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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CAROLYN LEMELSON, et al.

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

CASE NO. C22-1202JLR

ORDER

**I. INTRODUCTION**

Before the court is Defendant Wells Fargo Bank, N.A.’s (“Wells Fargo”) motion to dismiss Plaintiffs Carolyn Lemelson and Pacific Doodles, LLC’s (“Pacific Doodles”) (collectively, “Plaintiffs”) complaint. (Mot. (Dkt. ## 4, 5-1<sup>1</sup>); Reply (Dkt. # 10).) Plaintiffs oppose Wells Fargo’s motion. (Resp. (Dkt. # 9).) The court has considered the

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<sup>1</sup> Wells Fargo originally filed its motion to dismiss at docket entry 4. (See Dkt.) It subsequently filed a praecipe to replace its original motion with the corrected motion attached to that praecipe. (See Praecipe (Dkt. # 5).) The court cites the corrected motion in this order.

1 motion, all materials submitted in support of and in opposition to the motion, and the  
2 governing law. Being fully advised,<sup>2</sup> the court GRANTS in part and DENIES in part  
3 Wells Fargo’s motion to dismiss. The court DISMISSES Plaintiffs’ breach of contract  
4 and outrage claims without prejudice and with leave to amend.

## 5 II. BACKGROUND

6 On May 31, 2022, Ms. Lemelson was depositing funds at a Wells Fargo branch in  
7 Mount Vernon, Washington. (Compl. (Dkt. # 1-1) ¶ 7.) Plaintiffs allege that the bank’s  
8 manager and security guard “verbally accosted” Ms. Lemelson’s family, called the  
9 police, and falsely accused the family of trespass after “apparently taking issue with how  
10 Ms. Lemelson’s significant other parked.” (*Id.* ¶ 8.) Ms. Lemelson then instructed the  
11 bank manager to close her accounts. (*Id.* ¶ 9.) The bank manager, however, refused to  
12 close the accounts, and the police arrived to take statements. (*Id.* ¶ 10.)

13 According to Ms. Lemelson, after this encounter, Wells Fargo made multiple  
14 unauthorized transfers of funds from her account and the account of her business, Pacific  
15 Doodles, to third parties who were not authorized to receive those funds. (*Id.* ¶¶ 1, 11.)  
16 Plaintiffs allege that these transfers “were not properly payable and were not properly  
17 charged against the subject account as required by RCW 62A.4-401.” (*Id.* ¶ 12.) They  
18 further allege that the unauthorized transfers resulted in Plaintiffs missing payments,  
19 including real estate mortgage payments. (*Id.* ¶ 13.)

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21 <sup>2</sup> Wells Fargo requests oral argument on the motion. (*See* Mot. at 1). The court,  
22 however, concludes that oral argument would not be helpful to its disposition of the motion. *See*  
Local Rules W.D. Wash. LCR 7(b)(4).

1 Plaintiffs filed this lawsuit against Wells Fargo in Skagit County Superior Court  
2 on July 29, 2022. (*See generally* Compl.) They allege claims against Wells Fargo for  
3 breach of contract; unfair or deceptive business practices in violation of the Washington  
4 Consumer Protection Act, RCW 19.86.010 *et seq.* (“WCPA”); and the tort of outrage.  
5 (*Id.* ¶¶ 14-27.) On August 29, 2022, Wells Fargo timely removed the action to this court  
6 on the basis of diversity. (Not. of Removal (Dkt. # 1).) It filed the instant motion on  
7 September 6, 2022. (Mot.)

### 8 III. ANALYSIS

9 Below, the court sets forth the legal standard for reviewing motions to dismiss  
10 before considering Wells Fargo’s motion.

#### 11 A. Legal Standard

12 Federal Rule of Civil Procedure 12(b)(6) provides for dismissal when a complaint  
13 “fail[s] to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6).  
14 Under this standard, the court construes the complaint in the light most favorable to the  
15 nonmoving party, *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946  
16 (9th Cir. 2005), and asks whether the complaint contains “sufficient factual matter,  
17 accepted as true, to ‘state a claim to relief that is plausible on its face,’” *Ashcroft v. Iqbal*,  
18 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570  
19 (2007)). The court is not, however, required to accept as true legal conclusions or  
20 “formulaic recitation[s] of the legal elements of a cause of action.” *Chavez v. United*  
21 *States*, 683 F.3d 1102, 1008 (9th Cir. 2012). “A claim has facial plausibility when the  
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1 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
2 the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

3 **B. Breach of Contract**

4 Plaintiffs allege that Wells Fargo breached an unspecified contract and “acted  
5 contrary to RCW 62A.4-401,” a provision of Washington’s codification of the Uniform  
6 Commercial Code (“UCC”),<sup>3</sup> by refusing to close their accounts when Ms. Lemelson  
7 instructed it to do so and by making unauthorized transfers of funds from Plaintiffs’  
8 accounts to other accounts. (Compl. ¶ 17.) Wells Fargo argues that the court must  
9 dismiss the claim because Plaintiffs failed to (1) identify any contractual provision that  
10 Wells Fargo allegedly breached and (2) allege that they reviewed their statements or  
11 notified the bank of the allegedly unauthorized transactions. (Mot. at 4, Reply at 4-8.)

12 The court begins with Wells Fargo’s first argument. A plaintiff in a contract  
13 action must allege the existence of a valid contract between the parties, breach, and  
14 resulting damage. *See Lehrer v. State, Dep’t of Soc. & Health Servs.*, 5 P.3d 722, 727  
15 (Wash. 2000). Here, Plaintiffs allege only that “there existed and exists a valid contract  
16 between” themselves and Wells Fargo; they do not identify the contract or the contractual  
17 provision or provisions that they allege Wells Fargo breached. (Compl. ¶ 15; *see*  
18 *generally id.*) Because the court need not accept as true Plaintiffs’ “formulaic recitation”  
19 of the first element of their breach of contract claim, *Chavez*, 683 F.3d at 1008, the court  
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21 <sup>3</sup> Plaintiffs appear to base their claim on RCW 62A.4-401(a), which states “[a]n item is  
22 properly payable if it is authorized by the customer and is in accordance with any agreement  
between the customer and the bank.” RCW 62A.4-401(a).

1 agrees with Wells Fargo that Plaintiffs have failed to state a claim on which relief can be  
2 granted.

3 Wells Fargo’s second argument rests on the Washington Supreme Court’s decision  
4 in *Travelers Casualty & Surety Co. v. Washington Trust Bank*, 383 P.3d 512, 520-21  
5 (Wash. 2016). Although that case dealt with whether the claim at issue was time-barred,  
6 the Court observed that RCW 62A.4-406(f)’s “requirement that customers notify banks  
7 of unauthorized signatures, alterations, or indorsements is a condition precedent to  
8 bringing suit” under RCW 62A.4-401(a). *Id.* (citing cases so holding). Because  
9 Plaintiffs did not allege that they completed these conditions precedent (*see generally*  
10 *Compl.*), the court agrees that Plaintiffs’ claim also fails on this ground. Therefore, the  
11 court GRANTS Wells Fargo’s motion to dismiss Plaintiffs’ breach of contract claim and  
12 DISMISSES the claim without prejudice and with leave to amend. *See Lopez v. Smith*,  
13 203 F.3d 1122, 1127 (9th Cir. 2000) (“[A] district court should grant leave to  
14 amend . . . unless it determines that the pleading could not possibly be cured by the  
15 allegation of other facts.” (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.  
16 1995))).

### 17 **C. Unfair or Deceptive Business Practices**

18 The WCPA makes unlawful “[u]nfair methods of competition and unfair or  
19 deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020.  
20 To prevail under the WCPA, a plaintiff must show that (1) an unfair or deceptive act or  
21 practice, (2) occurred in the course of trade or commerce, (3) impacted the public  
22 interest, (4) injured the plaintiff’s business or property, and (5) was caused by the

1 defendant. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531,  
2 533-34 (Wash. 1986). A WCPA claim “may be predicated on a per se violation of  
3 statute, an act or practice that has the capacity to deceive substantial portions of the  
4 public, or an unfair or deceptive act not regulated by statute but in violation of public  
5 interest.” *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1187 (Wash. 2013). “[A] per se  
6 unfair trade practice exists when a statute which has been declared by the Legislature to  
7 constitute an unfair or deceptive act in trade or commerce has been violated.” *Hangman*  
8 *Ridge*, 719 P.2d at 535.

9 Plaintiffs allege that Wells Fargo engaged in unfair or deceptive acts or practices  
10 by refusing to close their accounts when instructed to do so and by making unauthorized  
11 transfers of funds in violation of their contracts and RCW 62A.4-401. (Compl.  
12 ¶¶ 19-23.) Wells Fargo argues that Plaintiffs’ claim must be dismissed because they  
13 failed to allege that they complied with their duty under RCW 62A.4-406 to examine  
14 their bank account statements and promptly notify Wells Fargo of the unauthorized  
15 transfers. (Mot. at 5 (citing *U.S. Bank, N.A. v. Whitney*, 81 P.3d 135, 140 (Wash. Ct.  
16 App. 2003)).) As a result, according to Wells Fargo, Plaintiffs have failed to adequately  
17 allege a per se violation of the WCPA based on Wells Fargo’s purported violation of  
18 RCW 62A.4-401. (*Id.*; *see also* Reply at 2.)

19 Plaintiffs counter that they do not base their claim solely on an alleged per se  
20 violation of the WCPA.<sup>4</sup> (*See* Resp. at 3-4.) Rather, as they correctly point out, they can

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22 <sup>4</sup> Nor could they, because the Washington legislature has not declared that a violation of  
the UCC constitutes a per se violation of the WCPA. *See McClellon v. Bank of Am., N.A.*, No.

1 also prove a WCPA violation by showing either that Wells Fargo’s conduct had the  
2 capacity to deceive a substantial portion of the public or was an unfair or deceptive act or  
3 practice in violation of the public interest. (*Id.* at 3 (citing *Klem*, 295 P.3d at 1187).) In  
4 addition, Wells Fargo addresses only Plaintiffs’ allegation that it violated the WCPA by  
5 violating RCW 62A.4-401; it does not address their separate allegation that Wells  
6 Fargo’s failure to close their accounts when Ms. Lemelson asked it to do so is an unfair  
7 or deceptive act or practice. (*See Mot.* at 5; *see also Reply* at 5 (stating, without citation  
8 to authority, that Plaintiffs cannot allege any damages caused by Wells Fargo’s refusal to  
9 close their accounts separate from the alleged unauthorized transfer of funds).) Because  
10 Wells Fargo moves to dismiss solely on the ground that Plaintiffs failed to adequately  
11 allege a per se violation of RCW 62A.4-401, the court DENIES Wells Fargo’s motion to  
12 dismiss Plaintiffs’ WCPA claim.

13 **D. Outrage**

14 “The elements of a claim for the tort of outrage or the intentional infliction of  
15 emotional distress are ‘(1) extreme and outrageous conduct, (2) intentional or reckless  
16 infliction of emotional distress, and (3) actual result to plaintiff of severe emotional  
17 distress.’” *Reyes v. Yakima Health Dist.*, 419 P.3d 819, 825 (Wash. 2018) (quoting  
18 *Kloepfel v. Bokor*, 66 P.3d 630, 632 (Wash. 2003)). Qualifying “conduct must be ‘so  
19 outrageous in character, and so extreme in degree, as to go beyond all possible bounds of  
20 decency, and to be regarded as atrocious, and utterly intolerable in a civilized

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C18-0829JCC, 2018 WL 4852628, at \*5 (W.D. Wash. Oct. 5, 2018) (citing *Haner v. Quincy Farm Chemicals, Inc.*, 649 P.2d 828, 833 (Wash. 1982)).

1 community.” *Id.* (quoting *Grimsby v. Samson*, 530 P.2d 291, 295 (Wash. 1975)). The  
2 conduct must be such that “the recitation of the facts to an average member of the  
3 community would arouse his resentment against the actor and lead him to exclaim  
4 ‘Outrageous!’” *Kloepfel*, 66 P.3d at 632 (quoting *Reid v. Pierce Cnty.*, 961 P.2d 333, 337  
5 (Wash. 1998)). Indeed, “[t]he law intervenes only where the distress inflicted is so  
6 severe that no reasonable person could be expected to endure it.” *Saldivar v. Momah*,  
7 186 P.3d 1117, 1130 (Wash. Ct. App. 2008), *as amended* (July 15, 2008) (citing  
8 Restatement (Second) of Torts § 46 cmt. j, at 77 (Am. Law Inst. 1965)). Thus, “the tort  
9 of outrage ‘does not extend to mere insults, indignities, threats, annoyances, petty  
10 oppressions, or other trivialities’” because the law expects plaintiffs to “be hardened to a  
11 certain degree of rough language, unkindness and lack of consideration.” *Kloepfel*, 66  
12 P.3d at 632 (quoting *Grimsby*, 530 P.2d at 295).

13 Plaintiffs allege that Wells Fargo’s manager and security personnel “engaged in  
14 extreme and outrageous conduct [by] accosting Ms. Lemelson’s young family in the  
15 parking lot of the bank and falsely accusing them, including the young children, of  
16 trespass and calling the police, and causing the police to appear.” (Compl. ¶ 25.) This  
17 conduct, according to Plaintiffs, “recklessly or intentionally inflicted emotional distress  
18 upon Ms. Lemelson” and caused her damages. (*Id.* ¶¶ 26-27.) Wells Fargo contends that  
19 the claim must be dismissed because the alleged acts of its bank manager and security  
20 personnel are not sufficiently “outrageous in character, and extreme in degree” to support  
21 an outrage claim. (Mot. at 6-7.) The court agrees. The conduct Plaintiffs describe in  
22 their complaint is not so outrageous or extreme as to “as to go beyond all possible bounds



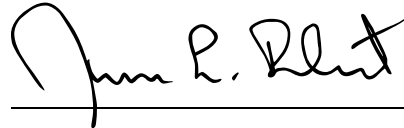
1 of decency, and to be regarded as atrocious, and utterly intolerable in a civilized  
2 community.” *Grimsby*, 530 P.2d at 295. Indeed, Washington cases allowing an outrage  
3 claim to proceed involve acts that are far more extreme than those alleged here. *See, e.g.*,  
4 *id.* at 295-96 (allowing claim to proceed where plaintiff pleaded he had to “witness the  
5 terrifying agony and explicit pain and suffering of his wife while she [p]roceeded to die  
6 right in front of his eyes” as a result of doctor’s failure to provide medical care); *Spicer v.*  
7 *Patnode*, 443 P.3d 801, 809 (Wash. Ct. App. 2019) (allowing claim to proceed where  
8 neighbor persistently harassed plaintiff for months with the intent to cause plaintiff severe  
9 emotional distress by remote-starting his truck and setting off its alarm whenever her  
10 piano students walked to or from lessons). Contrary to Plaintiffs’ assertions (*see* Resp. at  
11 6), the mere presence of Ms. Lemelson’s children during the alleged encounter is not  
12 enough, without more, to plausibly allege that Wells Fargo’s employees’ conduct met the  
13 threshold required to state an outrage claim. Accordingly, the court GRANTS Wells  
14 Fargo’s motion to dismiss Plaintiffs’ outrage claim and DISMISSES that claim without  
15 prejudice and with leave to amend. *See Lopez*, 203 F.3d at 1127.

#### 16 IV. CONCLUSION

17 For the foregoing reasons, the court GRANTS in part and DENIES in part Wells  
18 Fargo’s motion to dismiss (Dkt. ## 4, 5-1) and DISMISSES Plaintiffs’ breach of contract  
19 and outrage claims without prejudice and with leave to amend. Plaintiffs may file an  
20 amended complaint that addresses the deficiencies identified in this order by no later than  
21 Friday, October 14, 2022. Failure to timely file an amended complaint that addresses  
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1 these deficiencies will result in the dismissal of Plaintiffs' breach of contract and outrage  
2 claims with prejudice.

3 Dated this 3rd day of October, 2022.

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6 JAMES L. ROBART  
7 United States District Judge  
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