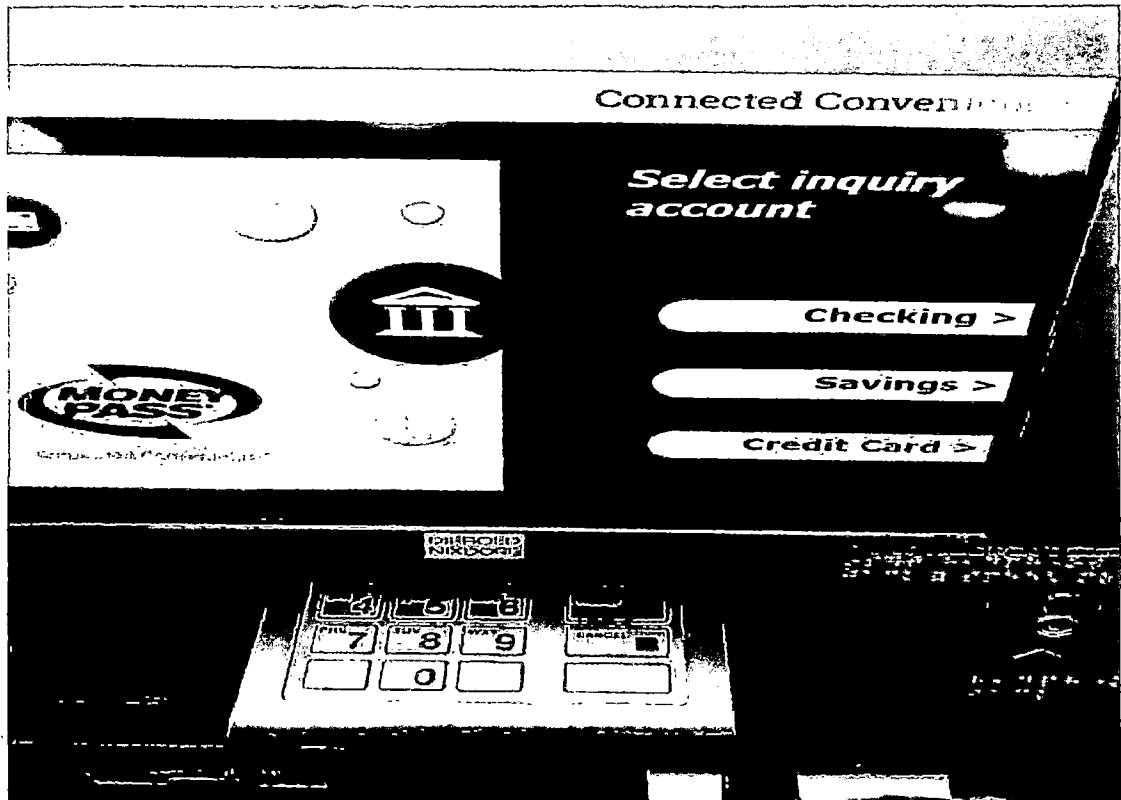
13 179. First, and as is the fundamental intention of Balance Inquiry at Start, the fact that the
14 very first screen presented is a question regarding a balance inquiry is an indication to reasonable
15 consumers that they must select “Yes” in order to proceed.

16 180. Moreover, the ATM user is never asked the simple question “Would you like to perform
17 a balance inquiry?” (As discussed below, the term “balance inquiry” is uniformly used by the Wells
18 Fargo in their account disclosures, but notably not used by the ATM operators.) Especially under the
19 quick time constraints of a real world ATM transaction, reasonable consumers do not understand that
20 “viewing your account balance” as a first step to making a cash withdrawals is equivalent to performing
21 a separate “balance inquiry.”

22 181. FCTI ATM users who select “Yes” next receive the following screen prompt, asking
23 them to select an account (*See* exhibit No. 2; **FCTI Screen No. 3**):

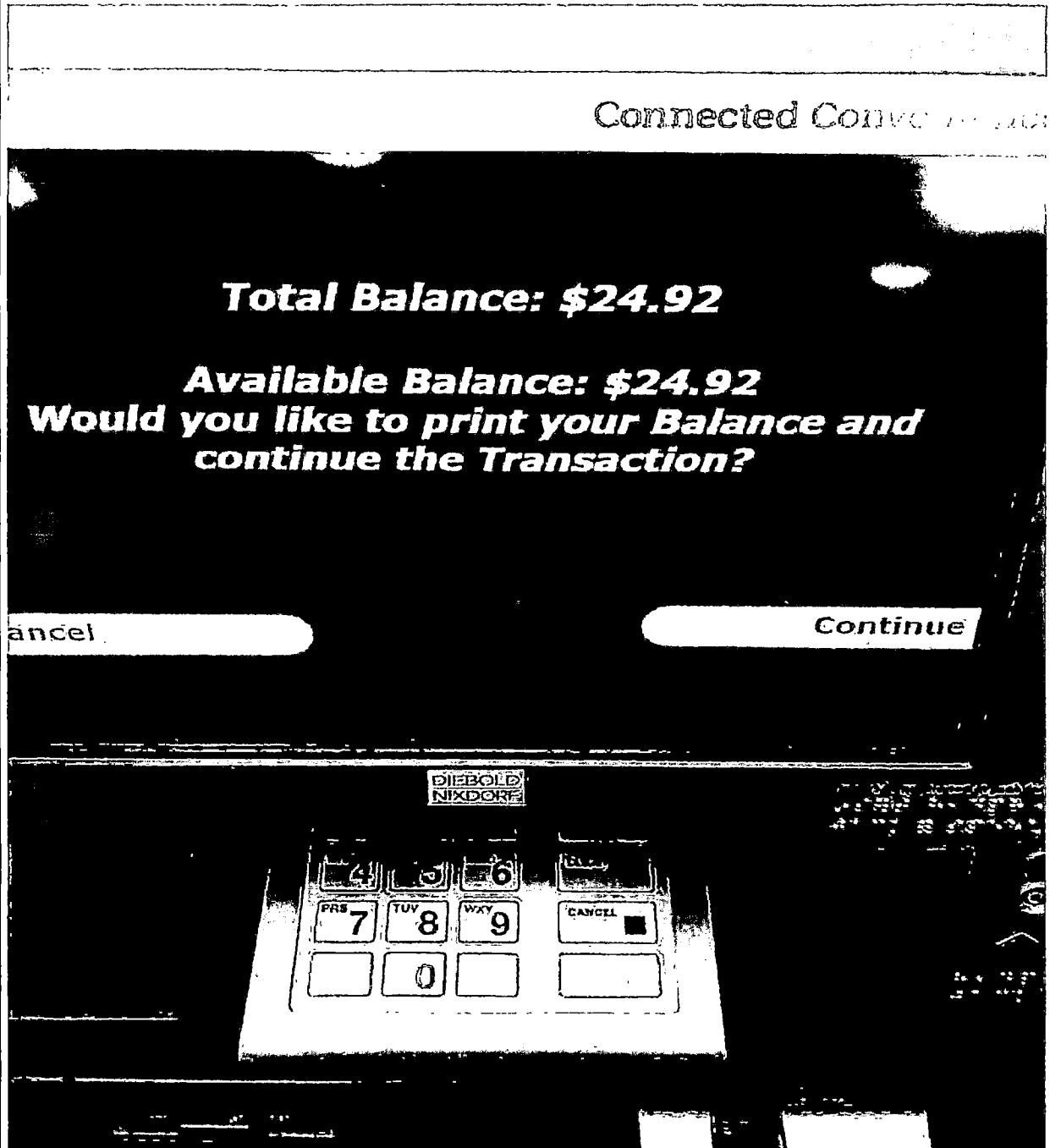
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182. After selecting "Checking," consumers are presented with the following screen, presenting a "Total Balance" and their "Available Balance" for their checking account and asking if the user would like "to print your receipt and *continue* the transaction"(FCTI Screen Prompt No. 4):

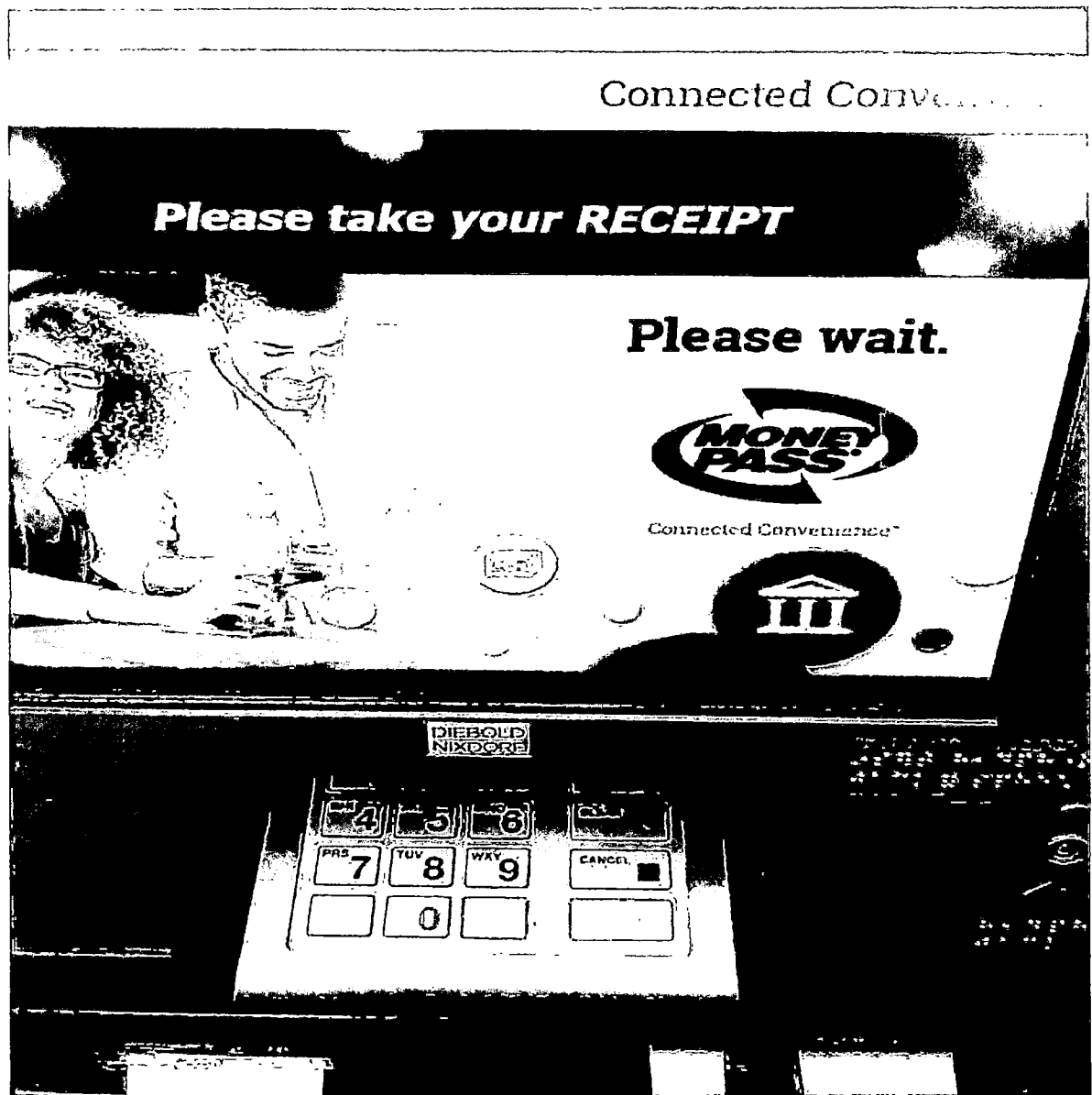
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183. Notably, with the phrase “continue the transaction,” FCTI’s screen prompts expressly represent that the just-performed balance inquiry is part and parcel of the same cash withdrawal “transaction” that the user came to the ATM for in the first place.

184. Because users are simply trying to execute what they came to the ATM for in the first place—a cash withdrawal—and because reasonable consumers understand they must select “Continue”

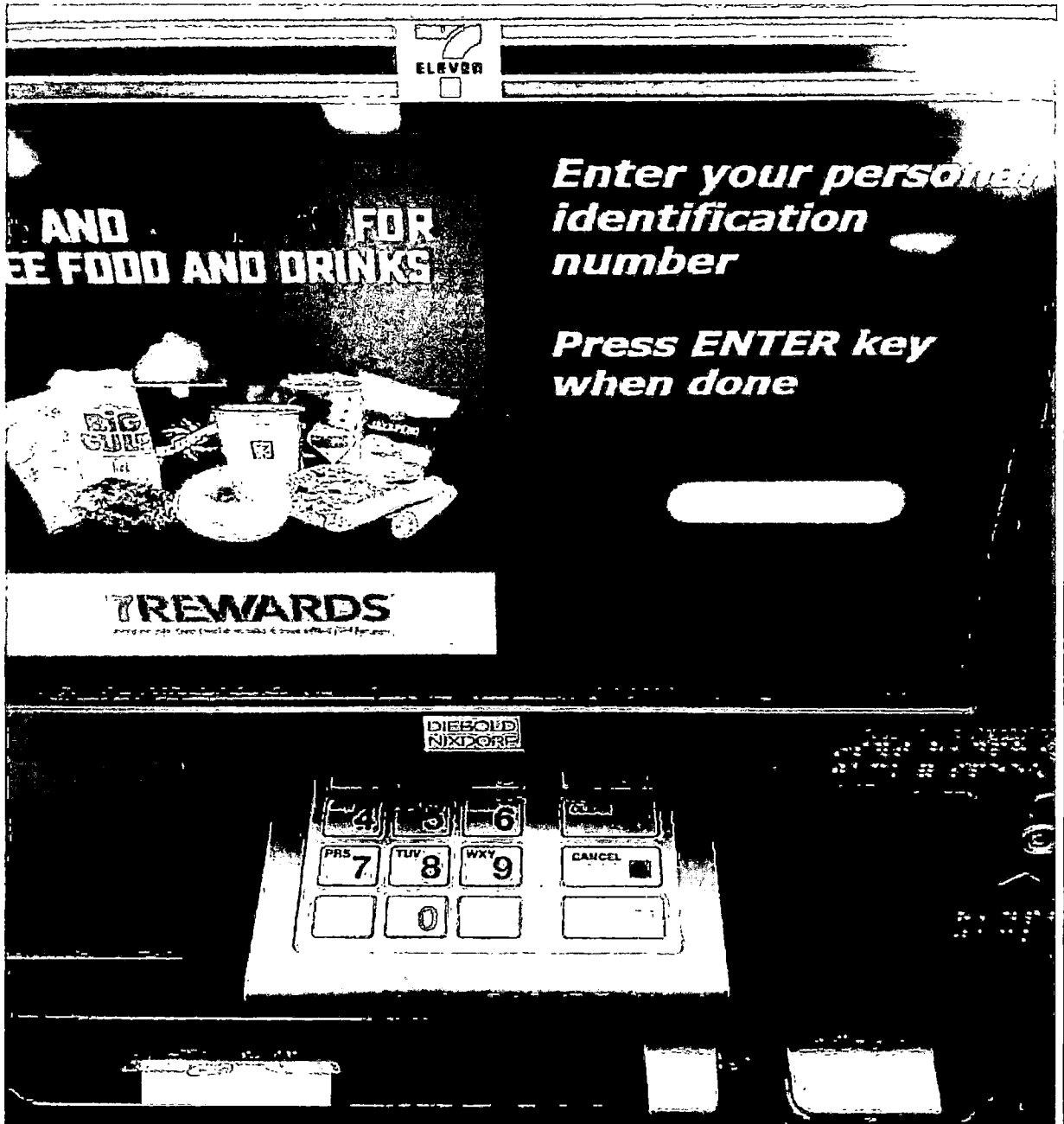
1 in order to do so, reasonable consumers like the FCTI Plaintiffs selected "Continue." Then the
2 following screen appears, *unexpectedly terminating the interaction with the ATM*: FCTI Screen
3 Prompt No. 5 appears:



24 185. Despite having represented that the "transaction" would "continue," FCTI in fact
25 terminates the transaction, then forces users to engage in a *second* transaction, requiring every customer
26 to re-enter their debit card pin in order to proceed with their intended cash withdrawal (FCTI Screen
27 Prompt No. 6):

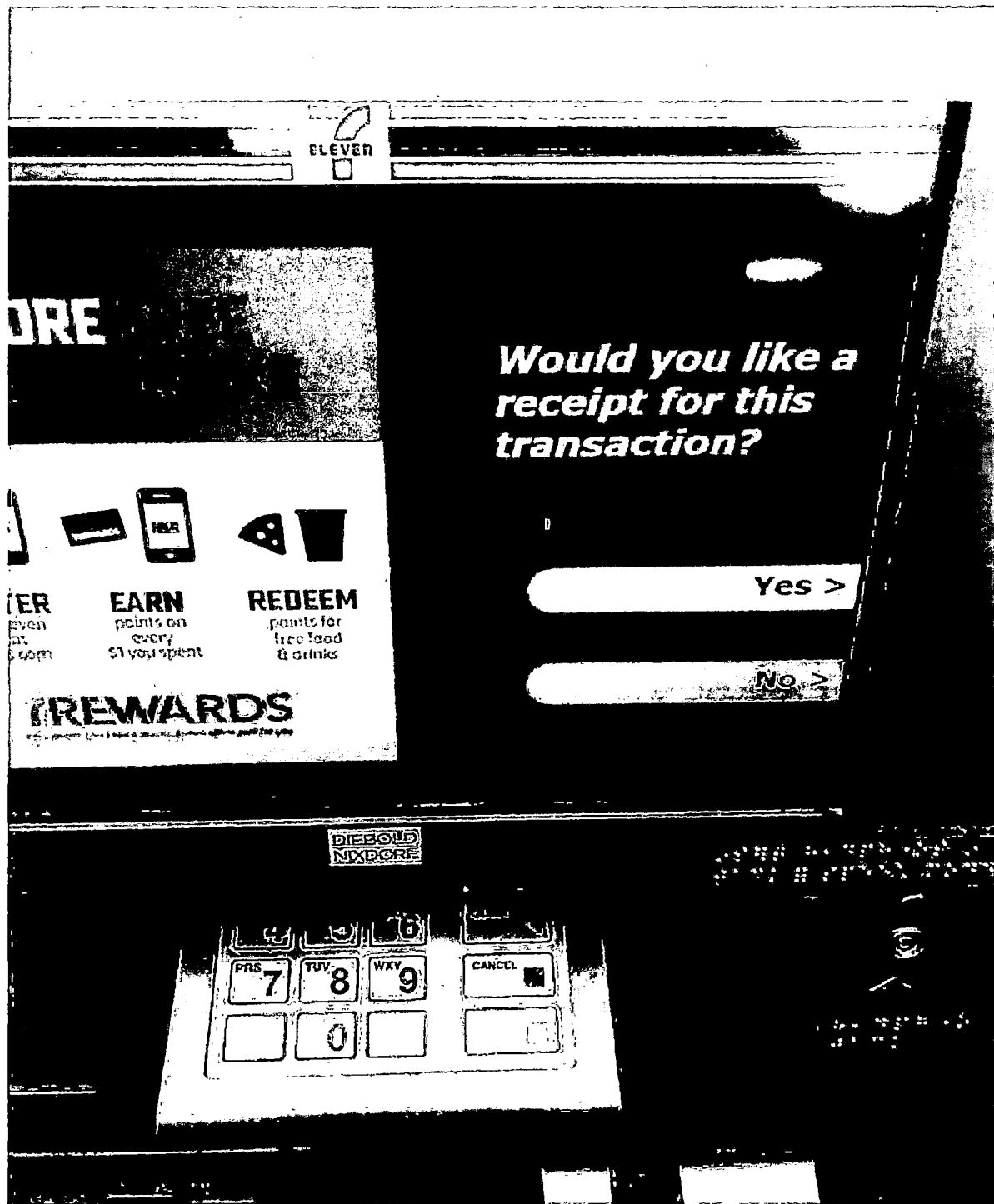
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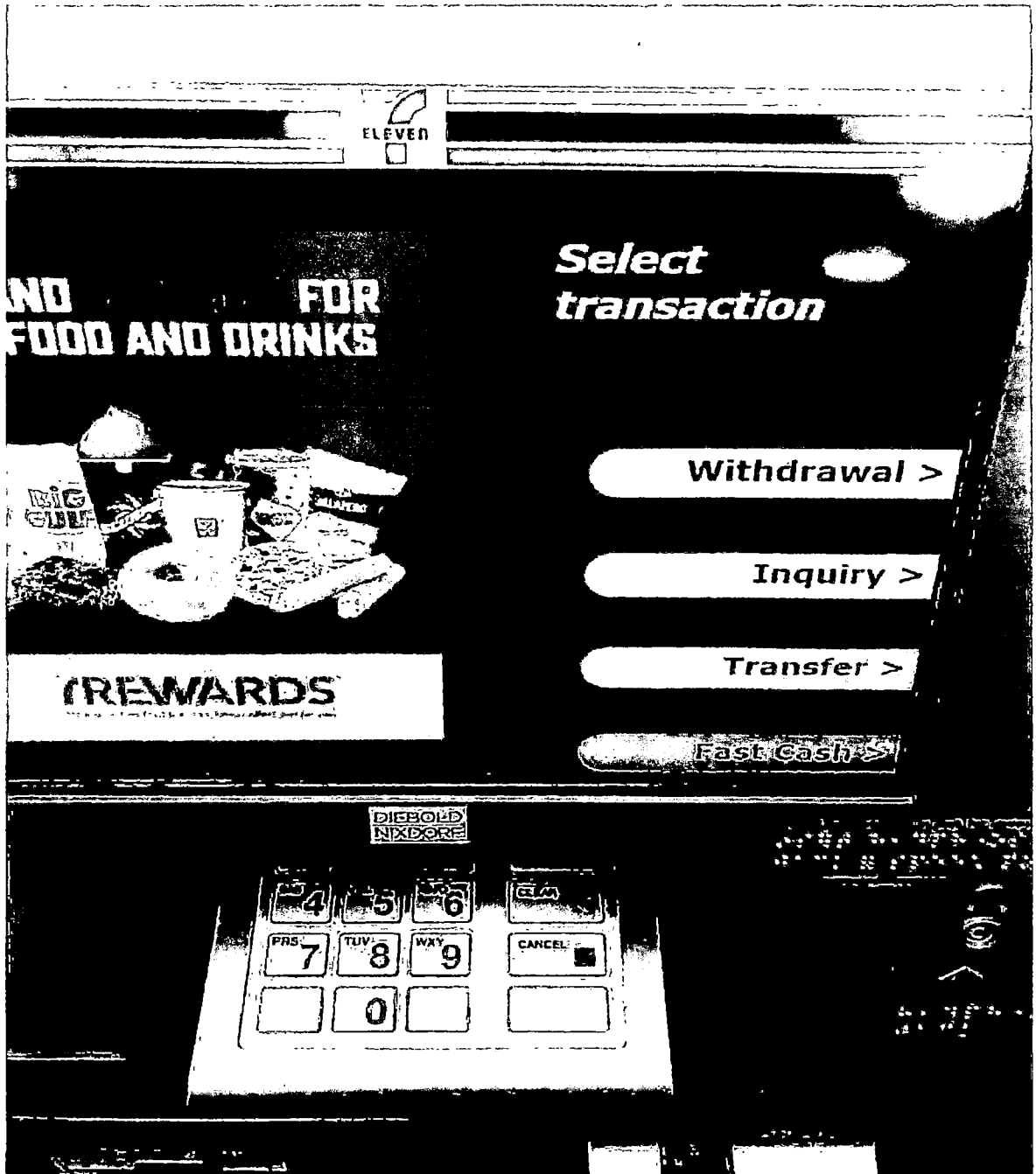
186. Once a user re-enters his or her pin, another screen appears, requesting if the customer would like a receipt for “this” transaction (FCTI Screen Prompt No. 7), with no mention whatsoever of viewing, inquiring or printing a balance:

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26 187. FCTI Screen Prompt No. 7 asks only if the customer would like a “receipt for their
27 transaction”—a transaction that can only reasonably be the cash withdrawal they originally set out to
28 make when they first entered their pin on FCTI Screen Prompt No. 1.

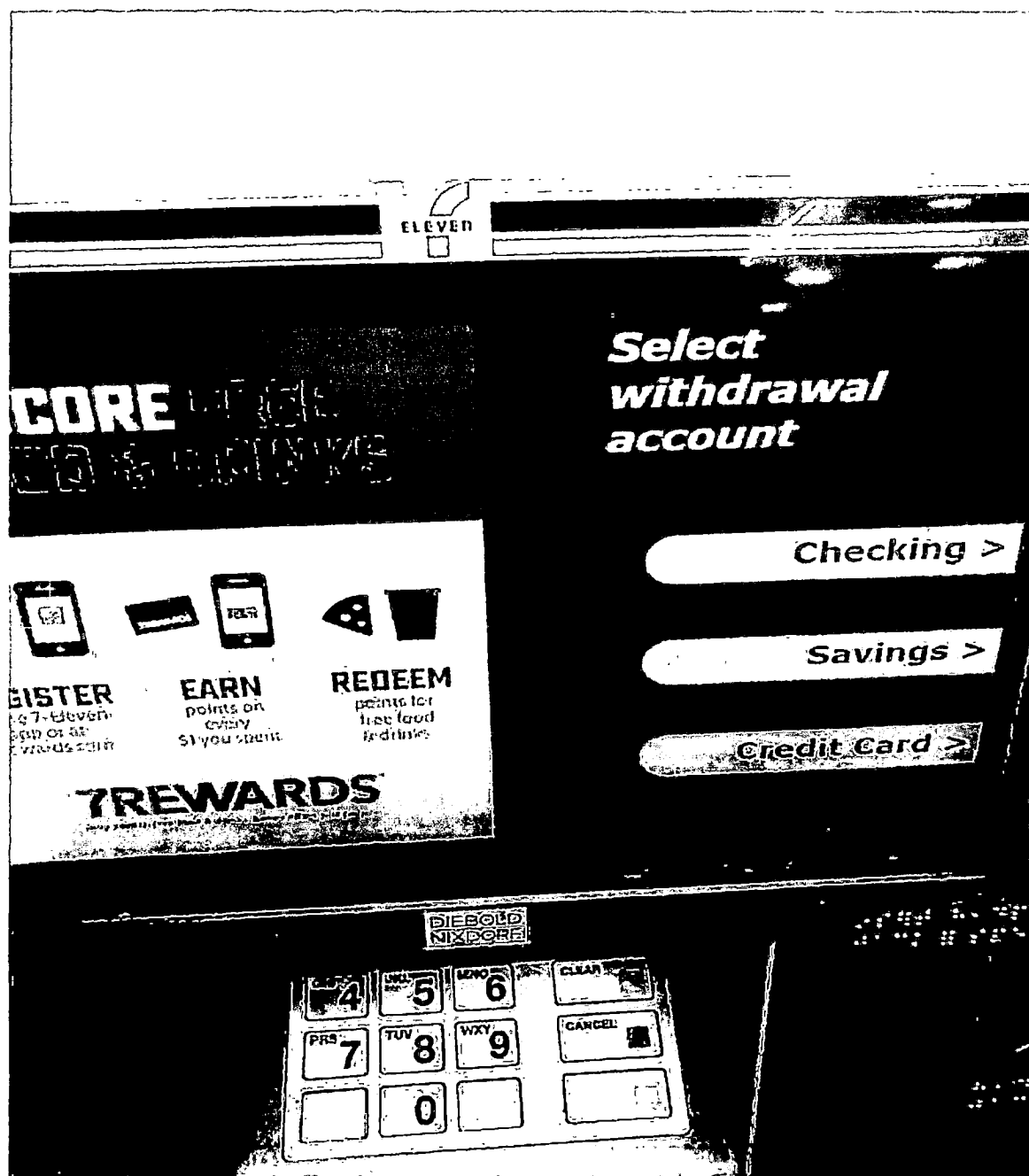
1 188. If the user chooses to request a "receipt," the user is directed to a traditional "main
2 menu" screen (FCTI Screen Prompt No. 8 (below)):



26 189. When a user selects the withdrawal screen, he or she is then directed to choose the
27 account from which they make a withdrawal (FCTI Screen Prompt No. 9 below):

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190. The transaction then proceeds, the customer selects an amount of money to be withdrawn, and the cash is dispensed with a receipt of the transaction. See Exhibit No. 2, FCTI Screen Prompts 10-13.

191. After the initial request asking the customer if they would like to view their available account balance (FCTI Screen Prompt No. 2) until this point, at no time was the customer ever asked

1 for their consent to a second balance inquiry. None of the FCTI Plaintiffs ever even arguably provided
2 consent to a second balance inquiry.

3 192. Yet, in each case, FCTI customers, including the FCTI Plaintiffs, were charged two
4 separate Balance Inquiry Fees by the Wells Fargo during their single cash withdrawal transaction.

5 193. FCTI is doing one of two things: 1) it is either equating the customers' consent to
6 receiving a receipt for their cash withdrawal (*See* FCTI Screen Prompt No. 7) as a second "balance
7 inquiry"; or 2) it is intentionally or inadvertently miscommunicating to their customers' financial
8 institutions, including the Wells Fargo, that their customers are performing two balance inquiries when
9 at the most they could only be considered to have performed one (and even then, under the deceptive
10 circumstances described above). Discovery will reveal which one; either scenario is improper, unfair
11 and unlawful, and both FCTI and the Wells Fargo are reaping huge fee revenues from it.

12 194. Even putting aside the improper and fraudulent assessment and/or communication to
13 Defendant Banks that two balance inquiries were authorized, even the first assessed balance inquiry is
14 deceptive and improper for all the reasons described above.

15 195. The FCTI Plaintiffs were lured with on-screen deception into undertaking a balance
16 inquiry they had no desire or intention to pay for; the harm was then multiplied by FCTI and the
17 Defendant Bank's improper doubling of the first purported balance inquiry.

18 **E. Overview of ATM Claim Against Wells Fargo**

19 196. Plaintiff brings this claim challenging Wells Fargo's practice of assessing two or three
20 out-of-network ATM Fees for certain out-of-network ATM transactions.

21 197. ATM fee revenue for Wells Fargo has risen dramatically in recent years and become one
22 of the primary drivers of the Bank's fee income. Wells Fargo assesses multiple OON Fees on its
23 accountholders who perform transactions on ATMs not owned by Wells Fargo, despite contractual
24 terms dictating otherwise.

25 198. When Wells Fargo accountholders use a non-Wells Fargo ATM, ATM fees add up very
26 quickly—to accountholders' surprise. Not only does the non-Wells Fargo ATM operator charge the
27 consumer a fee for use of its ATM, a charge which now averages \$3.00, but Wells Fargo charges an
28 OON Fee for a cash withdrawal as well—a punishing double-fee on accountholders that can rise to a

1 total of several dollars for simply accessing their own money. With most withdrawals below \$100, the
2 ratio of the ATM fees to the withdrawn amount can often be higher than a year's worth of interest.
3 Wells Fargo never adequately informs consumers they will be charged two separate fees for each non-
4 bank ATM withdrawal, and never once tells consumers the total amount of that double-fee.

5 199. Wells Fargo does not stop there, however. On some out-of-network ATM withdrawals,
6 Wells Fargo accountholders pay a *third* fee for withdrawing funds at an out-of-network ATM—one fee
7 to the ATM operator and *two or three* OON Fees to Wells Fargo. Specifically, when Wells Fargo
8 accountholders are deemed to have requested a balance inquiry prior to withdrawing funds at an out-of-
9 network ATM, Wells Fargo charges its accountholder three OON Fees—*one or two for the purported*
10 *balance inquiry and one for the withdrawal.*

11 200. Wells Fargo's Consumer Account Agreement and other supporting documents
12 misrepresent to accountholders the true nature of Wells Fargo's assessment of these fees. Wells Fargo's
13 contract terms mislead accountholders to believe that a balance inquiry is not a separate, individual
14 transaction; rather, accountholders are lead to believe that a balance inquiry is part of a single
15 transaction, such as a deposit or withdrawal, conducted almost simultaneously at a single out of network
16 ATM.

17 201. Alternatively, Wells Fargo's Consumer Account Agreement terms also provides
18 discretion as to when Wells Fargo will deem consumer responses to out-of-network ATM screen
19 prompts as tantamount to a "balance inquiry" for purposes of fee assessment. It uses that discretion
20 unfairly and abusively when it automatically and in all cases follows the ATM operators' coding and
21 when it charges fees for balance inquiries purportedly undertaken as part of a cash withdrawal.
22 Additionally, without a screen notification on the ATM indicating that an OON Fee will be charged, no
23 reasonable consumer would believe that they would subsequently be charged.

24 202. For a simple out-of-network ATM withdrawal, for example, Plaintiff paid a total of
25 \$7.50 for three separate fees, including \$4.50 for two separate fees to Wells Fargo.

26 203. Wells Fargo's uniform practice of charging two OON Fees per cash withdrawal preceded
27 by a balance inquiry is unfair and deceptive, violates representations in Wells Fargo's account
28 documents, and constitutes a breach of contract. Indeed, Wells Fargo's account documents fail to

1 provide adequate notice of the possibility of being charged two fees by Wells Fargo during one
2 transaction at an out of network ATM.

3 **F. Wells Fargo Profits From The Combined Deceptions In Its Account Documents And**
4 **On Out Of Network ATM Screens**

5 204. Plaintiffs bring this class action against Wells Fargo arising from their unfair and
6 unconscionable assessment of two or three OON Fees on a single, one-or-two-minute ATM cash
7 withdrawal that happens to be preceded a balance inquiry. There is simply no warning, at the out of
8 network ATM or in Wells Fargo's account disclosures, that 1) consumers will be charged for a balance
9 inquiry merely by agreeing to see their balance on a receipt, much less two of them (*See* ¶ 187 *infra*); 2)
10 consumers will be charged two or three OON Fees on a single ATM transaction; and 3) a balance
11 inquiry performed in conjunction with, and as an integral part of, the same cash withdrawal transaction
12 will, for fee assessment purposes, be treated the same as a balance inquiry for OON Fee purposes.

13 205. Wells Fargo profits handsomely from what it knows to be deceptive and false out of
14 network ATM screen prompts that lure consumers into purported balance inquiries without describing
15 them as such, without consumers having freely chosen them, and without consumers ever having been
16 warns they would result in a fee assessment.

17 206. Wells Fargo is fully aware of the infirmities with the representations made on out of
18 network ATMs—they could not help but be aware, as they have seen their ATM fee revenues
19 attributable to OON Fees rise exponentially over the years.

20 207. When the accountholders of Wells Fargo use an out-of-network ATM, including the
21 FCTI ATM machines described below, the fees add up very quickly—to their surprise. American
22 consumers simply do not know they can be assessed *three discrete fees for a simple out of network*
23 *ATM session that lasts less than two minutes*. Wells Fargo, along with the ATM owners, are all too
24 happy to keep consumers in the dark.

25 208. Here's how the fees add up. Not only do ATM owners charge consumers a surcharge for
26 withdrawing cash at their ATMs, but Wells Fargo charges an OON Fee for that withdrawal as well—a
27 punishing double-fee on accountholders that often rises to \$6 or \$7. Wells Fargo does not stop there,
28 however. Specifically, as noted above, when accountholders are deemed to have checked their account

1 balance prior to withdrawing funds at an Out-of-Network ATM—often through the force of the
2 deceptive screen prompts designed by ATM owners—Wells Fargo charges their accountholders *two* or
3 *three* OON Fees—one for the out of network withdrawal, one for the supposed balance inquiry (even if
4 the customer was tricked into making it), and in the case of withdrawals at FCTI machines, an
5 additional fee for a *phantom* balance inquiry. Consumers are thus charged three fees for a simple Out
6 of Network ATM withdrawal that was preceded by what Wells Fargo determined in their discretion
7 counted as a consented-to balance inquiry.

8 209. Wells Fargo’s practice of charging two or three OON Fees per transaction is deceptive
9 and violates representations in the Wells Fargo’ account documents. The Banks’ various account
10 documents do nothing to place consumers on notice of the large triple or quadruple-fee for an Out-of-
11 Network ATM withdrawal preceded by what they deem to be a consented-for “balance inquiry.”

12 **C. Wells Fargo Exploits Consumers Reasonable Expectations That They Will Only Be**
13 **Charged One Fee for an Out of Network Withdrawal Preceded by A Balance Inquiry.**

14 210. When consumers use ATMs not owned by their own bank, federal law requires the
15 owners of those Out-of-Network ATMs to inform users of the amount of the usage fees charged by the
16 ATM owner.

17 211. Thus, it is standard at ATMs in the United States that when a consumer uses an ATM not
18 owned by her home bank, a message is displayed on the screen stating that usage of the ATM will cost
19 a specified amount (“Surcharge”) to proceed with a withdrawal of funds, and that such a fee is in
20 addition to a fee that may be assessed by a consumer’s financial institution for use of the ATM. *See*
21 *supra*.

22 212. Through repeated exposure to such fee warning messages, consumers are accustomed to
23 being warned of fee assessments at out of network ATMs, and to being provided with the opportunity to
24 decide whether the fees charged are reasonable—before proceeding with their cash withdrawal.

25 213. Wells Fargo knows this—that consumers expect a fair fee disclosure at the ATM—and
26 have designed a scheme to assess Out of Network Fees on balance inquiries and exploit consumers’
27 reasonable expectation that they will only engage in fee-worthy actions knowingly and with appropriate
28 disclosures—and will be provided a warning and an opportunity to cancel actions before being assessed

1 a fee. As described herein, the scheme involves assessing two or more additional OON Fees for
2 pressing buttons during a cash withdrawal transaction that the Banks, in their discretion, deem to be
3 tantamount to requests for balance inquiries.

4 214. As demonstrated below, many ATMs have adopted Balance Inquiry at Start in various
5 forms, with on-screen displays that lure consumers into engaging in purported balances inquires they
6 never intended to perform and never intended to pay for.

7 215. None of these ATM screens ever disclose that a balance inquiry alone is an independent
8 basis for a fee from either the ATM owner or the user's bank—or warn consumers in any way that
9 checking a balance could result in a fee.

10 216. Repeated exposure to such messages is partly responsible for building the reasonable
11 consumer understanding that a balance inquiry is a common lead-in to a withdrawal, a mere first step to
12 the real business at hand, an informational exercise offered by the ATM to help inform the cash
13 withdrawal.

14 217. Reasonable consumers like Plaintiff do not, in sum, understand a balance inquiry to be
15 an independent transaction worthy of a separate fee.

16 218. Wells Fargo knows this—that in the absence of a prominent warning otherwise,
17 consumers expect a balance inquiry to be an integral, included part of a cash withdrawal—and they
18 know FCTI, through the deployment of deceptive screen prompts, has figured out a way to sever the
19 actions and make them into separate, fee-worthy transactions, without ever informing the customer that
20 they have just engaged in two, separate, out of network transactions that will be assessed two or more
21 OON Fees.

22 219. Wells Fargo has designed a scheme to assess OON Fees on those purported balance
23 inquiries. The Banks prey on the common sense that a balance inquiry preceded by a cash withdrawal
24 is not an independent and separate transaction and therefore should not form the basis for a separate fee.

25 220. If a Bank is going to charge such a conscience-shocking fee, it must fully and fairly
26 disclose such a fee in its account documentation. The Wells Fargo did the opposite—providing express
27 and implied indications that balance inquires undertaken in conjunction with cash withdrawals would
28 not incur additional OON Fees.

1 221. Wells Fargo holds complete discretion to determine whether an Out of Network
 2 Transaction occurred for purposes of determining whether a fee should be assessed. Rather than
 3 exercising their discretion in a manner that is fair to the consumers, Wells Fargo uniformly accepts what
 4 FCTI conveys to it, and gladly assesses a fee for anything deemed an out-of-network transaction by
 5 FCTI. This results in the consumers beings charged Out of Network fees for transactions where the
 6 customers were tricked into unwanted balance inquiries (i.e. at FCTIATM machines), or told explicitly
 7 that such inquiries would be “Free” (i.e. at Cash Depot ATMs) or are even being doubled charged for a
 8 single transaction (i.e. at all FCTI ATMs).

9 222. In other words, Wells Fargo has adopted automated processes that totally fails to
 10 distinguish between the very rare balance inquiries that, because they are not performed in conjunction
 11 with a cash withdrawal, are intentionally and knowingly consented to, and are fully and daily disclosed
 12 at the ATM, are valid; and those that are not.

13 **D. Account Disclosures**

14 223. Plaintiff Ashleigh Hartman has a Wells Fargo checking account, which is governed by
 15 Wells Fargo’s standardized Consumer Account Agreement.

16 224. Wells Fargo issues debit cards to its checking account customers, including Plaintiff,
 17 which allows its customers to have electronic access to their checking accounts for purchases,
 18 payments, and ATM withdrawals at both Wells Fargo and non-Wells Fargo ATMs.

19 225. Against the backdrop of the reasonable consumer expectations and federal law above,
 20 Wells Fargo’s disclosures deceive consumers and reinforce the reasonable understanding that no fee
 21 will be assessed for a balance inquiry—especially if ATM users are not warned beforehand.

22 226. Wells Fargo’s disclosures also reinforce the common sense presumption that there can be
 23 no balance inquiry fee when such an inquiry is in conjunction with a cash withdrawal at the same ATM.

24 227. Pursuant to Wells Fargo’s Account Agreement in effect at the time of the relevant
 25 transactions:

26 **Debit cards and ATM cards – Fees for use of card:** We will charge a fee for each
 27 non-Wells Fargo ATM transaction you perform (except for deposits or as waived by
 28 the terms of your account). In addition, the non-Wells Fargo ATM owner/operator will
 also charge a fee (unless waived by the terms of your account). This fee is included in

1 the total transaction amount that is withdrawn from your account. Transactions will be
2 limited to any withdrawal limits set by the non-Wells Fargo ATM.

3 Exhibit B, Consumer Account Agreement, p. 38 (emphasis added).

4 228. The language “a fee” reasonably implies to accountholders that a single fee will be
5 assessed during an out of network ATM transaction. However, this is not Wells Fargo’s practice: the
6 Bank imposes two OON Fees when it deems that a consumer checks her account balance immediately
7 preceding a cash withdrawal at the same out of network ATM machine.

8 229. Moreover, Wells Fargo’s Consumer Account Agreement misrepresents the mandatory
9 nature by which such “fee” will be assessed:

10 **What you can do at non-Wells Fargo ATMs:** View your account balance (fees may
11 apply); Withdraw cash (fees may apply).

12 Exhibit B, Consumer Account Agreement, p. 37 (emphasis added).

13 230. An informational “Checking Accounts” chart located in the Fee Schedule completely
14 fails to disclose to accountholders of Wells Fargo’s standard checking accounts the existence of, or even
15 the possibility of incurring, these mandatory fees. *See* Consumer Account Agreement, p. 19. In
16 contrast, accountholders who maintain Wells Fargo Portfolio checking accounts, (*i.e.*, accounts that
17 offer preferred services for customers who qualify by having higher balances), are provided full
18 disclosure of these fees. *See id.*, at p. 7 (“As a Portfolio by Wells Fargo customer, you receive many
19 banking benefits . . . No Wells Fargo fee for balance inquiries and account transfers at any ATM.”).

20 231. Wells Fargo intentionally fails to clearly disclose these types of fees to accountholders of
21 standard checking accounts because had they known the truth about the various hidden fees, those
22 accountholders would simply choose to bank elsewhere at an institution that does not impose
23 unconscionable OON Fees.

24 232. Based on the Consumer Account Agreement and Fee Schedule’s language, standard
25 checking accountholders would have no reason to believe that (a) a balance inquiry is a separate,
26 individual transaction, such that it will undoubtedly incur an additional OON Fee when it precedes a
27 withdrawal, and/or (b) a balance inquiry fee is actually a service fee that may or may not be charged to
28 the consumer, and especially will not be charged during instances where ATM machines fail to disclose

1 the same.

2 233. Accountholders using a non-Wells Fargo ATMs are never warned that they will receive
3 **two separate fees** from Wells Fargo—plus, sometimes, another one from the ATM owner—when they
4 check their balance before proceeding with a cash withdrawal at the same ATM. But that is exactly
5 what happens.

6 234. As discussed *supra*, ATMs immediately prompt consumers to check their balance, and
7 never warn that such a balance inquiry will be the basis for a fee, either from the ATM owner or from
8 the consumer’s own bank. Wells Fargo’s disclosures do nothing to disabuse consumers of the
9 reasonable understanding that a balance inquiry will not incur a separate fee when it precedes a cash
10 withdrawal at the same ATM.

11 235. Moreover, reasonable consumers like Plaintiff do not understand—and are never
12 warned—that a mere balance inquiry (in which no funds are transferred in any way) counts on its own
13 as a separate “transaction” that could be the basis for an independent OON Fee.

14 236. Merriman-Webster defines “transaction” to mean “something transacted; *especially*: an
15 exchange or transfer of goods, services, or funds.” There is no exchange or transfer involved in a
16 balance inquiry; a balance inquiry is merely a precursor to the actual “transaction”—the cash
17 withdrawal.

18 237. These disclosures totally fail to authorize the assessment of multiple OON Fees on the
19 same ATM usage; or on a balance inquiry that precedes a cash withdrawal.

20 238. The most reasonable understanding of this disclosure is that for all activities incident to a
21 cash withdrawal, including a balance inquiry undertaken simultaneously, a single \$2.50 fee will be
22 assessed by Wells Fargo, and a single fee “may” be assessed by the ATM operator; conversely, only
23 when an inquiry alone is undertaken at an out of network ATM, a fee of \$2.50 will be assessed.

24 239. When a balance inquiry precedes a withdrawal, common sense and consumer
25 expectation dictates that that two-step process is part of the same ATM “use.”

26 240. In general, and in Plaintiffs’ case here, the ATM owner does not warn the user that there
27 is a separate charge for a balance inquiry, and in fact the ATM owner does not charge a separate fee to
28

1 the user for a balance inquiry. Therefore, the user can have no reasonable expectation that Wells Fargo
2 will assess a fee for an action that the ATM owner does not charge or warn about.

3 241. Wells Fargo accountholders using a non-Wells Fargo ATM are never warned that they
4 will receive two separate fees from Wells Fargo—plus another one from the ATM owner—when they
5 check their balance before proceeding with a cash withdrawal at the same ATM. But that is exactly
6 what happens.

7 242. Moreover, Wells Fargo reserves sole discretion as to when it will impose an ATM Fee
8 for a balance inquiry at an out of network ATM and when it will deem that activities undertaken at an
9 out of network ATM constitute a balance inquiry. Wells implies that it will exercise its discretion in
10 good faith and in some cases will not impose a fee. In fact, it has adopted an automated process that
11 blindly and in all cases simply accepts the ATM owner’s electronic communication to it that one or
12 more balance inquiries have ben knowingly requested by its accountholder.

13 243. At the very least, by the repeated use of “may,” Wells Fargo uses contractual discretion
14 in bad faith when it a) unfairly deems as “balance inquiries” supposedly requested during a deceptive
15 and unfair series of ATM prompts; b) assesses two OON Fees during the same ATM use on when a
16 balance inquiry immediately precedes a cash withdrawal; c) never explains the circumstances under
17 which an accountholder interaction with an out of network ATM will be considered a “balance inquiry”
18 for purposes of an additional OON Fee; d) assesses fees for so called “balance inquiries” even when on-
19 screen prompts at out of network ATMs never use the same phrase.

20
21 **G. Plaintiff Hartman’s FCTI Out of Network ATM Balance Inquiry Transactions**

22 244. On or around June 20, 2018, Plaintiff Hartman placed her Wells Fargo ATM debit card
23 into the FCTI ATM located at a 7-11 convenience store at University Avenue, San Diego, CA 92104 to
24 make a \$20.00 cash withdrawal. Following her transaction, Plaintiff Hartman was surprised to learn that
25 she was assessed, in addition to the cash withdrawal surcharge paid to FCTI (\$2.95), a separate \$2.00
26 fee from Wells Fargo for making an out-of-network balance inquiry, and an additional \$2.50 fee from
27 Wells Fargo for making an out-of-network cash withdrawal. Plaintiff Hartman was also charged a
28 **second** out-of-network balance inquiry fee from Wells Fargo for \$2.00, despite making and consenting

1 to one single balance inquiry transaction. She was charged \$9.45 in total fees for making a \$20.00 cash
2 withdrawal.

3
4 CLASS ACTION ALLEGATIONS

5 245. Plaintiffs bring this action on behalf of themselves and on behalf of all others similarly
6 situated. The Classes include:

7 All holders of a WELLS FARGO checking and/or money market account in
8 California who, within the applicable statute of limitations preceding the filing of
9 this lawsuit, incurred both an NSF Fee and an Overdraft Fee, or more than one NSF
10 Fee, on the same item (the "Multiple Fee Class").

11 All holders of a WELLS FARGO checking account in California who, within the
12 applicable statute of limitations preceding the filing of this lawsuit, were assessed
13 two or more OON Fees when they performed a balance inquiry prior to withdrawing
14 cash at an out-of-network ATM (the "OON Class").

15 All holders of a WELLS FARGO checking account in California who, within the
16 applicable statute of limitations preceding the filing of this lawsuit, were charged OD
17 Fees on transactions that were authorized into a positive available balance (the
18 "APPSN Class").

19 All holders of a checking account in California who, within the applicable statute of
20 limitation preceding the filing of this lawsuit, were assessed one or more fees for
21 purportedly undertaking a balance inquiry as part of a cash withdrawal at a FCTI
22 ATM (the "FCTI Class").

23 246. Excluded from the Classes are Defendants, their subsidiaries and affiliates, their officers,
24 directors and member of their immediate families and any entity in which defendants have a controlling
25 interest, the legal representatives, heirs, successors or assigns of any such excluded party, the judicial
26 officer(s) to whom this action is assigned, and the members of their immediate families.

27 247. Plaintiffs reserve the right to modify or amend the definition of the proposed Classes
28 and/or to add a Subclass(es) if necessary before this Court determines whether certification is
appropriate.

29 248. The questions here are ones of common or general interest such that there is a well-
30 defined community of interest among the class members. These questions predominate over questions
31 that may affect only individual class members because Wells Fargo and/or FCTI have acted on grounds

1 generally applicable to the classes. Such common legal or factual questions include, but are not limited
2 to:

- 3 a) Whether Wells Fargo improperly charged both NSF Fees and OD Fee on the
4 same items;
- 5 b) Whether Wells Fargo charged OON Fees for balance inquiries made in
6 conjunction with a withdrawal at out-of-network ATMs;
- 7 c) Whether Wells Fargo improperly charged OD Fees on APPSN Transactions;
- 8 d) Whether FCTI double-charged OON Fees for single balance inquiries;
- 9 e) Whether such conduct enumerated above violates the contract;
- 10 f) Whether such conduct is deceptive or in bad faith;
- 11 g) Whether Wells Fargo and FCTI violated the UCL and CLRA; and
- 12 h) Whether Plaintiffs and other members of the Classes have sustained damages as
13 a result of Wells Fargo and FCTI's wrongful business practices described herein,
and the proper measure of damages.

14 249. The parties are numerous such that joinder is impracticable. Upon information and
15 belief, and subject to class discovery, the Classes consist of thousands of members or more, the identity
16 of whom are within the exclusive knowledge of and can be ascertained only by resort to Wells Fargo's
17 records. Wells Fargo has the administrative capability through its computer systems and other records
18 to identify all members of the Classes, and such specific information is not otherwise available to
19 Plaintiff.

20 250. It is impracticable to bring Class members' individual claims before the Court. Class
21 treatment permits a large number of similarly situated persons or entities to prosecute their common
22 claims in a single forum simultaneously, efficiently and without the unnecessary duplication of
23 evidence, effort, expense, or the possibility of inconsistent or contradictory judgments that numerous
24 individual actions would engender. The benefits of the class mechanism, including providing injured
25 persons or entities with a method for obtaining redress on claims that might not be practicable to pursue
26 individually, substantially outweigh any difficulties that may arise in the management of this class
27 action.

1 251. Plaintiffs' claims are typical of the claims of the other Class members in that they arise
2 out of the same wrongful business practices by Wells Fargo and/or FCTI, as described herein.

3 252. Plaintiffs are more than an adequate representatives of the Classes in that they have a
4 Wells Fargo checking account and have suffered damages as a result of Wells Fargo's and/or FCTI's
5 usurious and improper business practices. In addition:

- 6 a) Plaintiffs are committed to the vigorous prosecution of this action on behalf of
7 themselves and all others similarly situated and have retained competent counsel
8 experienced in the prosecution of class actions and, in particular, class actions on
9 behalf of consumers against financial institutions;
- 10 b) There is no conflict of interest between Plaintiffs and the unnamed Class members;
- 11 c) They anticipate no difficulty in the management of this litigation as a class action;
12 and
- 13 d) Plaintiffs' legal counsel has the financial and legal resources to meet the substantial
14 costs and legal issues associated with this type of litigation.

15 253. Plaintiffs know of no difficulty to be encountered in the maintenance of this action that
16 would preclude its maintenance as a class action.

17 254. Wells Fargo and/or FCTI has acted or refused to act on grounds generally applicable to
18 the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with
19 respect to the class as a whole.

20 255. All conditions precedent to bringing this action have been satisfied and/or waived.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
BREACH OF CONTRACT INCLUDING THE COVENANT
OF GOOD FAITH AND FAIR DEALING
(On behalf of the Multiple Fee Class)

23 256. Plaintiff Lotsoff incorporates the preceding allegations by reference as if fully set forth
24 herein.

25 257. Plaintiff Helen Lotsoff and Wells Fargo contracted for checking account and debit card
26 services, as embodied in the Consumer Account Agreement.

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1 258. The Consumer Account Agreement states that Wells Fargo will not assess both an OD
2 Fee and an NSF Fee on the same item.

3 259. Wells Fargo breached the contract when it authorized and charged NSF Fees and
4 overdraft fees on the same item.

5 260. Plaintiff and members of the putative Class have performed all of the obligations on
6 them pursuant to the Consumer Account Agreement.

7 261. Plaintiff and members of the putative Class have sustained monetary damages as a result
8 of Defendants' breach.

9 262. Under the laws of the State of California where Wells Fargo does business, good faith is
10 an element of every contract. Whether by common law or statute, all such contracts impose upon each
11 party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing
12 contracts and discharging performance and other duties according to their terms, means preserving the
13 spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually
14 obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the
15 bargain and abusing the power to specify terms constitute examples of bad faith in the performance of
16 contracts.

17 263. Subterfuge and evasion violate the obligation of good faith in performance even when an
18 actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair
19 dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain,
20 willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or
21 failure to cooperate in the other party's performance.

22 264. Wells Fargo breached the covenant of good faith and fair dealing in its Consumer
23 Account Agreement through its OD Fee policies and practices as alleged herein. Specifically, Wells
24 Fargo's Consumer Account Agreement misrepresents to accountholders the true nature of Wells
25 Fargo's assessment of its OD Fees. Wells Fargo's contract terms are unclear and mislead
26 accountholders to believe that a both an OD Fee and NSF Fee would be assessed on a single item.

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1 265. Plaintiff Lotsoff and members of the Class have performed all, or substantially all, of the
 2 obligations imposed on them under the Consumer Account Agreement.

3 266. Plaintiff Lotsoff and members of the Class have sustained damages as a result of Wells
 4 Fargo’s breach of the contract and the covenant of good faith and fair dealing.

5 **SECOND CAUSE OF ACTION**
 6 **BREACH OF CONTRACT INCLUDING THE COVENANT**
 7 **OF GOOD FAITH AND FAIR DEALING**
 8 **(On behalf of the OON Class and FCTI ATM Class)**

9 267. Plaintiff Ashleigh Hartman incorporates by reference each of the allegations set forth in
 10 the preceding paragraphs.

11 268. Plaintiff and Wells Fargo have contracted for bank account deposit, checking, ATM, and
 12 debit card services, as embodied in Wells Fargo’s Consumer Account Agreement, Fee Schedule, and
 13 related documents.

14 269. Wells Fargo has misconstrued in its Consumer Account Agreement, Fee Schedule, and
 15 related documents the true nature of its mandatory assessment of OON Fees at out of network ATM
 16 transactions and breached the terms of its Agreement with accountholders.

17 270. No contractual provision authorizes Wells Fargo to assess an OON Fee for a transaction
 18 at an out-of-network ATM without the Fee charged by Wells Fargo being displayed on the ATM screen
 19 and being given an opportunity to cancel the transaction before the fee is imposed.

20 271. Similarly, no contractual provision authorizes Wells Fargo to assess two OON Fees
 21 arising from a single balance inquiry transaction preceding a cash withdrawal when a customer uses an
 22 FCTI ATM machine.

23 272. Therefore, Wells Fargo breached the terms of its Consumer Account Agreement by
 24 charging multiple OON Fees for such transactions at out-of-network ATMs, including at Defendant
 25 FCTI’s ATM machines.

26 273. Under the laws of the State of California where Wells Fargo and FCTI do business, good
 27 faith is an element of every contract. Whether by common law or statute, all such contracts impose
 28 upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with
 executing contracts and discharging performance and other duties according to their terms, means

1 preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are
2 mutually obligated to comply with the substance of their contract in addition to its form. Evading the
3 spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the
4 performance of contracts.

5 274. Subterfuge and evasion violate the obligation of good faith in performance even when an
6 actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair
7 dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain,
8 willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or
9 failure to cooperate in the other party's performance.

10 275. Wells Fargo has breached the covenant of good faith and fair dealing in the Consumer
11 Account Agreement through its OON Fee policies and practices as alleged herein. Specifically, Wells
12 Fargo's Account Contract misrepresents to accountholders the true nature of Wells Fargo's assessment
13 of its OON Fees. Wells Fargo's contract terms are unclear and mislead accountholders to believe that a
14 balance inquiry is not a separate, individual transaction; rather, accountholders are lead to believe that a
15 balance inquiry is part of a single transaction, such as a deposit or withdrawal, conducted almost
16 simultaneously at a single out of network ATM. Alternatively, Wells Fargo's Account Contract terms
17 suggest that OON Fees "may" be applied at out of network ATM transactions. These permissive terms
18 indicate to accountholders that Wells Fargo has the discretion to charge or not to charge these OON
19 Fees, when in reality, they are always assessed. Additionally, without a screen notification on the ATM
20 indicating that an OON Fee will be charged, no reasonable consumer would believe that they would
21 subsequently be charged.

22 276. Moreover, Wells Fargo's practice of blindly permitting FCTI to determine for them
23 when and how an out-of-network ATM transaction has occurred and then subsequently collecting
24 double the amount of out-of-network balance inquiry fees that they would otherwise be entitled to
25 constitutes a breach of the covenant of good faith and fair dealing. FCTI similarly profits from this
26 breach by receiving kickbacks from Wells Fargo in the form of interchange fees for the phantom
27 balance inquiry transactions.

28 277. Plaintiff and members of the Class have performed all, or substantially all, of the

1 obligations imposed on them under the Consumer Account Agreement.

2 278. Plaintiff and members of the Class have sustained damages as a result of Wells Fargo's
3 and FCTI's breach of the contract and the covenant of good faith and fair dealing.

4 **THIRD CAUSE OF ACTION**
5 **BREACH OF CONTRACT INCLUDING THE COVENANT**
6 **OF GOOD FAITH AND FAIR DEALING**
7 **(On behalf of the APPSN Class)**

8 279. Plaintiff Hartman incorporates by reference each of the allegations set forth in the
9 preceding paragraphs.

10 280. Plaintiff Hartman and Wells Fargo have contracted for bank account deposit, checking,
11 ATM, and debit card services, as embodied in Wells Fargo's Consumer Account Agreement, Fee
12 Schedule, and other related documents.

13 281. Wells Fargo has misconstrued in its account documents its true debit card processing and
14 overdraft practices and breached the express terms of the account documents.

15 282. No contractual provision authorizes Wells Fargo to charge overdraft fees on APPSN
16 Transactions.

17 283. Therefore, Wells Fargo breached the terms of its account documents by charging
18 overdraft fees on transactions that were authorized into a sufficient available balance, but whose
19 available balances were allegedly insufficient at the time the transactions were settled.

20 284. Under the laws of the state of California where Wells Fargo does business, good faith is
21 an element of every contract. Whether by common law or statute, all such contracts impose upon each
22 party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing
23 contracts and discharging performance and other duties according to their terms, means preserving the
24 spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually
25 obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the
26 bargain and abusing the power to specify terms constitute examples of bad faith in the performance of
27 contracts.

28 285. Subterfuge and evasion violate the obligation of good faith in performance even when an
actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair

1 dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain,
 2 willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or
 3 failure to cooperate in the other party's performance.

4 286. Wells Fargo has breached the covenant of good faith and fair dealing in the Consumer
 5 Account Agreement through its overdraft policies and practices as alleged herein. Specifically, Wells
 6 Fargo harms consumers by abusing its contractual discretion in a number of ways which no reasonable
 7 consumer would anticipate. First, the term "to cover" a transaction is undefined, and Wells Fargo, uses
 8 its discretion to define "to cover" in a manner contrary to any reasonable, common sense understanding
 9 of that term. In Wells Fargo's implied definition, a transaction is not "covered" even if Wells Fargo
 10 sequesters sufficient available funds for that transaction at the time it is initiated.

11 287. Second, Wells Fargo uses its contractual discretion to cause APPSN Transactions to
 12 incur overdraft fees by knowingly authorizing later transactions that it allows to consume available
 13 funds previously sequestered for APPSN Transactions. "Our standard overdraft coverage is when, at
 14 our discretion, we pay checks or automatic payments (such as ACH payment) into *overdraft* rather than
 15 returning them unpaid . . . If you remove our standard overdraft coverage from your account, the
 16 following will apply if you do not have enough money in your account or accounts linked for Overdraft
 17 Protection to cover a transaction: . . . We will not authorize transactions such as ATM withdrawals or
 18 everyday debit card purchases into *overdraft*." Consumer Account Agreement, at p. 20.

19 288. Wells Fargo uses these contractual discretion points to extract overdraft fees on
 20 transactions that no reasonable consumer would believe could cause overdraft fees.

21 289. Plaintiff and members of the Class have performed all, or substantially all, of the
 22 obligations imposed on them under the Consumer Account Agreement.

23 290. Plaintiff and members of the Class have sustained damages as a result of Wells Fargo's
 24 breach of the contract and the covenant of good faith and fair dealing.

25 **FOURTH CAUSE OF ACTION**
 26 **VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT**
 27 **Cal. Civ. Code § 1770, et seq.**
 28 **(On behalf the Multiple Fee Class)**

1 301. Wells Fargo committed an unlawful business act or practice in violation of Cal. Bus. &
2 Prof. Code § 17200, *et seq.*, by violating the Consumers Legal Remedies Act, as set forth above.

3 302. Wells Fargo committed unfair business acts and practices in violation of Cal. Bus. &
4 Prof. Code § 17200, *et seq.*, by representing that it only authorizes one OD Fee or NSF Fee per item but
5 does otherwise.

6 303. Wells Fargo committed fraudulent business acts and practices in violation of Cal. Bus. &
7 Prof. Code § 17200, *et seq.*, when it affirmatively and knowingly misrepresented that it only authorizes
8 one OD Fee or NSF Fee per item but does otherwise. Wells Fargo’s representations are likely to
9 mislead the public with regard to when it imposes overdraft fees.

10 304. As a direct and proximate result of Wells Fargo’s unfair and deceptive practices, Plaintiff
11 and Class members suffered and will continue to suffer actual damages.

12 305. As a result of its unfair and deceptive conduct, Wells Fargo has been unjustly enriched
13 and should be required to disgorge its unjust profits and make restitution to Plaintiff and Class members
14 pursuant to Cal. Bus. & Prof. Code §§ 17203 and 17204.

15 306. Plaintiff and the Class further seek an order enjoining Wells Fargo’s unfair or deceptive
16 acts or practices, and an award of attorneys’ fees and costs under Cal. Code of Civ. Proc. § 1021.5.

17 **SIXTH CAUSE OF ACTION**
18 **VIOLATION OF THE UNFAIR COMPETITION LAW**
19 **Cal. Bus. & Prof. Code § 17200, et seq.**
(On behalf of the OON Class and FCTI ATM Class)

20 307. Plaintiff Hartman incorporates the preceding allegations by reference as if fully set forth
21 herein.

22 308. Defendants’ conduct described herein violates the Unfair Competition Law (the “UCL”),
23 codified at California Business and Professions Code section 17200, *et seq.*

24 309. The UCL prohibits, and provides civil remedies for, unfair competition. Its purpose is to
25 protect both consumers and competitors by promoting fair competition in commercial markets for
26 goods and services. In service of that purpose, the Legislature framed the UCL’s substantive provisions
27 in broad, sweeping language.

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1 310. By defining unfair competition to include any “any unlawful, unfair or fraudulent
2 business act or practice,” the UCL permits violations of other laws to be treated as unfair competition
3 that is independently actionable, and sweeps within its scope acts and practices not specifically
4 proscribed by any other law.

5 311. Wells Fargo committed fraudulent business acts and practices in violation of Cal. Bus. &
6 Prof. Code § 17200, *et seq.*, when it affirmatively and knowingly misrepresented its OON Fee practices.
7 Such representations misled the Plaintiff and are likely to mislead the public.

8 312. In addition, Wells Fargo committed fraudulent business acts and practices in violation of
9 Cal. Bus. & Prof. Code § 17200, *et seq.*, when it affirmatively and knowingly omitted the total price of
10 out of network ATM transactions and failed to adequately inform consumers they would be charged
11 two fees for a cash withdrawal preceded by a balance inquiry at the same out of network ATM. Such
12 omissions misled the Plaintiff and are likely to mislead the public.

13 313. Had Plaintiff known she would be charged a separate OON Fee by Wells Fargo for
14 checking her balance prior to withdrawing funds at an out of network ATM, she would not have
15 checked her balance at the out of network ATM prior to withdrawing funds.

16 314. Additionally, Wells Fargo’s conduct was unfair insofar as it was not motivated by any
17 business or economic need or rationale. The harm and adverse impact of Wells Fargo’s conduct on
18 members of the general public was neither outweighed nor justified by any legitimate reasons,
19 justifications, or motives.

20 315. The harm to Plaintiff Hartman and Class members arising from Wells Fargo’s unfair
21 practices relating to the imposition of OON Fees outweighs the utility, if any, of those practices.

22 316. Wells Fargo’s unfair business practices relating to OON Fees as alleged herein are
23 immoral, unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to Plaintiff
24 Hartman and Class members.

25 317. Wells Fargo’s conduct was substantially injurious to consumers in that they have been
26 forced to pay OON Fees, which are not adequately and clearly disclosed in their contract with Wells
27 Fargo.

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1 318. Wells Fargo also committed fraudulent business acts and practices in violation of Cal.
2 Bus. & Prof. Code § 17200, *et seq.*, in conjunction with FCTI when Defendants affirmatively and
3 knowingly double-billed customers two out-of-network balance inquiry fees for single balance inquiry
4 transactions. The deceptive manner in which FCTI designed and presented their screen prompts at their
5 ATM machines to consumers misled Plaintiff and are likely to mislead the public. Similarly, Wells
6 Fargo's practice of blindly permitting FCTI to determine for them when and how an out-of-network
7 ATM transaction has occurred and then subsequently collecting **double** the amount of out-of-network
8 balance inquiry fees that they would otherwise be entitled to constitutes a fraudulent business practice.

9 319. Had Plaintiff known she would be charged two balance inquiry fees by Wells Fargo for a
10 single balance inquiry transaction prior to withdrawing funds at an FCTI ATM machine, she would not
11 have used FCTI's ATM machine for her desired transactions.

12 320. Additionally, Defendants' conduct was unfair insofar as it was not motivated by any
13 business or economic need or rationale. The harm and adverse impact of Defendants' conduct on
14 members of the general public was neither outweighed, nor justified by any legitimate reasons,
15 justifications, or motives.

16 321. The harm to Plaintiff and class members arising from FCTI's unfair practice related to
17 their deceptive screen prompts and Defendants' unconscionable assessment of double-charging out-of-
18 network balance inquiry fees for single balance inquiry transactions outweighs the utility to Defendants,
19 if any, of those practices.

20 322. Defendants' unfair business practices related to their double-charging of out-of-network
21 balance inquiry fees as alleged herein are immoral, unethical, unconscionable, and/or substantially
22 injurious to Plaintiff and Class members.

23 323. Defendants' conduct was substantially injurious to consumers in that they have been
24 forced to pay double the amount of out-of-network balance inquiry fees than necessary.

25 324. As a result of Defendants' violations of the UCL, Plaintiff Hartman and members of the
26 Class have paid, and/or will continue to pay, unreasonably excessive amounts of money for banking
27 services and thereby have suffered and will continue to suffer actual damages.

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SEVENTH CAUSE OF ACTION
VIOLATION OF THE UNFAIR COMPETITION LAW
Cal. Bus. & Prof. Code § 17200, et seq.
(On behalf of the APPSN Class)

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4 325. Plaintiff Hartman incorporates the preceding allegations by reference as if fully set forth
5 herein.

6 326. Wells Fargo’s conduct described herein violates the Unfair Competition Law (the
7 “UCL”), codified at California Business and Professions Code section 17200, *et seq.*

8 327. The UCL prohibits, and provides civil remedies for, unfair competition. Its purpose is to
9 protect both consumers and competitors by promoting fair competition in commercial markets for
10 goods and services. In service of that purpose, the Legislature framed the UCL’s substantive provisions
11 in broad, sweeping language.

12 328. By defining unfair competition to include any “any unlawful, unfair or fraudulent
13 business act or practice,” the UCL permits violations of other laws to be treated as unfair competition
14 that is independently actionable, and sweeps within its scope acts and practices not specifically
15 proscribed by any other law.

16 329. Wells Fargo’s conduct violates the UCL by charging OD Fees on APPSN Transactions.

17 330. Defendants committed fraudulent business acts and practices in violation of Cal. Bus. &
18 Prof. Code § 17200, *et seq.*, in the following respect, among others:

19 Wells Fargo’s practice of falsely indicating in account documents that overdraft fees
20 will not be charged when sufficient funds exist to “cover” transactions.

21 331. Specifically, Defendants’ conduct was not motivated by any business or economic need
22 or rationale. The harm and adverse impact of Wells Fargo’s imposition of OD Fees on APPSN
23 Transactions was neither outweighed nor justified by any legitimate reasons, justifications, or motives.

24 332. The harm to Plaintiff Hartman and Class members arising from Wells Fargo’s unfair
25 practices relating to the imposition of OD Fees on APPSN Transactions outweighs the utility, if any, of
26 those practices.

27 333. Wells Fargo’s unfair business practice relating to OD Fees as alleged herein are immoral,
28 unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to Plaintiff Hartman

1 and Class members.

2 334. Wells Fargo's conduct was substantially injurious to consumers in that they have been
3 forced to pay OD Fees on APPSN Transactions, which is not disclosed in the contract with Wells
4 Fargo.

5 335. As a result of Wells Fargo's violations of the UCL, Plaintiff Hartman and Class
6 members have paid, and/or will continue to pay OD Fees and thereby have suffered and will continue to
7 suffer actual damages.

8 **EIGHTH CAUSE OF ACTION**
9 **CONVERSION**
10 **(On behalf of the FCTI ATM Class)**

11 336. Plaintiff Hartman incorporates the preceding allegations by reference as if fully set forth
12 herein.

13 337. FCTI utilizes deceptive screen prompts on their ATM machines to trick customers into
14 engaging in balance inquiry transactions that the consumers would not otherwise purchase. Plaintiffs
15 and each consumer who used an FCTI ATM machine made a single balance inquiry, but was
16 subsequently charged two out-of-network ATM balance inquiry fees.

17 338. FCTI's deceptive scheme has allowed Wells Fargo to wrongfully collect double the
18 amount of out-of-network balance inquiry fees than they otherwise might have been entitled to. These
19 funds are specific and readily identifiable from their customers' accounts.

20 339. As a result, FCTI has wrongfully collected interchange fees from Wells Fargo through
21 their wrongful double-charging practice associated with out-of-network balance inquiries at their ATM
22 machines.

23 340. Defendants, have thus, without proper authorization, assumed and exercised the right of
24 ownership over these funds, in hostility to the rights of Plaintiffs and the members of the FCTI ATM
25 Class, without legal justification.

26 341. Defendants continue to retain these funds unlawfully without the consent of Plaintiffs or
27 members of the FCTI ATM Class.

28 342. Defendants intend to permanently deprive Plaintiffs and members of the FCTI ATM

1 Class of those funds.

2 343. These funds are properly owned by Plaintiffs and members of the FCTI ATM Class, not
3 Defendants, which now claim that they are entitled to their ownership, contrary to the rights of Plaintiffs
4 and members of the FCTI ATM Class.

5 344. Plaintiffs and the members of the FCTI ATM Class are entitled to the immediate
6 possession of these funds.

7 345. Defendants have wrongfully converted these specific and readily identifiable funds.

8 346. Defendants' wrongful conduct is continuing.

9 347. As a direct and proximate result of this wrongful conversion, Plaintiff and the members
10 of the FCTI ATM Class have suffered and continue to suffer damages.

11 348. By reason of the foregoing, Plaintiffs and the members of the FCTI ATM Class are
12 entitled to recover from Defendants all damages and costs permitted by law, including all amounts that
13 Defendants have wrongfully converted.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs demand judgment against Defendants for themselves and the Class
16 members as follows:

- 17 (a) Declaring Wells Fargo's OON Fee and OD Fee policies and practices to be
18 wrongful, unfair, and a breach of contract;
- 19 (b) Declaring FCTI's double-charging out-of-network balance inquiry fees for
20 single balance inquiry fee transactions to be a fraudulent, unfair, and
21 unlawful business practice and a breach of the covenant of good faith and fair
dealing;
- 22 (c) Restitution of all relevant OON Fees and OD Fees paid to Wells Fargo by
23 Plaintiffs and the Classes, as a result of the wrongs alleged herein in an
amount to be determined at trial;
- 24 (d) Restitution of all interchange fee revenue that Wells Fargo shared directly
25 with FCTI resulting from the double balance inquiry transaction;
- 26 (e) Disgorgement of the ill-gotten gains derived by Wells Fargo and/or FCTI
27 from its misconduct;
- 28 (f) Actual damages in an amount according to proof;

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- (g) Statutory, punitive, and exemplary damages, as permitted by law;
- (h) Pre-judgment interest at the maximum rate permitted by applicable law;
- (i) An order on behalf of the general public enjoining Wells Fargo and FCTI from continuing to employ unfair methods of competition and commit unfair and deceptive acts and practices alleged in this complaint and any other acts and practices proven at trial;
- (j) Costs and disbursements assessed by Plaintiffs in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- (k) Such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs and all others similarly situated hereby demand trial by jury on all issues in this complaint that are so triable as a matter of right.

Dated: July 13, 2018

**CARLSON LYNCH SWEET
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