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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERONICA GUTIERREZ, *et al.*,
Plaintiffs,

No. C 07-05923 WHA

v.

WELLS FARGO & COMPANY, *et al.*,
Defendants.

**ORDER ON MOTION
CHALLENGING DAMAGE
STUDY AND SEEKING
CLASS DECERTIFICATION**

_____ /

INTRODUCTION

In this certified consumer class action, defendant Wells Fargo Bank, N.A., challenges plaintiffs’ damage study and moves to decertify the two classes previously allowed. The main holding of this order is that the record does not justify resorting to an aggregate fluid-recovery method of proving injury and damages. Decertification is the proper remedy for one class but not yet for the other.

ANALYSIS

This consumer action challenges certain overdraft-charge practices by Wells Fargo Bank. Both practices allegedly gouge depositors and one supposedly even lures them into writing overdrafts by overstating the “available balance.” The full background of this case is

1 set forth in companion orders filed today. Suffice it here to say that two classes were certified
2 earlier on as follows (Dkt. 98):

3 the “re-sequencing” class was defined as “all Wells Fargo
4 customers from November 15, 2004, to June 30, 2008, who
5 incurred overdraft fees on debit card transactions as a result of the
6 bank’s practice of sequencing transactions from highest to lowest.”

7 the “including and deleting” class was defined as “all Wells Fargo
8 California customers with consumer checking accounts from
9 November 15, 2004, to June 30, 2008, who incurred overdraft fees
10 on debit card transactions after dissemination by Wells Fargo of
11 available-balance information that once reflected and later deleted
12 a debit card transaction.”

13 Now that expert reports have been exchanged and fact discovery has closed,
14 Wells Fargo challenges plaintiffs’ proof regarding injury and damages. Although the class
15 period covers a 43-month period, the expert damages study covered only *one* month. From this
16 one month, plaintiffs’ counsel proposes to extrapolate to the full 43-month period and seek
17 hundreds of millions in alleged damages.

18 More specifically, during fact discovery, plaintiffs requested and Wells Fargo provided
19 transaction data for 10,000 customers within the one-month period between May 14 and
20 June 13, 2008. The data included the number of overdrafts and the amount of overdraft fees
21 for each customer during the period. (Those actually penalized by overdraft charges was a
22 much smaller group than the 10,000 customers.) Plaintiffs did not request information outside
23 the one-month period and no claim is made that the bank would have refused to supply it.

24 **1. THE RE-SEQUENCING CLASS.**

25 With respect to the “re-sequencing claim” class, Computer Expert Art Olsen analyzed
26 the data to calculate the amount of overdraft fees for actual versus different hypothetical
27 scenarios. Olsen wrote software code to put the transactions in the order as sequenced by
28 Wells Fargo for each customer each day (*i.e.*, the challenged re-sequencing practice of highest
to lowest). He also wrote a code to alternatively sequence the transactions in chronological
order in addition to other possible sequencing orders. When a customer received less
overdraft charges as a result of the alternate chronological sequencing, then the code
determined the difference in the amount of overdraft fees. Finally, the overdraft fees for all

1 customers who received less overdrafts under the alternate chronological sequencing were
2 totaled. According to plaintiffs, Olsen’s analysis showed that the amount of overdraft fees
3 for the thirty-day period was much larger using the bank’s re-sequencing order than when the
4 chronological order was used.

5 He also compared it against yet another more benign sequencing policy, namely,
6 the bank’s pre-2001 sequencing debit card transactions before checks and ACH and then
7 sequencing each group from lowest to highest. That analysis produced an even larger disparity
8 in overdraft fees.

9 Olsen provided his calculations to Expert Statistian Charles Cowan who then
10 extrapolated from the thirty-day to the 43-month period. Using Olsen’s calculations, Cowan
11 determined that the bank would have assessed 13.97 percent less in overdraft fees if it would
12 have sequenced transactions in chronological order and the bank would have assessed
13 15.95 percent less in overdraft fees if it would have sequenced transactions from lowest to
14 highest. The total amount of overdraft fees assessed to California consumers during the class
15 period was \$1.7 billion. Cowan then applied the 13.97 percent increase to the total amount
16 of overdraft fees that Wells Fargo assessed — \$1.7 billion dollars — to calculate the total
17 additional overdraft fees assessed by Wells Fargo due to re-sequencing. He then reduced
18 that figure by twenty percent to adjust globally for overdraft fees that were waived or not
19 collected by Wells Fargo. He calculated the total damages for the re-sequencing class to be
20 \$198.1 million.

21 Earlier, Wells Fargo served interrogatory requests on plaintiffs seeking identification
22 of the algorithm or methodology that identified individual members of the certified classes
23 (Jolley Exh. 8 at 2–3). In addition to referring defendant to the code used by Olsen, plaintiffs
24 responded: “The script utilized by Mr. Olsen does not output a listing of customers.
25 However, it would be a simple matter of added script code to the existing script code to output
26 a listing of customers for each scenario. . . The methodology utilized for the sample would be
27 the same as utilized for the universe of class members” (*id.* at 3).

28

1 or, once liability is otherwise determined, individual injury/damages proceedings must be held.
2 Otherwise, Rule 23 would be used to truncate the required substantive elements of proof by
3 each claimant in violation of the Rules Enabling Act, 28 U.S.C. 2071–77. The main argument
4 the other way is that it is sometimes hard to prove injury and damages on a member-by-member
5 basis yet easy to reliably estimate class-wide damages in the aggregate and it is better that the
6 wrongdoer disgorge all ill-gotten gains even though windfalls will result.

7 In the Ninth Circuit, the best reading of the law is that fluid recovery is allowed only
8 where conventional methods of proof are demonstrably unavailable and, even then, only in an
9 extraordinary circumstance such as the Marcos case described below. The seminal decision in
10 our circuit is *In re Hotel Telephone Charges*, 500 F.2d 86, 89–90 (9th Cir. 1974). Citing *Eisen*,
11 Judge Ely wrote for the circuit: “allowing gross damages by treating unsubstantiated claims of
12 class members collectively significantly alters substantive rights under the antitrust statutes”
13 and “is clearly prohibited by the Enabling Act.” *Id.* at 90; *see also Six Mexican Workers v.*
14 *Arizona Citrus Growers*, 904 F.2d 1301, 1305–06 (9th Cir. 1990); *Molski v. Gleich*, 318 F.3d
15 937, 954 (9th Cir. 2003). One circumstance where it appears the circuit would relax this
16 requirement is where a defendant has not preserved its records so as to allow a more precise
17 calculation of damages. Such a defendant cannot complain of an inability of plaintiffs to do
18 a more accurate analysis. *Cf. Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

19 With the foregoing in mind, the crux of this order is that plaintiffs have not
20 demonstrated that the bank’s records cannot be used to calculate the actual damages
21 suffered by each class member. Instead, plaintiffs have simply resorted to a short-cut method
22 of aggregation and attempted to extrapolate from one month to 43 months without *actually*
23 doing the hard work. All 43 months of data were available but only one month was requested.
24 The bank has not been shown to have stonewalled or destroyed evidence. Although they have
25 not yet done so, plaintiffs’ counsel assert the same process used for the one-month period can be
26 used for the class as a whole. On this record, plaintiffs have not shown that they could not use
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1 the bank's records to calculate damages on a member-by-member basis and, indeed, concede
2 that it could have been done.¹

3 * * *

4 The Court has carefully considered all of the federal authorities cited by plaintiffs
5 to justify use of a short-cut method of aggregation. None contradicts what the undersigned
6 believes the law to be in the Ninth Circuit — fluid recovery or aggregate damages cannot be
7 used to circumvent individual proof requirements with the limited exceptions noted above.
8 The undersigned recognizes that fluid recovery is sometimes used in *settling* class actions
9 but the extent to which fluid recovery may be used in *litigated* class actions is subject to the
10 rule stated.

11 Most authorities cited by plaintiffs did not even involve class actions but addressed
12 statistical evidence in some other context. For example, *Salas by Salas v. Wang*, 846 F.2d 897
13 (3rd Cir. 1988), did not involve a class action.²

14 While *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007), was a class action,
15 statistical projection was used in that case to demonstrate the disparity between the treatment
16 of employees in order to raise an inference of discrimination. Significantly, it was not used as
17 a method of aggregating class-wide damages. (Also, of course, the entire decision is being
18 reheard *en banc*.)

19 To be sure, in *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006),
20 Judge Weinstein allowed a sampling technique in a class action to calculate damages. But this
21 very point was reversed on appeal, an important item plaintiffs' counsel neglected to add, it is
22 sad to have to say. *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

26 ¹ Plaintiffs' Expert Olsen submitted a declaration stating among other things that the same code used
27 for the sample of Wells Fargo customers can be applied to the entire class to provide a list of affected customers
and the amount for each customer.

28 ² As to the state court cases cited, state courts are not bound by the Rules Enabling Act.

1 In *In re Static Random Access (SRAM) Antitrust Litigation*, 2008 WL 4447592, *6
2 (N.D. Cal. Sept. 29, 2008), Judge Wilken certified a class of direct purchasers in an antitrust
3 case and stated in part:

4 Plaintiff has proffered three methodologies for calculating
5 damages on a class-wide basis: the first compares SRAM prices
6 before and after the period of the price-fixing conspiracy; the
7 second compares SRAM prices for comparable products; and the
8 third uses Defendants’ cost data to estimate what competitive
9 prices for SRAM should have been. Plaintiff has proffered
10 methods for calculating aggregate damages for overcharges paid
11 by class members, based on average market prices. The validity of
12 those methods will be adjudicated at trial based upon economic
13 theory, data sources, and statistical techniques that are entirely
14 common to the class.

15 This passage sheds little light on the issue at hand because the statistical techniques alluded to
16 were not described in Judge Wilken’s opinion. In addition, the issue of whether or not the
17 statistical techniques were valid was left for another day.

18 In *In re Sugar Industry Antitrust Litigation*, 1976 WL 1374, 27 (N.D. Cal. 1976),
19 Judge Boldt said “[w]ith respect to damages determined on a class-wide basis, decisional law,
20 including Ninth Circuit decisions, approves proof of injury by just and reasonable inferences
21 where the facts and circumstances of a case necessitate such a method.” But the decisions
22 then cited by Judge Boldt did not involve class actions; at most, they stood for the familiar
23 proposition that where a defendant has done wrong, the defendant, as the wrongdoer, cannot
24 object to a damage study that is the best possible with the data available. *See, e.g., Bigelow v.*
25 *RKO Radio Pictures*, 327 U.S. 251 (1946).

26 The best federal authority cited by plaintiffs is *Hilao v. Estate of Marcos*, 103 F.3d 767,
27 782 (9th Cir. 1996). That decision allowed statistical sampling for class damage claims in
28 a narrow and extraordinary context. After a trial against the estate of Philippines dictator
Ferdinand Marcos, 10,059 claims were received from class members of which 518 were
deemed facially invalid, leaving 9,541 claims. From these, 137 claims were randomly selected
based on expert testimony that there would be a 95 percent statistical probability that the
same percentage determined to be valid among the examined claims would be applicable to
the totality of claims filed. The district court then appointed a special master who oversaw

1 depositions taken in the Philippines of the 137 claimants. The special master recommended
2 damages for 131 valid claims in the category of “torture” claims, a separate amount for
3 “summary-execution” claims, and yet a third amount for “disappearance” claims. The Ninth
4 Circuit stated: “While the district court’s methodology in determining valid claims is
5 unorthodox, it can be justified by the extraordinarily unusual nature of this case.” *Id.* at 786.
6 Given the extraordinary nature of the case in that it involved extreme violations of human rights
7 against many victims, the Ninth Circuit held that the methodology did not violate due process.
8 The present case, however, does not involve extraordinary circumstances such as human rights
9 violations.

10 This order holds that plaintiffs have not justified the use of an aggregate class-wide
11 method of proving fluid-recovery damages. The statistical methodology in question might be
12 admissible for *other* purposes, such as to prove the bank’s intention to maximize profits rather
13 than to act in good faith vis-a-vis its customers. But it does not come even close to a proper
14 damages study.

15 * * *

16 On the other hand, two bank arguments have no merit.

17 *First*, with respect to the issue of how to account for after-the-fact waivers by the bank
18 of overdraft charges, the answer is simple. They could reasonably be accounted for on a
19 last-in-first-out basis, meaning that waivers should be applied to erase the most recent penalty
20 charges first, and then working backwards in time. This presumption is entirely reasonable
21 given that normally it would be the most recent spate of charges that would bring a customer
22 into the bank to seek a waiver. If the bank wishes to prove some other specific individualized
23 agreement by a specific customer on how to allocate a waiver across a history of charges, the
24 bank would be permitted to try to rebut the presumption on an individualized basis, provided
25 it has timely disclosed the evidence under Rule 26.

26 *Second*, contrary to the bank, customers who continued to stay with Wells Fargo after
27 being forced to pay overdraft penalties did not consent to a “voluntary” payment. A depositor
28 retains his or her right under the contract, *i.e.*, his or her right to good faith and fair dealing,

1 even if the bank violates that right and the depositor fails to switch banks. The bank's argument
2 to the contrary is like saying an employee subjected to unlawful working conditions voluntarily
3 consents thereto by not quitting his or her job.

4 * * *

5 A common misconception about class actions is that all counsel must do at trial is to
6 prove the case for the class representative and then the case will be automatically proven for
7 each class member, at least as to liability. This is not so. While the fact pattern of the class
8 representative's story may serve to illustrate the problem, proof must be furnished to cover
9 each element of the class for each class member. Fortunately, this can often be done via
10 class-wide avenues of proof. For example, the same standardized consumer contract (with
11 the same covenant of good faith and fair dealing) could extend to all class members, although
12 actual evidence of the class-wide usage of the contract must be presented at trial. Thus, while
13 class-wide proof can prove elements of even the class representative's own claim, the reverse
14 is not true, *i.e.*, facts bearing on the representative's individual case will not automatically go
15 class-wide.

16 Another misconception is that in a class action an individualized issue is a showstopper
17 under Rule 23. The rule tolerates some individualized issues so long as they do not
18 predominate over the common issues. For example, damages are almost always individualized
19 issues and, at worst, they can be handled via individualized trials after a claims process. Other
20 elements of proof may occasionally have to be individualized or at least be proven by chapters
21 using subclasses. How many localized fact patterns to accept in the mix just depends on how
22 problematic the unique questions will be in the context of the overall case, always keeping in
23 mind that we must ever be fair to the absent class members whose rights will be extinguished
24 by any judgment under *res judicata*.

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1 As to the re-sequencing class, decertification seems too severe a remedy on the present
2 record, at least without further considering less drastic alternatives. Two less drastic remedies
3 will be first considered, reserving on whether decertification will ultimately occur:

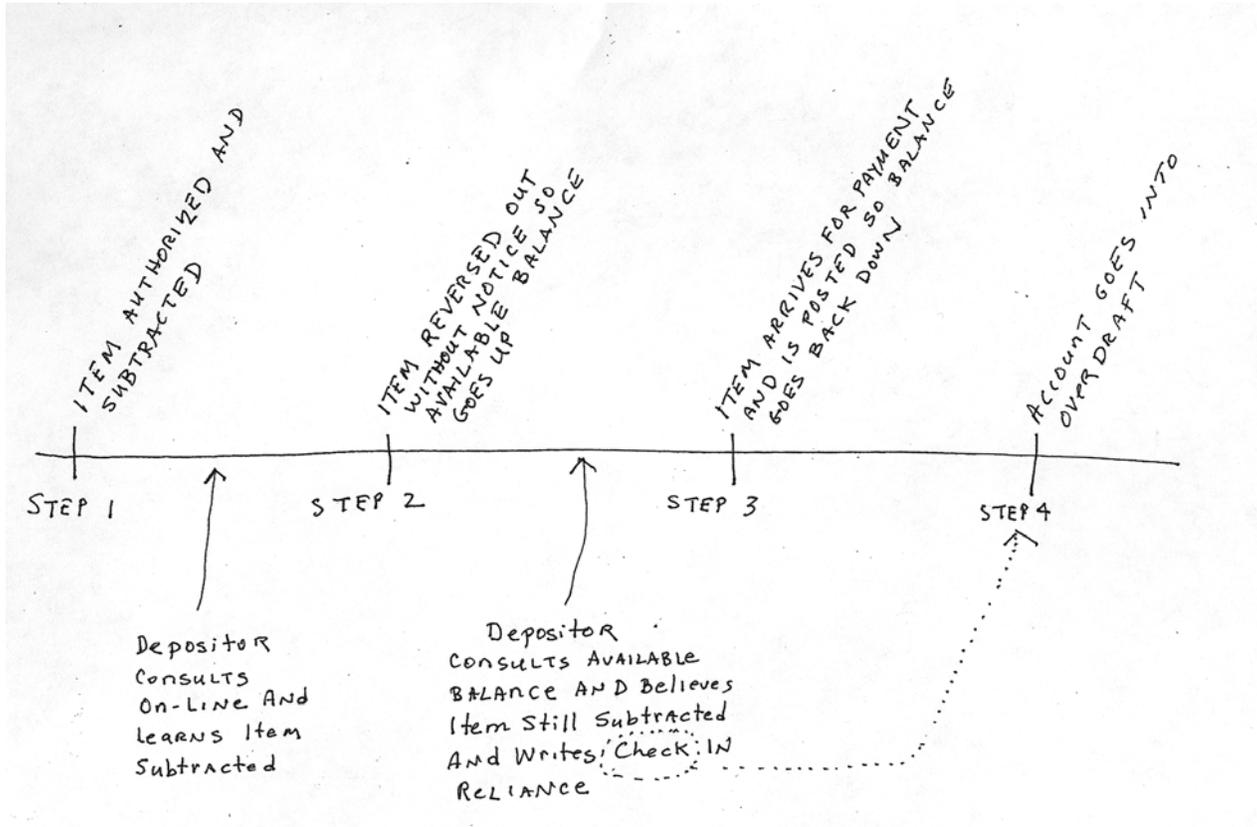
- 4 • *Alternative One*: Proceed to trial and if the class prevails on liability,
5 invite class members to submit individual claims, allowing trials as
6 necessary as to disputed claims, both as to injury and as to amount.
- 7 • *Alternative Two*: Postpone the trial and allow plaintiffs' counsel to mine
8 the bank data for all of the damage analysis practicable, submit new
9 reports, and entertain a new round of motions in limine. Were this
10 allowed, counsel would be well advised to address all of the bank's
11 myriad other objections to the study, at least as an alternative branch of
12 analysis. This order addresses only the main flaws and, those being
13 sufficient, finds it unnecessary to reach the other attacks.

14 Given that we are within a month of the trial date, within **SEVEN CALENDAR DAYS**, counsel shall
15 please submit separate memoranda limited to ten double-spaced pages advising on which
16 alternative (or some other alternative) is preferred. Please also advise whether plaintiffs' counsel
17 should be required to pay the bank's incremental costs and fees associated with Alternative Two
18 if that course is adopted, meaning the costs and fees that could have been saved had counsel
19 done it right to begin with. Within **THREE CALENDAR DAYS** thereafter, each side may then
20 respond, limited to five double-spaced pages.

21 **2. THE INCLUDING-AND-DELETING CLASS.**

22 The including-and-deleting claim is predicated on a multi-step fact pattern that allegedly
23 lures customers into making overdrafts. Customers go online and consult their available balance
24 shortly after a purchase and see that very purchase listed among the items reflected in the
25 available balance. Usually, the item stays deducted and is paid and posted when the item is
26 presented, so that no problem usually arises. If, however, the item is not presented for payment
27 within three days (an occasional scenario), then the bank has an undisclosed policy of reversing
28 the item out of the available balance. If the same customer *then* consults and relies on the

1 available balance, he is apt to make an overdraft, not realizing that the bank has reversed out the
 2 item and not realizing that the available balance shows higher than it really is or so it is alleged.
 3 The following diagram illustrates the chronological steps for this claim:



19 With respect to the “including-and-deleting claim” class, the same thirty-day sample was
 20 used to project damages. Olsen wrote a different software code to identify the customers in the
 21 sample that were affected by the bank’s including-and-deleting practice. Significantly, he had to
 22 make some assumptions. Here is a critical one: *Olsen assumed that every time a customer*
 23 *accessed his or her account online, at an automatic teller machine, or in a branch store, the*
 24 *customer learned the then-current available balance.*

25 Then, Expert Cowan determined that 8.8 percent of all overdraft fees were incurred
 26 because of the including-and-deleting practice. Cowan applied 8.8 percent to \$1.7 billion —
 27 the aggregate overdraft fees charged by Wells Fargo — and then reduced that number by
 28 8.75 percent to account for fees that the sample showed were waived. Cowan calculated the total

1 damages for the including-and-deleting class to be \$141.7 million. According to plaintiffs, this
2 number requires further deduction by twelve to twenty percent to reflect overdraft fees that were
3 waived or not collected by Wells Fargo. Significantly, Cowan included all cases wherein the
4 customer consulted the online available balance between steps 2 and 3 even if the customer had
5 not consulted the available balance between steps 1 and 2.

6 As with the companion class, the including-and-deleting class was certified on the
7 representation that plaintiffs could utilize a computer program to ascertain precisely who belongs
8 in the class and the extent of any injury: “It seems reasonable that a computer program can be
9 fashioned and applied against the bank’s database to track when customers accessed their
10 available-balance information, determine the available balance displayed, and verify whether an
11 overdraft fee was charged. Presumably, the program could also determine whether a transaction
12 was included in the available balance and later deleted” (Dkt. 98 at 24).

13 * * *

14 For the including-and-deleting class, the threshold deficiency is the same as above —
15 counsel cannot use a one-month sample in place of reconstructing the alleged wrongs done to
16 each class member, account-by-account, for all 43 months involved. This deficiency might be
17 curable but other flaws are not curable.

18 One concerns proof of the reliance element, this being a deception claim. In a class
19 action, as stated, it is still necessary to prove *each* class member’s full claim, including the
20 elements of proof needed for the claim. Some individualized proofs can, of course, be furnished
21 in a class action but common proofs must predominate. Otherwise, the proceeding will be
22 unmanageable. Where fraud is alleged, it is necessary to prove reliance by each class member.
23 In an earlier era, defendants regularly argued that reliance was inherently an individual,
24 subjective issue and was not amenable to any class-wide method of proof. For some species of
25 fraud cases, however, the courts have developed presumptions of reliance to serve as class-wide
26 methods of proof. One example is fraud-on-the-market theory of reliance in securities class
27 actions. Another is the standardized-sales-pitch theory in real-estate fraud cases (wherein the
28 wrongdoer makes the same false sales pitch directly to all purchasers with the manifest intent

1 that they rely thereon). Except where a class-wide method of proof is furnished, however, the
2 federal courts have regularly disfavored fraud class actions in litigated cases, for the individual
3 issues usually will predominate over the common issues.

4 Here, plaintiffs have supplied no class-wide method of proving reliance as to the
5 “including and deleting” class. Even if plaintiffs’ streamlined and revised claim were allowed
6 to go forward (a point addressed below), the essence of the claim would still be that customers
7 were led to believe that an item was reflected in the available balance when, in fact, it had been
8 backed out without notice so as to make the available balance appear higher than it really was,
9 leading the customer to incur overdrafts.

10 As stated, plaintiffs’ expert assumed that *every time any* customer accessed his or her
11 account online, or via an ATM, or in person (by visiting a teller window), he or she would have
12 then learned and relied on the then available balance. This categorical assumption is mere *ipse*
13 *dixit* and defies common experience. It is easy to use an ATM without obtaining one’s balance.
14 It is easy to make a teller transaction without obtaining the balance. It is possible to consult an
15 account online for reasons other than obtaining one’s balance, such as to remind oneself of the
16 amount of a specific charge so as to apply for a reimbursement. The record includes no
17 foundation whatsoever to support plaintiffs’ blanket and universal assumption that such events
18 communicate the available balance to the depositor. To be sure, many customers specifically
19 consult the available-balance information — and surely rely on it to write checks and make debit
20 purchases. But it is too far a leap to presume that all customers who access their accounts in the
21 ways described invariably seek or even learn their account balances, there being too many other
22 plausible purposes in the customer contacts described.

23 If we could isolate those instances in which the available balance was consulted from
24 those where it was not, the next question would be whether those who did consult the available
25 balance *actually relied* on it to make an innocent overdraft, putting aside the further question
26 whether any such reliance was reasonable. Here a presumption might be available. If it could
27 be proven that the bank intentionally misled customers into believing that they could rely on the
28 “available balance” without the customer reviewing what items were or were not reflected

1 therein, then it might be proper to presume that any new checks or debits incurred in the
2 *immediate aftermath* of such a consultation would have been in actual reliance on the
3 misinformation. This would be akin to presuming reliance when a wrongdoer intends that a
4 victim rely on misinformation, as in the standardized sales-pitch cases. The reason for the
5 “immediate aftermath” qualifier is that most checking accounts are in perpetual motion.
6 Most customers would not rely on stale balance information. If, for example, a bank gave out
7 a misleading available balance on a Monday, it would be unlikely that customers would still
8 rely on it by the end of the week. Too many things could have changed. Any presumption,
9 were one to be used at all, ought to extend only to fresh misinformation, perhaps one-day old
10 or less. (The seven-day period used by plaintiffs would be far too long.) Even then the records
11 might show that the customer would have overdrawn irrespective of the misinformation, in
12 which case it would be unreasonable to make any presumption of reliance. To repeat, however,
13 the present record does not allow us to even reach this step in the analysis, for plaintiffs have
14 advanced no plausible class-wide method for sorting those who actually *learned* any
15 misinformation from those who did not.

16 This leads to the final flaw evaluated by this order. This claim was originally sold to the
17 Court as one in which the bank customer consulted the available balance between steps 1 and 2,
18 noticed that a specific item had been subtracted, and then later consulted the available balance
19 between steps 2 and 3 and relied on it without realizing that it looked larger than it really was
20 due to the backed-out items.

21 Now, however, plaintiffs seek to skip the first part and to broaden the claim to depositors
22 who merely consulted the online balance between steps 2 and 3, whether or not they consulted it
23 between steps 1 and 2. The damage study thus wholly ignores the very scenario that formed the
24 basis for class certification. The bank says this expansion has been done to triple the amounts
25 involved in the damage study.

26 At the time of class certification, this very attempt was expressly rejected by the
27 certification order (Dkt. 98 at 13–14):

28 To be clear, the only viable claim concerning the available-balance
information concerns Wells Fargo’s practice of including but then

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deleting transactions without adequate notice. The mere fact that the available balance appearing online or at an ATM is sometimes not fully accurate is not, by itself, enough to state a claim. One reason is that the bank has no way of knowing the extent of un-presented checks and the extent of debit transactions that will turn out to be more than what was initially authorized. The definition published online for “available balance” itself states:

(Please note that some transaction activity may not be immediately recorded to your account and will then not be reflected in the available balance)

Therefore, with respect to the available-balance information, only plaintiffs’ claims as related to Wells Fargo’s practice of including items and then deleting them without adequate notice, thereby deceiving customers into thinking they have a larger balance and inducing them to go into overdraft situations, will move forward.

In disregard of this limitation, plaintiffs’ damage theory severely overreaches and tries to include the very category of claims expressly rejected. Significantly, plaintiffs did not even calculate a number based on the very clear definition supplied in the certification order.

Under the certified issue, the reliance problem is even more exacerbated. A class-wide method of proving reliance should have been found for *both* times the customer consulted the available balance. And, as to the first (between steps 1 and 2), we would need a class-wide presumption that the customer not only consulted the “available balance” but specifically *noted that a particular item was listed* as a deduction. This is a hopelessly individualized question, not amenable to any plausible method of common proof (and may well be the reason that counsel sought to switch theories).

This order need not reach all of the other challenges presented, for the foregoing is sufficient.

* * *

For all of the foregoing reasons, the including-and-deleting class is hereby **DECERTIFIED** and shall not proceed as a class claim. This order finds that, contrary to the views that led to the original certification order, individual issues will plainly predominate over common issues with respect to the including-and-deleting class. At their expense, plaintiffs’ counsel shall promptly cause notice to be given to class members advising them of this development, and the reasons, so that any class members who have been relying on the pendency of this action can timely bring

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their own claims. Within **SEVEN CALENDAR DAYS**, please submit a form of notice and a plan of notice distribution.

CONCLUSION

For the foregoing reasons, the motion to decertify is **GRANTED IN PART AND DENIED IN PART.**

IT IS SO ORDERED.

Dated: May 5, 2009.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE