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Superior Court of California,
County of San Diego

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Clerk of the Superior Court
By Chelsea Martinez, Deputy Clerk

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

HELEN LOTSOFF, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

WELLS FARGO & COMPANY, WELLS
FARGO BANK, N.A., and DOES 1-50,
inclusive

Defendants.

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

[E-FILE]

CLASS ACTION COMPLAINT

[DEMAND FOR JURY TRIAL]

CLASS ACTION COMPLAINT

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

INTRODUCTION

1. Plaintiff brings this action on behalf of herself and a class of all similarly situated consumers against Defendants Wells Fargo & Co. and Wells Fargo Bank, N.A. (“WF” or “Bank”), arising from a practice that breaches the Bank’s contracts and/or is deceptive and designed to unfairly increase the Bank’s fee revenue.

2. Wells Fargo charges account holders a \$35 non-sufficient funds (“NSF”) fee when there are insufficient funds to pay a transaction and it rejects the charge. Wells Fargo charges account holders a \$35 overdraft (“OD”) fee when there are insufficient funds to pay a requested transaction and it accepts the charge.

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

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

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

6. As discussed more fully below, it is a breach of the Bank’s contract and of reasonable consumers’ expectations for the Bank to charge both a \$35 NSF *and* a \$35 OD Fee on the *same transaction*, since the contract explicitly states—and reasonable consumers understand—that the same transaction cannot incur both types of fees.

7. Plaintiff, and other Wells Fargo customers, have been injured by Wells Fargo's improper practices. On behalf of herself and the Class, Plaintiff seeks damages, restitution and injunctive relief for Wells Fargo's breach of contract and violation of California consumer protection laws.

PARTIES

8. Helen Lotsoff is a resident of San Diego, California and holds a Wells Fargo checking account.

9. Wells Fargo & Co. is the parent of all Wells Fargo entities. Wells Fargo & Co. is a diversified financial services company providing banking, insurance, investments, mortgage banking and consumer finance to individuals, businesses and institutions in all 50 states and internationally. Wells Fargo & Co. is headquartered in San Francisco, California.

10. Defendant Wells Fargo Bank, N.A. is a subsidiary of Wells Fargo & Co. Among other things, Wells Fargo Bank, N.A. is engaged in the business of providing retail banking services to consumers, including Lotsoff and members of the putative Class, which includes the issuance of debit cards for use by its customers in conjunction with their checking accounts. Wells Fargo Bank, N.A. operates banking centers, and thus conducts business, throughout the State of California and the United States.

11. Based on information and belief, the decisions relating to developing, marketing and implementing the actions complained of herein originated from Wells Fargo & Co. in San Francisco, California. For all plans and decisions that originated at Wells Fargo business locations outside of San Francisco, California, those plans and decision required approval from Wells Fargo & Co.'s San Francisco, California headquarters, thereby providing Wells Fargo & Co. authority and control over the actions complained about herein.

JURISDICTION AND VENUE

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

13. Venue is proper in this District pursuant to CCP § 395(b) because Plaintiff is a citizen and resident of San Diego, California, which is located in this District.

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

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

I. WELLS FARGO CHARGES NSF FEES AND OD FEES ON THE SAME TRANSACTION

A. Plaintiff Lotsoff's Experience

15. On October 24, 2016, Ms. Lotsoff attempted to make an online bill payment of \$152.31 through her Wells Fargo checking account. Because Ms. Lotsoff had insufficient funds in her account, Wells Fargo rejected that payment request and charged Ms. Lotsoff a \$35 NSF Fee for doing so. Unbeknownst to Plaintiff, that very same transaction was processed again by Wells Fargo seven days later, on October 31, 2017, with Wells Fargo calling the transaction a "RETRY PAYMENT" on the bank statement. This time, Wells Fargo paid the transaction and charged Plaintiff a \$35 OD Fee for doing so. In sum, *Wells Fargo charged Plaintiff \$70 in fees to process a single bill payment.*

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

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

18. Wells Fargo can easily code transactions it considers "overdrawn" to not incur OD/NSF Fees.

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

B. Relevant Account Documents

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

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

If we receive a bill payment drawn against your checking account or a Command Asset Program, and there are insufficient available funds in your Funding Account to cover the payment, we may at our sole discretion: • Cover the payment by transferring available credit or funds from an account you have linked for Overdraft Protection, or • 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).

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

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

An item is an order, instruction, or authorization to withdraw or pay funds or money from an account. Examples include a check, draft, and an electronic transaction (including Automated Clearing House (ACH), an ATM withdrawal, and a purchase 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.

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

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

Overdraft and returned item \$35 per item (non-sufficient funds/NSF) fees Note: • No overdraft fee will be assessed on ATM and everyday debit card transactions (transactions may be declined) unless Debit Card Overdraft Service is added to the account. See the “Debit Card Overdraft Service” section for more information. • No more than three overdraft and/or returned item fees will be charged on any business day • No overdraft or returned item fees on transactions \$5 or less • No overdraft fees if at 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.

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

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

1 25. The Consumer Account Agreement also states:

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

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

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

18 Ex. B, pp. 19–20.

19 26. All these provisions indicate that one of two things will occur: payment or rejection; OD
20 Fee or NSF Fee.

21 C. **Wells Fargo May Not Charge Both OD and NSF Fees on a Single Transaction**

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

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

28 29. The contract documents bar Wells Fargo from assessing both an NSF and an OD Fee on
the same item or transaction.

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

1 31. Both the Consumer Account Agreement and Online Banking Agreement state that a
2 given transaction can be paid or declined, but not both.

3 32. Wells Fargo states that it will charge a fee whether it pays or rejects an item, and it
4 expressly states it will only charge one.

5 33. The Consumer Account Agreement states more than once that “We will return your
6 checks and automatic payments (such as ACH payments) and assess a non-sufficient funds (NSF)
7 returned item fee and you could be assessed additional fees by merchants.” Ex. B, p. 20. This reiterates
8 the Bank’s promise that it will charge either an OD Fee or an NSF Fee, but not both, on the same item.
9 Moreover, the statement that “you could be assessed additional fees by merchants” indicates that the
10 rejection of a transaction is final. *See id.*

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

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

20 **D. Wells Fargo Abuses Discretion**

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

24 37. First, Wells Fargo engages in a pattern of rejecting, then approving, the same items in
25 order to maximize fee revenue. Wells Fargo initially denies, then approves, the same item in order to
26 increase fee revenue.

27 38. For example, Wells Fargo rejected payment on the first iteration of the \$152 bill
28 payment because Plaintiff purportedly had a negative balance on her account. But it approved the

1 second iteration of the same transaction even though Plaintiff still purportedly had a negative balance
2 and was in fundamentally the same financial position.

3 39. The reject-then-approve pattern used by Wells Fargo has one purpose: to maximize fee
4 revenue for the Bank.

5 40. Second, the Bank uses its discretion to define the meaning of “item” in an unreasonable
6 way that violates common sense and reasonable consumer expectations. Wells Fargo uses its
7 contractual discretion to set the meaning of that term to choose a meaning that directly causes more
8 NSF Fees or OD Fees.

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

12 CLASS ACTION ALLEGATIONS

13 42. Plaintiff brings this action on her own behalf and on behalf of all others similarly
14 situated. The Class includes:

15 All holders of a WELLS FARGO checking and/or money market account in
16 California who, within the applicable statute of limitation preceding the filing of this
lawsuit, incurred both an NSF Fee and an Overdraft Fee on the same item.

17 43. Excluded from the Class are Defendants, their subsidiaries and affiliates, their officers,
18 directors and member of their immediate families and any entity in which defendants have a controlling
19 interest, the legal representatives, heirs, successors or assigns of any such excluded party, the judicial
20 officer(s) to whom this action is assigned, and the members of their immediate families.

21 44. Plaintiff reserves the right to modify or amend the definition of the proposed Class
22 and/or to add a Subclass(es) if necessary before this Court determines whether certification is
23 appropriate.

24 45. The questions here are ones of common or general interest such that there is a well-
25 defined community of interest among the class members. These questions predominate over questions
26 that may affect only individual class members because Wells Fargo has acted on grounds generally
27 applicable to the class. Such common legal or factual questions include, but are not limited to:
28

- a) Whether Wells Fargo improperly charges both NSF Fees and OD Fee on the same items;
- b) Whether such conduct violates the contract;
- c) Whether such conduct is deceptive or in bad faith; and
- d) Whether Plaintiff and other members of the Class have sustained damages as a result of Wells Fargo's wrongful business practices described herein, and the proper measure of damages.

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

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

48. Plaintiff's claims are typical of the claims of the other Class members in that they arise out of the same wrongful business practice by Wells Fargo, as described herein.

49. Plaintiff is more than an adequate representative of the Classes in that she has a Wells Fargo checking account and has suffered damages as a result of Wells Fargo's usurious and improper business practices. In addition:

- a) Plaintiff is committed to the vigorous prosecution of this action on behalf of herself and all others similarly situated and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers against financial institutions;

- b) There is no conflict of interest between Plaintiff and the unnamed Class members;
- c) They anticipate no difficulty in the management of this litigation as a class action; and
- d) Plaintiff's legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

50. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

51. Wells Fargo has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

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

CAUSES OF ACTION

BREACH OF CONTRACT INCLUDING THE COVENANT OF GOOD FAITH AND FAIR DEALING (On behalf of the Class)

53. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

54. Plaintiff and Wells Fargo contracted for checking account and debit card services, as embodied in the Consumer Account Agreement.

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

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

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

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

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VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT

Cal. Civ. Code § 1770, et seq.

(On behalf the Class)

59. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

60. Defendant is a “person” as defined by the CLRA. Cal. Civ. Code § 1761(c).

61. Plaintiff and Class members are “consumers” within the meaning of the CLRA, as defined by Cal. Civ. Code § 1761(d).

62. The CLRA prohibits “unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer[.]” Cal. Civ. Code § 1770(a).

63. Defendants’ representation that it will not charge both NSF Fees and OD Fees on the same item constitutes a deceptive and misleading business practice in violation of the CLRA.

64. Defendants continue to violate the CLRA and continue to injure the public by using false, deceptive, and misleading terms in its Consumer Account Agreements. Accordingly, Plaintiff seeks injunctive relief on behalf of the general public to prevent Wells Fargo from continuing to engage in these deceptive and illegal practices.

65. Defendants’ violation of the CLRA caused Plaintiff and putative Class members to suffer ascertainable losses.

66. Pursuant to Section 1782(d) of the CLRA, Plaintiff reserves the right to amend this Complaint to include a request for damages under the CLRA pursuant to Section 1782(a) of the CLRA within thirty (30) days of providing the required notice.

VIOLATION OF THE UCL

Cal. Bus. & Prof. Code § 17200, et seq.

(On behalf of the Class)

67. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

68. California Business & Professions Code § 17200 prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice.” Wells Fargo’s conduct related to the imposition of overdraft fees violated each of this statute’s three prongs.

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

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

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

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

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

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants for herself and the Class members as follows:

- (a) Certifying this matter as a class action pursuant to California Code of Civil Procedure Section 382;
- (b) Designating Plaintiff as an appropriate Class representative and her counsel as Class Counsel;
- (c) Awarding Plaintiff and the Class damages (including twice the amount of the usurious interest paid), prejudgment interest from the date of loss, and their costs and disbursements incurred in connection with this action, including reasonable attorney's fees, expert witness fees and other costs;
- (d) Declaring that Wells Fargo violated the CLRA and UCL by using unfair, deceptive, and misleading terms in its Consumer Account Agreements;
- (e) Public injunctive relief to ensure compliance with the CLRA and UCL;

1 (f) Ordering Wells Fargo to immediately cease the wrongful conduct set forth
2 above and enjoining Wells Fargo from continuing to charge overdraft fees to
3 its accountholders that did not opt in to its Debit Card Overdraft Service and
4 otherwise and conduct business via the unlawful and unfair business acts and
5 practices complained of herein; and

6 (g) Granting such other relief as the Court deems just and proper.

7 **DEMAND FOR JURY TRIAL**

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

10 Dated: May 29, 2018

11 **CARLSON LYNCH SWEET**
12 **KILPELA & CARPENTER, LLP**

13 /s/ Todd D. Carpenter

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