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United States District Court  
For the Northern District of California

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

VERONICA GUTIERREZ, ERIN  
WALKER, and WILLIAM SMITH, as  
individuals and on behalf of all others  
similarly situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

No. C 07-05923 WHA

**CLASS ACTION**

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
AFTER BENCH TRIAL**

**INTRODUCTION**

This certified consumer class action challenges hundreds of millions of dollars in overdraft fees imposed on depositors of Wells Fargo Bank, N.A. through allegedly unfair and fraudulent business practices. This order is the decision of the Court following a two-week bench trial.

**SUMMARY**

Overdraft fees are the second-largest source of revenue for Wells Fargo’s consumer deposits group, the division of the bank dedicated to providing customers with checking accounts, savings accounts, and debit cards. The revenue generated from these fees has been massive. In California alone, Wells Fargo assessed over \$1.4 billion in overdraft penalties between 2005 and 2007. Only spread income — money the bank generated using deposited funds — produced more revenue.

1 This action does not challenge the amount of a single overdraft fee (currently \$35). That  
 2 is accepted as a given. Rather, the essence of this case is that Wells Fargo has devised a  
 3 bookkeeping device to turn what would ordinarily be *one* overdraft into as many as *ten* overdrafts,  
 4 thereby dramatically multiplying the number of fees the bank can extract from a single mistake.  
 5 The draconian impact of this bookkeeping device has then been exacerbated through closely  
 6 allied practices specifically “engineered” — as the bank put it — to multiply the adverse impact  
 7 of this bookkeeping device. These neat tricks generated colossal sums per year in additional  
 8 overdraft fees, just as the internal bank memos had predicted. The bank went to considerable  
 9 effort to hide these manipulations while constructing a facade of phony disclosure. This order  
 10 holds that these manipulations were and continue to be unfair and deceptive in violation of  
 11 Section 17200 of the California Business and Professions Code. For the certified class of  
 12 California depositors, the bookkeeping device will be enjoined and restitution ordered.

**PROCEDURAL HISTORY**

13  
 14 Plaintiffs commenced this action in November 2007, alleging violations of the “unfair”  
 15 and “fraudulent” restrictions of Section 17200. Two of Wells Fargo’s business practices were  
 16 initially targeted: (1) a high-to-low “resequencing” practice, challenged herein, and (2) an  
 17 “including and deleting” practice, which plaintiffs no longer challenge.<sup>1</sup> Originally, the Court  
 18 certified two classes corresponding to these separate practices: (1) a high-to-low “resequencing”  
 19 class represented by plaintiff Veronica Gutierrez and (2) an “including and deleting” class  
 20 represented by plaintiffs Erin Walker and William Smith (Dkt. No. 98). In early 2009, Wells  
 21 Fargo moved for summary judgment against all of plaintiffs’ claims, which — in addition to  
 22 Section 17200 violations — included other state claims targeting the same business practices.  
 23 The bank also moved for decertification of both classes (Dkt. Nos. 176, 199, 200). In a trio of  
 24 orders, these motions were granted in part and denied in part (Dkt. Nos. 245–47). Most  
 25 significantly, the “including and deleting” class was decertified (Dkt. No. 245). The last vestiges  
 26 of plaintiffs’ “including and deleting” claims were then abandoned at trial (Tr. 965–66).

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27  
 28 <sup>1</sup> This “including and deleting” practice involved the inclusion and deletion of pending debit-card transactions in the calculation of a customer’s available balance.

1 The “resequencing” class, however, survived for trial. This class was defined as (Dkt. No.  
2 98):

3 [A]ll Wells Fargo customers from November 15, 2004 to June 30,  
4 2008, who incurred overdraft fees on debit card transactions as a  
5 result of the bank’s practice of sequencing transactions from  
highest to lowest.

6 Plaintiffs were allowed to conduct a new restitution study covering Wells Fargo transaction data  
7 for the entire “resequencing” class period. Following the completion of this study, Wells Fargo  
8 again moved for summary judgment and class decertification (Dkt. No. 292). These motions  
9 were denied.

10 The instant order follows a two-week bench trial that commenced on Monday, April 26,  
11 2010, and concluded on Friday, May 7. Following the close of evidence, both sides submitted  
12 lengthy proposed findings of fact and conclusions of law, followed by responses (Dkt. Nos.  
13 452–55). The undersigned also denied without prejudice a motion for judgment on partial  
14 findings submitted by Wells Fargo during trial and allowed the bank to reargue its points in its  
15 proposed findings of fact (Dkt. Nos. 417, 446). Closing arguments were heard on the morning of  
16 July 9.

17 Rather than merely vet each and every finding and conclusion proposed by the parties, this  
18 order has navigated its own course through the evidence and arguments, although many of the  
19 proposals have found their way into this order. Any proposal that has been expressly agreed to by  
20 the opposing side, however, shall be deemed adopted (to the extent agreed upon) even if not  
21 expressly adopted herein. It is unnecessary for this order to cite the record for all of the findings  
22 herein. Citations will only be provided as to particulars that may assist the court of appeals. In  
23 the findings, the phrase “this order finds . . .” is occasionally used to emphasize a point. The  
24 absence of this phrase, however, does not mean (and should not be construed to mean) that a  
25 statement is not a finding. All declarative statements set forth in the findings of fact are factual  
26 findings.

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**FINDINGS OF FACT**

1. The core of this controversy is a bookkeeping device adopted by the bank called “high-to-low resequencing” that transforms one overdraft into as many as ten overdrafts — ten being the voluntary limit the bank imposed on what could otherwise be an almost limitless prospect. The bank instituted this device for California accounts in April 2001 and then soon magnified its impact through closely allied practices. What now follows is an explanation of the bookkeeping device and how it changed overdrafting at Wells Fargo.

**LOW-TO-HIGH vs. HIGH-TO-LOW**

2. “Posting” is the procedure followed by all banks to process debit items presented for payment against accounts. During the wee hours after midnight, the posting process takes all debit items presented for payment during the preceding business day and subtracts them from the account balance. These items will typically be debit-card transactions and checks (plus a few other occasional items described below). If the account balance is sufficient to cover all such debit items, there will be no overdrafts regardless of the bookkeeping method used. If, however, the account balance is insufficient to cover all such debit items, then the account will be overdrawn. When an account is overdrawn, the posting sequence can have a dramatic effect on the *number* of overdrafts incurred by the account (even though the total overdraft will be exactly the same). In turn, the *number* of overdrafts drives the *number* of overdraft fees.

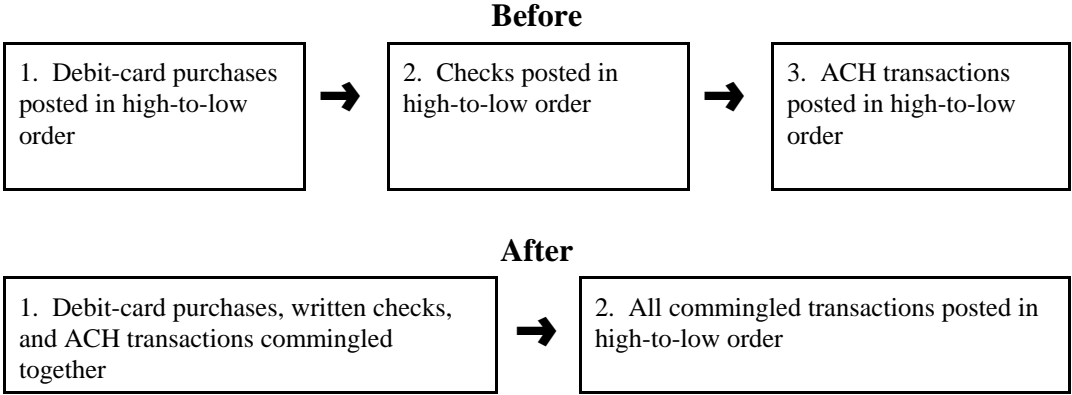
3. Prior to April 2001, Wells Fargo used a low-to-high posting order, as did most banks (then and now). Low-to-high posting meant that the bank posted settlement items from lowest-to-highest dollar amount. Low-to-high posting paid as many items as the account balance could possibly cover and thus *minimized* the number of overdrafts. This was because the smallest purchases were always deducted from the customer’s checking account first and the balance was used up as slowly as possible.

4. This changed in April 2001. Then, Wells Fargo did an about-face in California and began posting debit-card purchases in highest-to-lowest order. The reversal of the bank’s previous low-to-high posting order had the immediate effect of *maximizing* the number of overdraft fees imposed on customers. This was exactly the reason that the bank made the switch.

**United States District Court**  
For the Northern District of California



1 9. For the commingling change, the “before and after” looked like this (high-to-low  
2 posting having already been instituted in April 2001):



**THE SHADOW LINE**

11

12 10. The last step in the three-step plan was executed in May 2002. Wells Fargo

13 implemented a practice involving a secret bank program called “the shadow line.” Before, the

14 bank declined debit-card purchases when the account’s available balance was insufficient to

15 cover the purchase amount. After, the bank authorized transactions into overdrafts, but did so

16 with no warning that an overdraft was in progress. Specifically, this was done without any

17 notification to the customer standing at the checkout stand that the charge would be an overdraft

18 and result in an overdraft fee. Thus, a customer purchasing a two-dollar coffee would unwittingly

19 incur a \$30-plus overdraft fee. (This very scenario happened to plaintiff Walker.) Internally,

20 Wells Fargo called this its “shadow line,” as in shadow “line of credit.” The amount of the credit

21 ceiling per customer was and still is kept secret. Again, customers were not even alerted when

22 shadow-line extensions were made to them — until it was too late and many overdraft fees were

23 racked up. In this program, the bank correctly expected that it would make more money in

24 overdraft fees than it would ever lose due to “uncollectibles” (*i.e.*, overdrafts that were never paid

25 back).

**CLASS REPRESENTATIVE VERONICA GUTIERREZ**

1  
2 11. Ms. Gutierrez opened a checking account and a savings account at the Rancho  
3 Cucamonga branch of Wells Fargo in San Bernadino County on October 25, 2002. She was  
4 eighteen at the time.

5 12. Ms. Gutierrez had never held a bank account in her own name prior to opening  
6 these two accounts. She had also never used a debit or ATM card. This was her first real banking  
7 experience.

8 13. A Wells Fargo customer service representative (“CSR”) assisted Ms. Gutierrez in  
9 opening her checking and savings accounts. The CSR provided Ms. Gutierrez with various Wells  
10 Fargo documents during this process.

11 14. One such document given to Ms. Gutierrez was a Wells Fargo brochure entitled  
12 “Checking, Savings and More” (TX 89). Certain portions of this brochure were shown to  
13 Ms. Gutierrez by the CSR, including sections highlighting the features of “Student Checking,”  
14 “Wells Fargo Advantage Checking,” and “Wells Fargo Cards” (Tr. 373–76). The CSR  
15 highlighted these sections after asking Ms. Gutierrez what kind of account she was interested in  
16 opening and learning that Ms. Gutierrez was going to be a college student.

17 15. With respect to the “Wells Fargo Cards” section of the brochure, Ms. Gutierrez  
18 reviewed the subsections entitled “overdraft protection,” “ATM card,” “ATM & Check Card,”  
19 and “Visa Credit Cards” while at the branch (*id.* at 374–76).

20 16. Wells Fargo refers to its debit cards as “check cards” in all of its marketing  
21 literature. The difference between the two terms is purely branding. In all relevant respects, a  
22 debit card is the same as a check card.

23 17. The “ATM & Check Card” subsection of the brochure included the following  
24 statements regarding Wells Fargo debit cards (TX 89) (emphasis added):

25 All the features of the ATM card, plus:

- 26
- 27 • Make purchases at over 19 million MasterCard merchants worldwide.
  - 28 • Purchase amounts are *automatically deducted* from your primary checking account.

1           18.     After reviewing the “Wells Fargo Cards” section of the brochure, Ms. Gutierrez  
2 asked the CSR for guidance about how to use an ATM and debit card (Tr. 381). The CSR told  
3 Ms. Gutierrez that a debit card could be used in any store where a MasterCard logo was shown  
4 (the bank has since switched to VISA-based debit cards). The CSR then assisted Ms. Gutierrez in  
5 setting up a PIN number to use for ATM transactions.

6           19.     The CSR also mentioned to Ms. Gutierrez that she would have overdraft protection  
7 through the savings account she was opening. Ms. Gutierrez was not informed by the CSR,  
8 however, as to what “having overdraft protection” meant (Tr. 376). She had no idea at the time.

9           20.     Ms. Gutierrez was also provided with a Wells Fargo “Welcome Jacket” while  
10 opening these accounts (*id.* at 377; TX 86). The front of the Welcome Jacket stated “Welcome to  
11 Wells Fargo” and “Thank You for Opening Your Account With Us.” Inside the Welcome Jacket  
12 was a pocket to hold additional materials.

13           21.     The Welcome Jacket provided to Ms. Gutierrez contained a copy of Wells Fargo’s  
14 then-current Consumer Account Agreement (“CAA”), effective April 1, 2002 (TX 13). The CAA  
15 was 69 pages in length and was densely packed with single-spaced text in ten-point font.

16           22.     The CSR did not go through any of the 69 pages of content in the CAA with  
17 Ms. Gutierrez when her accounts were opened at the branch (Tr. 380). The CSR also failed to  
18 inform Ms. Gutierrez about the bank’s resequencing practices, including the order in which  
19 debit-card purchases would be posted against her checking account (*ibid.*).

20           23.     Also included in the Welcome Jacket given to Ms. Gutierrez was a copy of Wells  
21 Fargo’s then-current Consumer Account Fee and Information Schedule (*id.* at 379; TX 14). This  
22 document, which included 37 pages of densely packed text in ten-point font, detailed the amount  
23 charged by Wells Fargo for various types of account-related fees, including overdraft and  
24 returned-item (*e.g.*, bounced check) fees.

25           24.     Ms. Gutierrez only briefly flipped through the hundred-plus pages of text in the  
26 CAA and Consumer Account Fee and Information Schedule while at the branch (Tr. 380).

27           25.     Finally, before leaving the branch, Ms. Gutierrez signed at least one Wells Fargo  
28 document and received a printout of the deposits she had made to open her accounts (*id.* at



1 376–78). By the end of the process, Ms. Gutierrez had acquired a Wells Fargo checking account,  
2 savings account, and an ATM and debit card (hereinafter simply referred to as a debit card). She  
3 also applied for a Wells Fargo student VISA credit card.

4 26. Ms. Gutierrez received her debit card in the mail sometime after opening her  
5 checking and savings accounts (*id.* at 381–82). She also signed up for Wells Fargo’s “online  
6 banking” service, which allows customers to view their available balance and account statements  
7 over the internet (*ibid.*).

8 27. Using her Wells Fargo checking account, Ms. Gutierrez paid for school books, gas,  
9 bills, and recreation (*id.* at 383). For the first few years, to keep track of her balance, she would  
10 use a check register. Ms. Gutierrez would also keep copies of receipts from purchases and carbon  
11 copies of checks to compare them with Wells Fargo monthly account statements. She did this to  
12 be “absolute[ly] sure that extra purchases were not being made on [her] account, without [her]  
13 knowing” (*id.* at 383–85).

14 28. After a few years, however, Ms. Gutierrez stopped using a check register. She also  
15 stopped verifying receipts against her account statements. This was because of “inconsistencies”  
16 between what Wells Fargo was reporting to her regarding her account balance and what she was  
17 “keeping track of, personally” (*id.* at 385). Instead, Ms. Gutierrez began relying on Wells Fargo’s  
18 online banking information and toll-free customer service phone numbers to obtain her available  
19 balance and to check which transactions had been posted to her account (*ibid.*).

20 29. On Thursday, October 5, 2006, Ms. Gutierrez walked into a Subway sandwich  
21 shop. She spent \$11.27 and used her Wells Fargo debit card to pay for the meal (TX 1). That  
22 same day, she made three purchases at AutoZone, an auto-parts store where she was then  
23 employed (Tr. 395–96). The three purchases were for \$47.99, \$17.23, and \$3.23 (TX 1).

24 30. For whatever reason, Ms. Gutierrez returned one of the three AutoZone  
25 purchases — specifically, the purchase in the amount of \$17.23. The return was made on the  
26 same day as the purchase (*ibid.*).

27 31. The next day, Friday, October 6, Ms. Gutierrez went to an IHOP restaurant. She  
28 used her Wells Fargo debit card to pay for her meal, totaling \$26.51. Ms. Gutierrez also went to a

1 hamburger house that same day called Farmer Boys and purchased a meal with her debit card  
2 totaling \$8.10. Finally, that evening, Ms. Gutierrez used her Wells Fargo debit card at a Bank of  
3 America ATM at the Hollywood Bowl to withdraw \$22.00 from her Wells Fargo checking  
4 account (*ibid.*). Since a non-proprietary ATM was used, Ms. Gutierrez was charged a two-dollar  
5 transaction fee by Wells Fargo.<sup>3</sup>

6 32. That weekend, Ms. Gutierrez went to an Albertsons supermarket and spent \$74.39.  
7 She used her Wells Fargo debit card to complete the purchase (*ibid.*).

8 33. Finally, on Tuesday, October 10, Ms. Gutierrez used Wells Fargo’s online banking  
9 service to initiate and complete an “online transfer” of \$80.00 from her Wells Fargo checking  
10 account to the checking account of a family member (*ibid.*; Tr. 400). That same day, a check  
11 written by Ms. Gutierrez in the amount of \$65.00 was presented to the bank for payment  
12 (TX 449).

13 These transactions are shown as follows:

14				
15	\$11.27 Subway	\$26.51 IHOP	\$74.39 Albertsons	\$80.00 online transfer of
16	\$47.99 Autozone	\$8.10 Farmer Boys		funds to family member
17	\$17.23 Autozone	\$22.00 ATM cash		
18	\$3.23 Autozone	withdrawal		\$65.00 check presented to
		\$2.00 fee for non-Wells		Wells Fargo for payment
	(\$17.23) return of	Fargo ATM		
	Autozone purchase			
19	<b>Thurs. Oct. 5</b>	<b>Fri. Oct. 6</b>	<b>Weekend Oct. 7–8</b>	<b>Tues. Oct. 10</b>

20  
21 34. None of the debit-card purchases was declined or otherwise rejected by Wells  
22 Fargo. In fact, all were allowed by the bank. There were no indications given to Ms. Gutierrez  
23 by Wells Fargo that any of her purchases, withdrawals, or transfers had been made against  
24 insufficient funds or would result in overdraft fees being assessed.

25 35. The very next day, on Wednesday, October 11, Wells Fargo assessed \$88 in  
26 overdraft fees against Ms. Gutierrez’s checking account (TX 1, 2). These fees were triggered by

27  
28 <sup>3</sup> The two-dollar fee charged by Wells Fargo was in addition to a two-dollar fee charged by Bank of America, the bank that operated the ATM. This is why Ms. Gutierrez’s withdrawal amount was \$22.00 rather than \$20.00 — Bank of America automatically added its two-dollar fee to the withdrawal amount.

1 four overdrafts caused by the two smallest AutoZone purchases made by Ms. Gutierrez on  
 2 October 5, her Subway purchase made on October 5, and her Farmer Boys purchase made on  
 3 October 6. Each overdraft carried a penalty of \$22. (The overdraft fee today is \$35.)

4 36. The four debit-card purchases that triggered overdraft fees were among twelve  
 5 transactions that posted against Ms. Gutierrez's checking account after the close of business day  
 6 on Tuesday, October 10 (TX 1). These transactions are listed below in the exact order that they  
 7 were posted against her checking account (*ibid.*). Amounts that were debited from her account  
 8 are represented below in parentheses. According to Ms. Gutierrez's account statement, her  
 9 checking account balance prior to the posting of these transactions was \$316.90 (*ibid.*).

	<b>Transaction Description</b>	<b>Amount</b>	<b>Balance</b>
11	1. Return of debit-card purchase made on 10/5/2006 at AutoZone	\$17.23	\$334.13
12	2. Online transfer of funds to another account	(\$80.00)	\$254.13
13	3. ATM withdrawal on 10/6/2006 at a non-Wells Fargo ATM	(\$22.00)	\$232.13
14	4. Non-Wells Fargo ATM fee	(\$2.00)	\$230.13
15	5. Debit-card purchase made on 10/7/2006 at Albertsons supermarket	(\$74.39)	\$155.74
16	6. Check #1103	(\$65.00)	\$90.74
17	7. Debit-card purchase made on 10/5/2006 at AutoZone	(\$47.99)	\$42.75
18	8. Debit-card purchase made on 10/6/2006 at IHOP restaurant	(\$26.51)	\$16.24
19	9. Debit-card purchase made on 10/5/2006 at AutoZone	(\$17.23)	-\$0.99 **
20	10. Debit-card purchase made on 10/5/2006 at Subway restaurant	(\$11.27)	-\$12.26 **
21	11. Debit-card purchase made on 10/6/2006 at Farmer Boys restaurant	(\$8.10)	-\$20.36 **
22	12. Debit-card purchase made on 10/5/2006 at AutoZone	(\$3.23)	-\$23.59 **

23  
24  
25  
26  
27 \*\* \$22 overdraft fee assessed.

1           37.     The transactions were posted by Wells Fargo in the following order: *First*, all  
2 credits were posted to Ms. Gutierrez’s checking account. This is why the returned AutoZone  
3 purchase was the first of the twelve items to post. *Second*, transactions representing cash  
4 withdrawals (or their equivalent) were posted from highest-to-lowest dollar amount. The online  
5 transfer of funds, ATM withdrawal, and associated two-dollar transaction fee were part of this  
6 “priority posting” group (as called by the bank). *Third*, and most significantly, debit-card  
7 transactions, checks, and ACH transactions were commingled together and posted from  
8 highest-to-lowest dollar amount. The parties agree that this is how Wells Fargo posted  
9 transactions during the class period (Dkt. No. 448).

10           38.     The adverse impact of Wells Fargo’s high-to-low bookkeeping switch is clearly  
11 shown by these transactions. If the last eight transactions had been posted by Wells Fargo from  
12 lowest-to-highest dollar amount, only *one* of the debit-card purchases — the \$74.39 purchase at  
13 Albertsons supermarket — would have been an overdraft. Thus, only *one* overdraft fee (\$22), as  
14 opposed to *four* overdraft fees (\$88), would have been assessed.

15           39.     The adverse impact of commingling is also well illustrated. Assuming that  
16 debit-card transactions were posted in high-to-low order, if Wells Fargo had simply posted the  
17 \$65 check *after* all of the debit-card transactions — as was its practice prior to commingling —  
18 only *one* overdraft fee (\$22) as opposed to *four* overdraft fees (\$88) would have been assessed.<sup>4</sup>  
19 This clearly illustrates the adverse impact that the commingling decision had on customers like  
20 Ms. Gutierrez, as well as the integral role that commingling had in enhancing the bank’s  
21 high-to-low bookkeeping play.

22           40.     Finally, if Wells Fargo had posted Ms. Gutierrez’s debit-card transactions in  
23 chronological order (or as close to chronological order as possible), the \$74.39 purchase at  
24 Albertsons supermarket — which was made on October 7 — would have been posted last. Under  
25 this scenario, only *one* overdraft fee (\$22), as opposed to *four* overdraft fees (\$88), would have  
26 been assessed.

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<sup>4</sup> Even if the check was returned unpaid, only one “returned item fee” would have been assessed.

1           41.     At trial, Wells Fargo noted that it had instituted a one-dollar “overdraft courtesy  
2 threshold” during the class period (Tr. 356). It is clear — when examining Ms. Gutierrez’s  
3 account statement — that this minuscule threshold was not in place when she incurred these  
4 overdrafts (TX 1).

5           42.     With a one-dollar courtesy threshold, a checking-account holder is allowed to  
6 overdraw his or her account up to the one-dollar threshold amount before the account is  
7 considered “overdrafted” and a fee is assessed. At an unknown date during the class period, this  
8 threshold increased from zero to one dollar (Tr. 356). The fact that Ms. Gutierrez was assessed a  
9 \$22 overdraft fee for overdrafting her account by \$0.99 shows that the one-dollar courtesy  
10 threshold had not yet been instituted. Despite being touted by the bank, it provided no benefit to  
11 her.

12           43.     Ms. Gutierrez first learned about these four overdraft fees via an insufficient-funds  
13 notice sent by Wells Fargo using regular “snail mail” (TX 2). While it is unclear when  
14 Ms. Gutierrez actually received the notice, it is likely that she did not receive it until a few days  
15 after the fees had been assessed. The notice informed Ms. Gutierrez that the last four debit-card  
16 purchases listed above had been presented to Wells Fargo for payment on October 10 and were  
17 paid into overdraft. It also informed Ms. Gutierrez that \$88 in fees had been imposed on her.

18           44.     The notice further instructed Ms. Gutierrez to deposit \$111.59 into her checking  
19 account to cover the items paid into overdraft and their corresponding fees. Thus, despite  
20 overdrafting her checking account by only \$23.59, Ms. Gutierrez was required to pay \$111.59 to  
21 Wells Fargo to return her account to a zero balance.

22           45.     The high-to-low bookkeeping devices employed by Wells Fargo caused  
23 Ms. Gutierrez to be assessed four overdraft fees (\$88) rather than one overdraft fee (\$22) *for*  
24 *exactly the same conduct*. These manipulations mathematically ensured that the larger items  
25 would consume her balance faster, thereby allowing Wells Fargo to impose more overdraft fees.

26           46.     When she received the insufficient-funds notice, Ms. Gutierrez had no  
27 understanding of what the \$88 fee meant, or how the amount had been calculated (Tr. 388).  
28 Ms. Gutierrez also did not understand how overdraft fees could be assessed if a debit-card

1 purchase was “approved” by Wells Fargo while making purchases at a store or restaurant. She  
2 had not been adequately apprised of the shadow-line extension.

3 47. With respect to the posting of debit-card purchases against her checking account,  
4 Ms. Gutierrez did not know “how the system worked” but simply assumed that when her Wells  
5 Fargo debit card was swiped when making a purchase, it would be deducted “automatically” from  
6 her account as Wells Fargo marketing literature had indicated (*id.* at 386).

7 48. Over the next two days, October 12 and 13, two additional overdraft fees were  
8 assessed on Ms. Gutierrez by Wells Fargo (TX 1). The fee imposed on October 12 was caused by  
9 a debit-card purchase of \$5.68 made by Ms. Gutierrez on October 9 at a Jack in the Box  
10 restaurant. The fee on October 13 was caused by a debit-card purchase of \$20.01 made by  
11 Ms. Gutierrez on October 10 at an ExxonMobil gas station. Unlike the prior overdraft fees,  
12 however, the October 13 overdraft fee was \$33 (rather than \$22) — a result of Wells Fargo’s  
13 two-tiered fee schedule that imposed harsher fees on account holders who had overdrafted their  
14 accounts on multiple occasions within a twelve-month period.

15 49. To sum up the damage, by October 13, Ms. Gutierrez had overdrafted her account  
16 by only \$49.28. Due to the multiplication of overdraft penalties, however, she was required to  
17 deposit almost four times that amount — \$192.28 — into her checking account to return it to a  
18 zero balance (TX 4). Stated differently, three-fourths (in round terms) of her \$192.28 checking-  
19 account deficit consisted of Wells Fargo overdraft penalties.

20 50. Had the bank not commingled Ms. Gutierrez’s debit-card purchases with her  
21 checks, she would have only had to pay \$126.28 (rather than \$192.28) to return her checking  
22 account balance to zero. Similarly, if Ms. Gutierrez’s transactions had been posted in low-to-high  
23 order or chronologically, she would have only had to pay \$126.28 to return her checking account  
24 to a zero balance.

25 51. Ms. Gutierrez received a payroll payment via direct deposit from her employer,  
26 AutoZone, on October 13. The deposit, which went straight into her Wells Fargo checking  
27 account that evening, was in the amount of \$412.90. While this returned Ms. Gutierrez’s  
28

1 checking account to a positive balance, over a third of this payroll payment went directly into  
2 Wells Fargo's pockets to cover the overdraft penalties (TX 1).

3 52. While the high-to-low bookkeeping device did not directly affect the overdraft fees  
4 incurred by Ms. Gutierrez on October 12 and 13 (since her account was already overdrafted on  
5 those days), it catapulted her into a higher overdraft bracket and upped her per-occurrence fee.  
6 Moreover, as stated, the high-to-low posting of Ms. Gutierrez's debit-card purchases dramatically  
7 increased the rate at which her balance was consumed, thereby multiplying the number of  
8 overdraft penalties she incurred on October 11.

9 53. Given the costs of Ms. Gutierrez's college education and her limited income at the  
10 time, \$143 in overdraft fees was a significant amount of money for her to have to pay in overdraft  
11 penalties (Tr. 405). Ms. Gutierrez would *not* have made the four purchases that resulted in  
12 overdraft fees if she had been advised or warned that each purchase — some as small as \$3.23 —  
13 would be covered by a secret shadow line of credit and assessed a \$22 or \$33 overdraft fee (*id.* at  
14 403–05).

15 54. Ms. Gutierrez did not benefit in any way, shape, or form from Wells Fargo's  
16 high-to-low bookkeeping device.

17 55. After receiving these fees, Ms. Gutierrez decided not to depend on the available  
18 balance information Wells Fargo communicated to her online and over the phone (*id.* at 406).  
19 Instead, she had to “sort of trick [her] brain” to remind herself that she had less money in her  
20 checking account than the bank had been communicating to her.

21 56. Even after receiving and reviewing her Wells Fargo account statement for the  
22 period covering the transactions discussed above, Ms. Gutierrez could *still* not decipher the  
23 process or order in which the various transactions were posted to her checking account and how  
24 her debit-card purchases could lead to multiple overdraft fees. The Court has studied her account  
25 statements and finds that it was impossible for her or anyone else to reconstruct how the bank  
26 came up with its number of overdrafts.

27 57. Even if Ms. Gutierrez had meticulously maintained a chronological check register  
28 of all of her transactions (as Wells Fargo insists that she and other customers should), it could not

1 have accurately reflected or predicted how the bank would have posted transactions. Stated  
2 differently, Ms. Gutierrez had no reason to know that Wells Fargo would resequence her  
3 debit-card transactions in a way that would maximize the number of overdraft fees it could assess  
4 on her. She would *not* have known that she was at risk of incurring *four* overdraft fees on  
5 October 10. This is significant, for over and over again at trial, bank counsel and bank witnesses  
6 waxed eloquent about the virtues of keeping a check register. In reality, the most exacting  
7 register would not have told Ms. Gutierrez that she would be hit with four rather than one  
8 overdraft fee.

9 58. Despite being new to banking, Ms. Gutierrez understood the importance of  
10 managing her checking account and not spending more than she had. She acknowledged that she  
11 made a mistake by overdrafting her account. She did *not*, however, expect or believe it was fair  
12 for Wells Fargo to capitalize upon her mistake by artificially resequencing her debit-card  
13 transactions to maximize fee revenue for the bank.

14 59. Ms. Gutierrez was harmed by this practice. She was deceived by the bank's  
15 obfuscation of its practice regarding high-to-low posting and the risk that one overdraft could be  
16 transformed into as many as ten overdrafts. She also relied upon the bank's misleading marketing  
17 materials that reinforced her natural assumption that debit-card transactions would post  
18 chronologically.

19 60. Ms. Gutierrez's testimony in support of these findings was and remains  
20 imminently credible.

21 **CLASS MEMBER ERIN WALKER**

22 61. Erin Walker, a member of the "resequencing class," suffered a similar piling-on  
23 encounter. Ms. Walker opened a checking account and a savings account in July 2006 at a Wells  
24 Fargo branch in Culver City. Like Ms. Gutierrez, she was around eighteen at the time she opened  
25 these accounts and this was her first real banking experience.

26 62. Ms. Walker chose Wells Fargo because she had seen its ATMs throughout the  
27 campus of Arizona State University, where she was about to start school.  
28



1           63.     The Wells Fargo CSR who assisted Ms. Walker in opening her accounts provided  
2 her with a Wells Fargo “Welcome Jacket” (Tr. 756–57; TX 18, 84). Ms. Walker did not read the  
3 Welcome Jacket while at the branch, but read it at home (Tr. 757–58). In particular, Ms. Walker  
4 read the same portion of the Welcome Jacket pertaining to debit cards that Ms. Gutierrez read,  
5 which stated that “[e]ach purchase is automatically deducted from your primary checking  
6 account” (TX 84).

7           64.     Ms. Walker did not recall receiving a Wells Fargo CAA at the time she opened her  
8 account. She also did not recall if her Welcome Jacket contained a copy of a CAA (Tr. 758).  
9 This order finds, however, that it was Wells Fargo’s customary business practice to provide  
10 CAAs to its customers when they opened a new account, and that in all likelihood, Ms. Walker  
11 *did* receive a copy of the CAA (*id.* at 275). In any event, she did not read through Wells Fargo’s  
12 CAA and was unaware of its contents when she opened her accounts. She had no knowledge or  
13 understanding of how transactions would be posted against her checking account (*id.* at 768).  
14 No one at the bank had explained it to her.

15           65.     During the account-opening process, Ms. Walker signed up for overdraft  
16 protection and to receive a Wells Fargo debit card. The debit card arrived in the mail sometime  
17 thereafter. While she was at the Wells Fargo branch, the CSR did *not* instruct Ms. Walker about  
18 how to use her debit card (*id.* at 759). Nevertheless, Ms. Walker ended up using her debit card  
19 more often than checks to make purchases (*id.* at 759–60).

20           66.     Like Ms. Gutierrez, Ms. Walker also signed up for Wells Fargo’s online banking  
21 services after opening her accounts. She used this service periodically to check her available  
22 balance online (*id.* at 760).

23           67.     On Tuesday, May 29, 2007, Ms. Walker made a \$9.66 purchase at Jackson Market  
24 in Culver City using her Wells Fargo debit card (TX 21). Two days later, on Thursday, May 31,  
25 she used the same debit card to purchase \$10.92 of merchandise at a store called Essence of  
26 Nature in Los Angeles.

27           68.     The following day, Friday, June 1, Ms. Walker purchased \$20.27 worth of gasoline  
28 from a Shell gas station using her Wells Fargo debit card (*ibid.*). That same day, Ms. Walker

1 purchased food items at a restaurant called Sandbags and at Jamba Juice, an establishment that  
 2 serves smoothies. The purchase at Sandbags totaled \$7.52 while the Jamba Juice purchase totaled  
 3 \$4.00. Both purchases were made using her Wells Fargo debit card.

4 69. Finally, on Saturday, June 2, Ms. Walker went to an ARCO gas station and spent  
 5 \$20.61 using her Wells Fargo debit card. That same day, she also went to two coffee shops —  
 6 Starbucks and The Coffee Bean & Tea Leaf — and spent \$5.55 and \$4.10, respectively, using her  
 7 Wells Fargo debit card.

8 These transactions are shown as follows:

9	10	11	12	13
\$9.66 Jackson Market	\$10.92 Essence of Nature	\$20.27 Shell gas station	\$20.61 ARCO gas station	
		\$7.52 Sandbags	\$5.55 Starbucks	
		\$4.00 Jamba Juice	\$4.10 The Coffee Bean	
14		15		16
<b>Tues. May 29</b>	<b>Thurs. May 31</b>	<b>Fri. June 1</b>	<b>Sat. June 2</b>	

17 70. Ms. Walker completed each of these debit-card purchases without any indication  
 18 from the bank that she lacked sufficient available funds to cover them. At no time did Wells  
 19 Fargo warn her that she was overdrawn or that any one of these purchases could trigger an  
 20 avalanche of overdraft penalties from earlier purchases she had already made. Instead, Wells  
 21 Fargo allowed each transaction to go through with nary a warning.

22 71. On Tuesday, June 5, Wells Fargo assessed *eight* overdraft fees against  
 23 Ms. Walker's checking account. The amount of each fee was \$34. In total, Ms. Walker was  
 24 assessed \$272 in overdraft fees.

25 72. The eight debit-card purchases were posted in high-to-low order against her  
 26 account (TX 21). Commingled with these debit-card purchases was a check Ms. Walker had  
 27 written in the amount of \$8.47. This check was presented for payment on June 4.

28 73. During the posting of these nine transactions, a transfer of funds from  
 Ms. Walker's savings account to her checking account was made in the amount of \$3.72 (*ibid.*).  
 This automated transfer was triggered by Wells Fargo's overdraft-protection service when the

1 first of eight overdraft items was posted.<sup>5</sup> The \$3.72 transfer, however, was not large enough to  
 2 cover the overdraft amount, resulting in an overdraft fee. Since Ms. Walker only had \$3.72 in her  
 3 savings account at the time, that was the most that Wells Fargo could transfer into her checking  
 4 account.

5 74. The balance of Ms. Walker's checking account before any of these transactions  
 6 were posted was \$36.41. Shown below is an illustration of how the eight debit-card purchases,  
 7 the written check, and the overdraft-protection transfer posted against her checking account after  
 8 the close of business day on June 4. As before, items that were debited are represented in  
 9 parentheses.

	<b>Transaction Description</b>	<b>Amount</b>	<b>Balance</b>
11	1. PIN-based debit-card purchase on 6/2/2007 at ARCO gas station	(\$20.61)	\$15.80
12	2. Debit-card purchase on 6/1/2007 at Shell gas station	(\$20.27)	-\$4.47 **
13	3. Overdraft protection transfer from Ms. Walker's savings account	\$3.72	-\$0.75
14	4. Debit-card purchase on 5/31/2007 at Essence of Nature	(\$10.92)	-\$11.67 **
15	5. Debit-card purchase on 5/29/2007 at Jackson Market	(\$9.66)	-\$21.33 **
16	6. Check #104 presented for payment on 6/4/2007	(\$8.79)	-\$30.12 **
17	7. Debit-card purchase on 6/1/2007 at Sandbags restaurant	(\$7.52)	-\$37.64 **
18	8. Debit-card purchase on 6/2/2007 at Starbucks	(\$5.55)	-\$43.19 **
19	9. Debit-card purchase on 6/2/2007 at The Coffee Bean & Tea Leaf	(\$4.10)	-\$47.29 **
20	10. Debit-card purchase on 6/1/2007 at Jamba Juice	(\$4.00)	-\$51.29 **

\*\* \$34 overdraft fee assessed.

27  
 28 <sup>5</sup> It is possible that the overdraft-protection transfer was made after all of the debit-card and check transactions had posted. The record is unclear on *when* overdraft-protection transfers were processed during batch posting. In any event, it does not affect this analysis.

1           75. As shown, by commingling the eight debit-card purchases with the written check  
2 and posting them in high-to-low order, Ms. Walker's available balance was depleted to a negative  
3 balance using the least number of transactions possible, allowing the maximum number of  
4 overdraft fees to be assessed.

5           76. Taking into account the availability of \$3.72 in overdraft protection funds, if Wells  
6 Fargo posted these same transactions in low-to-high order, only *three* overdraft fees (\$101) rather  
7 than *eight* overdraft fees (\$274) would have been assessed on Ms. Walker on June 5 — a  
8 difference of \$173. This again illustrates how a high-to-low ordering dramatically increases the  
9 number of overdraft items *for exactly the same conduct*.

10           77. Similarly, if all debit-card transactions had been posted from low-to-high *before*  
11 the written check, as Wells Fargo used to do in California prior to April 2001, only *four* overdraft  
12 fees would have been assessed (or, alternatively, the check would have been returned, resulting in  
13 a \$34 non-sufficient funds fee) (TX 353).

14           78. Finally, if the transactions had been posted in chronological order (or as close to  
15 chronological order as possible), Ms. Walker would have been assessed between five and seven  
16 overdraft fees, depending upon where the check was posted relative to the debit-card purchases  
17 and the time-stamp information for the June 1 purchases.<sup>6</sup> In either scenario, the fees would have  
18 been less than under a high-to-low ordering.

19           79. Ms. Walker did not learn that she had been assessed hundreds of dollars in  
20 overdraft fees until a few days after the eight fees had been assessed. She found out by using  
21 Wells Fargo's online banking services, although insufficient funds notices had been mailed to her  
22 mother's address — the address of record on her account — by the bank (Tr. 762–63, 801–02).

23           80. By that time, a number of additional debit-card purchases had triggered more  
24 overdraft fees to be assessed. For example, a \$6.60 purchase at The Coffee Bean & Tea Leaf on  
25

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26           <sup>6</sup> Wells Fargo stored the date and time data for approximately 84 percent of debit-card purchases for  
27 class members during the class period (nearly 84 percent) (Tr. 879–80). It did not store timestamp information  
28 for the remaining 16 percent of debit-card transactions. Based upon this timestamp information, the bank could  
chronologically order most debit-card purchases in the order transacted. The record, however, does not contain  
time-stamp data for Ms. Walker's June 1 purchases. The order in which these purchases were made affects the  
number of overdraft fees that could have been assessed under chronological sequencing.

1 June 3 was posted after the close of business day on June 5. That transaction triggered an  
2 additional \$34 overdraft fee to be assessed against Ms. Walker's checking account on June 6.

3 81. Three other transactions, including an ATM withdrawal of \$20, a \$20.78  
4 debit-card purchase of gasoline made on June 5 at an ARCO gas station, and a \$4.69 debit-card  
5 purchase made on June 4 at Coldstone Creamery (an ice cream parlor) posted to Ms. Walker's  
6 checking account after the close of business day on June 6. This caused three more \$34 overdraft  
7 fees to be assessed on June 7. Additionally, Ms. Walker was assessed five dollars for a so-called  
8 "Continuous OD Level 2 Charge" by Wells Fargo on June 7. This charge was imposed due to  
9 Ms. Walker's failure to pay off her negative balance within a certain number of days.

10 82. By the end of day on June 7, Ms. Walker's checking account had reached a  
11 negative balance of -\$516.36. Of this deficit, \$413 were Wells Fargo overdraft fees (including  
12 continuous overdraft fees). In other words, despite overdrafting her account by one hundred  
13 dollars, thanks to high-to-low resequencing and the shadow-line program, Ms. Walker was  
14 required to pay Wells Fargo nearly five times that amount to return her checking account to a  
15 zero balance.

16 83. That same day, Ms. Walker made a purchase at a Starbucks coffee shop in the  
17 amount of \$5.60. She used her Wells Fargo debit card to complete the purchase. Despite being  
18 overdrafted by hundreds of dollars at this point, Wells Fargo nevertheless approved the purchase  
19 at the point-of-sale under its shadow line. Ms. Walker was assessed an additional \$34 overdraft  
20 fee for this purchase on June 11.

21 84. Finally, for a \$10.34 debit-card purchase made by Ms. Walker on June 5 at  
22 Jackson Market, she was assessed an additional \$34 overdraft fee on June 12, again due to the  
23 shadow line of credit.

24 85. By June 14, Ms. Walker had been assessed six five-dollar continuous overdraft  
25 fees and fourteen \$34 overdraft fees by Wells Fargo. This amounted to \$506 in penalties for  
26 overdrafting her checking account by approximately \$120.

27 86. While only a portion of these penalties can be directly tied to the bank's high-to-  
28 low posting (since posting order will not change the number of overdrafts assessed once the

1 account is already overdrafted), high-to-low bookkeeping made it much more difficult for Ms.  
2 Walker to return her account to a positive balance. Stated differently, by enabling Wells Fargo to  
3 assess the maximum number of overdraft fees on June 5, high-to-low ordering and the shadow  
4 line made it much more likely that Ms. Walker's account would remain overdrafted for a longer  
5 time period.<sup>7</sup>

6 87. Ms. Walker was able to convince Wells Fargo — after calling the bank, meeting  
7 in-person with a Wells Fargo representative, and complaining about these fees — to reverse four  
8 overdraft fees and four continuous overdraft fees. She was still liable for \$350 in penalties  
9 (TX 22). After repaying these fees, she closed her Wells Fargo checking and savings accounts  
10 (Tr. 784).

11 88. Like Ms. Gutierrez, Ms. Walker understood the importance of not spending more  
12 than she had in her checking account (*id.* at 788–89). Nevertheless, she acknowledged that she  
13 made a mistake and forgot to check her balance prior to making the above purchases (*id.* at 779).  
14 She neither understood nor expected, however, that her purchases would be deducted from her  
15 account in a way that would maximize her exposure to overdraft fees. She had no idea that all of  
16 her smallest purchases made at a Starbucks or The Coffee Bean would be posted last so as to  
17 allow Wells Fargo to charge her a \$34 overdraft fee for each cup of coffee purchased.

18 89. Ms. Walker also did not understand how she could be assessed over \$500 in  
19 overdraft-related fees for purchases that were “approved” at the point-of-sale, the majority of  
20 which were less than ten dollars in value.

21 90. Ms. Walker was harmed by Wells Fargo's unfair and deceptive business practices.  
22 Like Ms. Gutierrez, she was deceived by the bank's non-disclosures regarding high-to-low  
23 posting and the risk that one overdraft could be transformed into as many as ten overdrafts. She  
24 also reasonably relied upon the bank's misleading marketing materials reinforcing a customer's  
25 natural assumption that debit-card transactions would post chronologically.

26  
27  
28 

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<sup>7</sup> These findings aside, the amount of restitution ordered herein will be strictly limited to overdraft penalties caused by high-to-low posting. Restitution will not be awarded for any overdraft fees that would have been assessed regardless of the bank's posting order.

1 91. Ms. Walker’s testimony in support of these findings was and remains imminently  
2 credible.

### 3 THE BATCH POSTING PROCESS

4 92. All banks post transactions after the close of every business day. This occurs in  
5 the wee hours after midnight. During this process, transactions that were presented for settlement  
6 during the day are posted against the customer’s checking account (Tr. 593–94). In recent years,  
7 this has become a computerized process.

8 93. Wells Fargo calls its automated system HOGAN. The HOGAN deposit system  
9 does not exercise individualized discretion based upon the nature of a customer’s transactions.  
10 Unlike only a few years ago when individualized discretion was sometimes exercised in a manual  
11 sort, Wells Fargo does not prioritize payments, for example, to the Internal Revenue Service  
12 versus payments to a wine shop. Rather, HOGAN is designed to sequence and post transactions  
13 in a pre-programmed order selected by the bank.

14 94. When a credit transaction is “posted” during batch posting, the amount of the  
15 credit is added to the ledger (*i.e.*, actual) balance of the customer’s checking account. Examples  
16 of credit transactions include a deposited check, a return of a debit-card purchase, a transfer of  
17 funds into a checking account from another source (*e.g.*, a savings account), and the direct deposit  
18 of payroll. This increases the balance, although a temporary hold is sometimes placed on  
19 deposited checks.

20 95. When a debit transaction is “posted,” the amount of the debit is deducted from the  
21 ledger balance of the customer’s checking account. If the customer has sufficient funds in his or  
22 her checking account to cover a debit, it is simply posted to the customer’s checking account and  
23 paid. No overdraft fee is assessed.

24 96. All possible types of debit transactions are posted during batch processing,  
25 including debit-card transactions, traditional written checks, ACH transactions, cash withdrawals  
26 or transfers, cashiers-check purchases, and cashed checks (Tr. 604). As stated, debit-card  
27 purchases, checks, and ACH transactions are commingled together and posted in high-to-low  
28 order by Wells Fargo. Most banks, by contrast, still use the opposite low-to-high sequencing.

1           97.     Once the funds in an account are consumed, further debits will be overdrafts.  
2     When the HOGAN deposit system at Wells Fargo is presented with a debit transaction for  
3     posting, two steps are performed: *First*, the system determines whether the transaction is a  
4     “must pay” item. A “must pay” item means exactly that — the bank is obligated to pay it and  
5     cannot reject it, even if the customer lacks sufficient funds to cover it. This is because the bank  
6     has already authorized the purchase and the merchant has relied on the authorization by letting the  
7     customer leave the store with merchandise. Significantly, the vast majority of debit-card  
8     purchases are “must pay” items. This is significant because it undercuts the bank’s rationale  
9     presented at trial for high-to-low posting, as will soon be seen.

10           98.     *Second*, if the transaction is not a “must pay” item, the HOGAN system determines  
11     whether to pay the item or return it unpaid. To make this decision, the HOGAN system first  
12     looks at the customer’s balance. If there are insufficient funds to cover the transaction, the  
13     HOGAN system then looks for overdraft-protection sources — *e.g.*, savings or credit-card  
14     accounts that are linked to the customer’s primary checking account.

15           99.     If the customer has sufficient funds available through overdraft protection, Wells  
16     Fargo automatically transfers funds from the customer’s savings account (or charges the  
17     customer’s credit card) to cover the overdraft amount (Tr. 612–14). A fee, however, is charged  
18     every time an overdraft-protection transfer is made (*id.* at 1147; TX 6, 347, 353, 355). These  
19     overdraft-protection fees — though lower than overdraft fees — are also a profit center for the  
20     bank (Tr. 1368).

21           100.    Finally, if there are still not enough funds to cover the transaction, the HOGAN  
22     system looks to a hidden source of funds that the bank internally calls the “shadow line.” The  
23     bank computer performs a secret “risk assessment” — akin to a credit analysis — to determine  
24     whether the customer would be likely to repay the overdraft amount and corresponding fee if the  
25     item is honored (*id.* at 1564–65). As stated, this hidden amount that the bank is willing to “spot  
26     the customer” is the customer’s “shadow line” — as in shadow “line of credit.” If the bank  
27     decides, based upon the shadow line, to pay the item into overdraft, an overdraft fee is then  
28



1 assessed. If, however, the bank elects to return the item unpaid, a non-sufficient funds (“NSF”)  
2 fee is assessed. During the class period, NSF fees were lower than overdraft fees.

3 101. Importantly, during the class period, the same shadow line was employed *before*  
4 the posting process to authorize debit-card transactions in the first place. Put differently, rather  
5 than declining debit-card purchases when the customer lacked sufficient funds (as the bank did  
6 prior to May 2002), the bank approved such transactions with the shadow line without any  
7 warning to the customer at the checkout counter that an overdraft was in the making. Then, when  
8 the debit-card purchase came in for settlement soon thereafter, one or more overdraft fees were  
9 assessed.

#### 10 **WELLS FARGO’S ACTUAL MOTIVE AND PURPOSE: PROFITEERING**

11 102. The trial record is most telling about the true reasons Wells Fargo adopted  
12 high-to-low bookkeeping and the two allied practices — commingling and the shadow line —  
13 described herein. Internal bank memos and emails leave no doubt that, overdraft revenue being a  
14 big profit center, the bank’s dominant, indeed sole, motive was to maximize the number of  
15 overdrafts and squeeze as much as possible out of what it called its “ODRI customers”  
16 (overdraft/returned item) and particularly out of the four percent of ODRI customers it recognized  
17 supplied a whopping 40 percent of its total overdraft and returned-item revenue. This internal  
18 history — which is laid bare in the bank’s internal memos — is so at odds with the bank’s theme  
19 of “open and honest” communication and that “overdrafts must be discouraged” that the details  
20 will be spread herein.

21 103. Internal bank memos were presented at trial pertaining to a bank-wide strategic  
22 plan called “Balance Sheet Engineering” — or “BSE” for short (*see, e.g.*, TX 36, 61). The  
23 documents and testimony surrounding the BSE plan provided clear evidence that the challenged  
24 practices were implemented for no other purpose than to increase overdrafts and overdraft fee  
25 revenue (Tr. 134–35, 237).

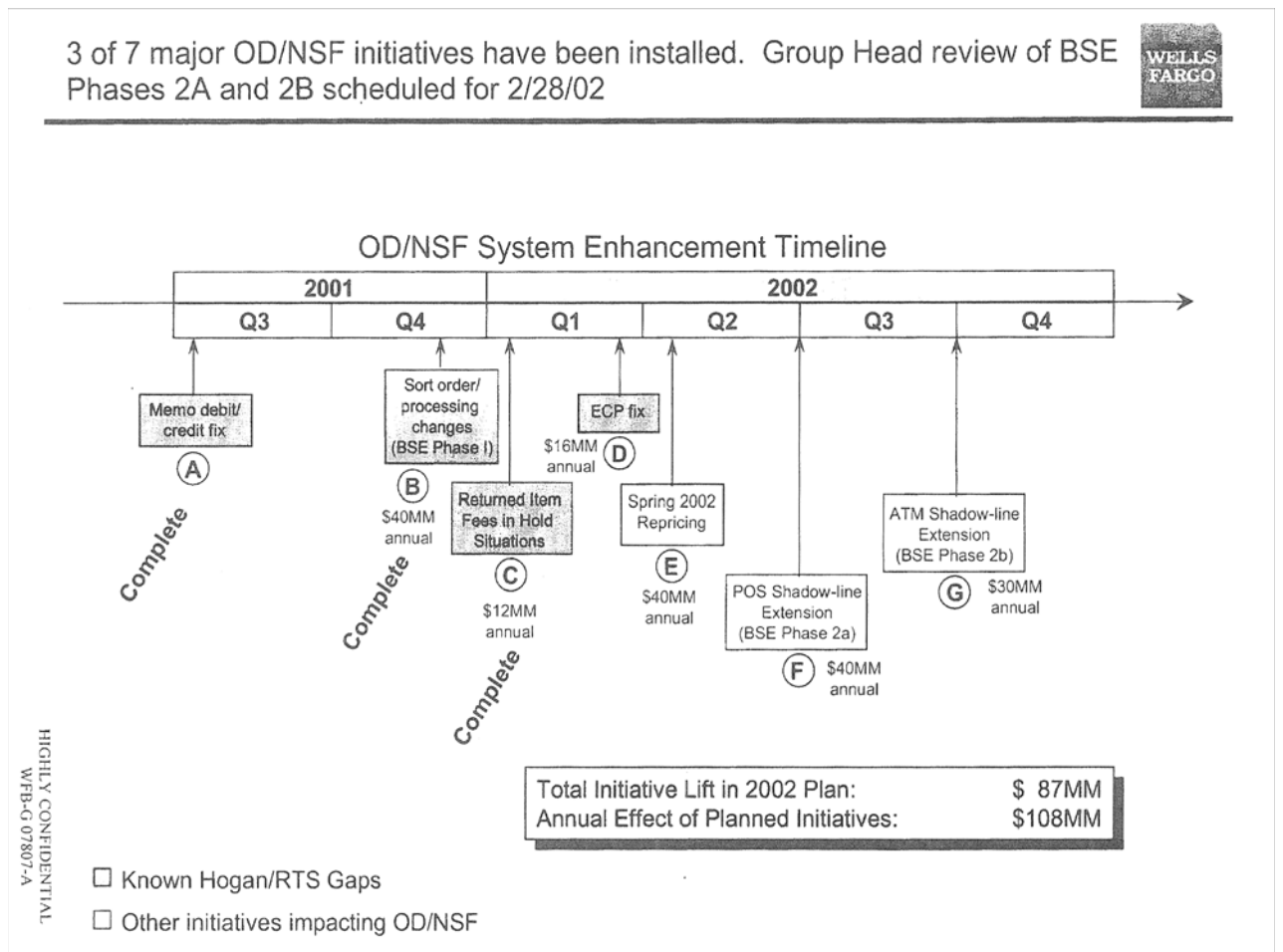
26 104. Both the commingling of debit-card transactions with checks and ACH  
27 transactions and the extension of the shadow line to debit-card purchases were part of Wells  
28 Fargo’s BSE plan. The commingling change was deemed “BSE Phase 1” while the extension of

1 the shadow line to point-of-sale (POS) debit-card purchases was deemed “BSE Phase 2a” (*ibid.*;  
 2 TX 36, 61).

3 105. The internal BSE memos show that both the commingling change and the adoption  
 4 of the shadow-line program were intended to capitalize on the overdraft-multiplying effect of  
 5 high-to-low ordering, which had been recently implemented in California in April 2001, a few  
 6 months before.

7 106. A graphical timeline of Wells Fargo’s BSE initiatives, taken straight out of a Wells  
 8 Fargo internal memo from February 2002, is shown below (TX 36). As the internal timeline  
 9 illustrates, both BSE Phase 1 and BSE Phase 2a were part of a larger suite of OD/NSF  
 10 (overdraft/non-sufficient funds) initiatives being deployed by the bank. The internal timeline also  
 11 shows that these initiatives were implemented by Wells Fargo specifically to increase revenue.

12 Here is the internal bank graphical timeline dated February 2002:



1           107. Again, this internal timeline picked up just after high-to-low sequencing was  
2 deployed in California. As shown in the timeline, Wells Fargo expected the commingling change  
3 in combination with the high-to-low change — labeled as BSE Phase 1 — to generate an  
4 additional \$40 million annually in overdraft fees nationwide (TX 36; Tr. 73). This was over and  
5 above the millions that the high-to-low change alone was already going to add. These financial  
6 projections were echoed in a number of internal spreadsheets pertaining to these initiatives (*see*,  
7 *e.g.*, TX 61).

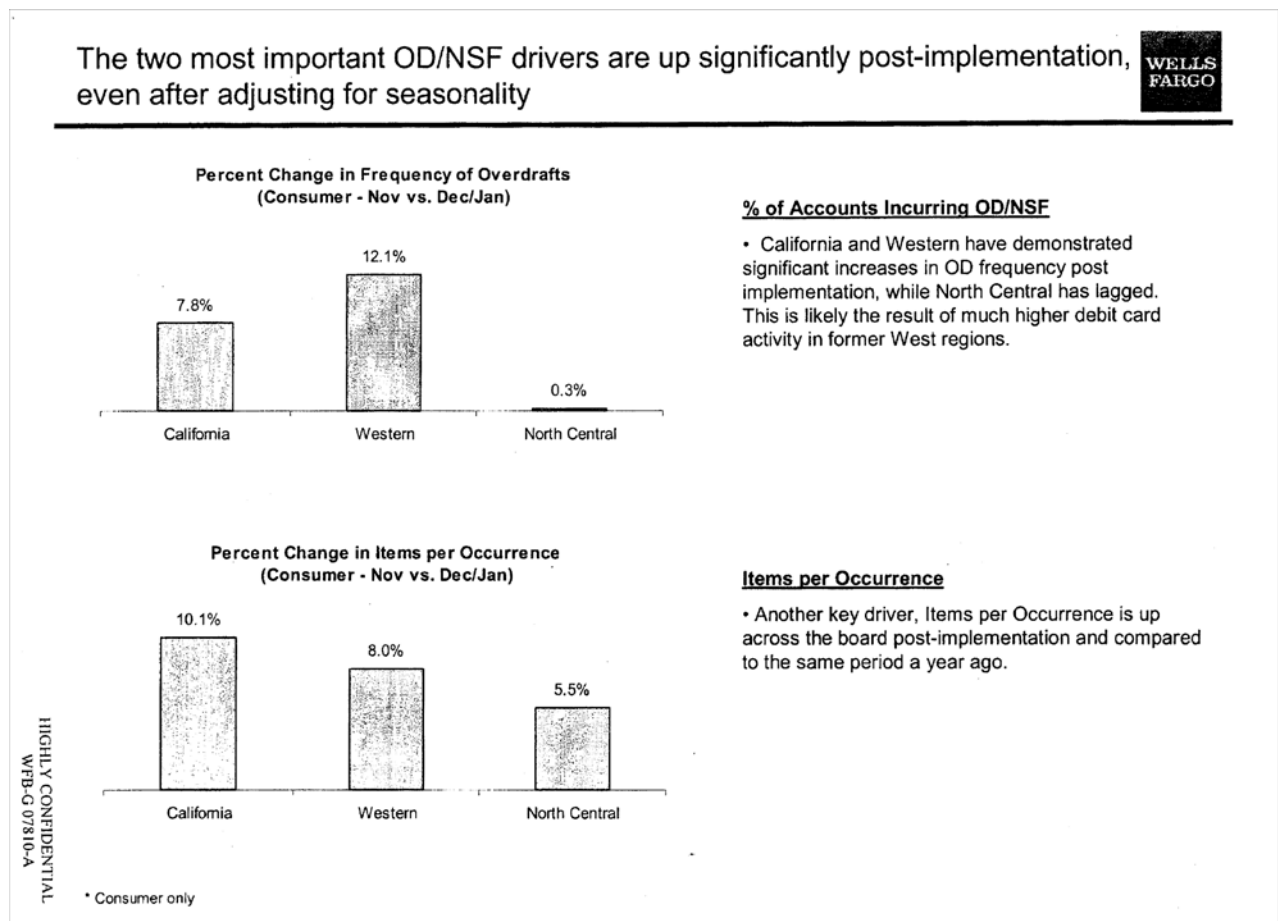
8           108. The commingling change was implemented in December 2001. Prior to this date,  
9 the bank posted all debit-card transactions from highest-to-lowest dollar amount, *then* all checks  
10 from highest-to-lowest dollar amount, and *then* all ACH transactions from highest-to-lowest  
11 dollar amount. In other words, the different transaction types were posted separately. In  
12 December 2001, however, the bank began commingling debit-card transactions with checks and  
13 ACH transactions and posting the entire group from highest-to-lowest dollar amount. Since  
14 checks and ACH transactions tended to be the larger items, commingling assured that balances  
15 would be consumed more rapidly so as to increase the number of overdrafts under a high-to-low  
16 ordering. This was the meaning of the \$40 million revenue boost predicted by the memo.

17           109. Consistent with the \$40 million projection in the February 2002 document,  
18 Wells Fargo Executive Vice-President Ken Zimmerman, who personally took part in the  
19 decision-making process for the commingling change, admitted at trial that the bank was well  
20 aware that commingling was expected to produce a “significant increase in overdraft income”  
21 (Tr. 1422). According to Mr. Zimmerman, the increase in overdraft income was “one of the  
22 significant factors in the decision-making” process for the commingling change. Indeed, the trial  
23 record shows that it was the only significant factor.

24           110. The undeniable connection between commingling and high-to-low resequencing  
25 was also clearly evidenced by internal bank memos. In the February 2002 BSE memo, the bank  
26 explained that the December 2001 commingling change was designed “to more-closely mirror  
27 true High-to-Low sort order” (TX 36). This is significant because Wells Fargo knew — and its  
28 own expert witness, Professor Christopher James, confirmed at trial — that high-to-low posting

1 would “mechanically . . . lead to more overdrafts” than other posting order (Tr. 613, 1863–64). It  
 2 is a mathematical certainty. Indeed, Mr. Zimmerman, who was personally involved in the bank’s  
 3 decision, admitted that he recommended *against* a high-to-low posting order due to the adverse  
 4 impact it would have on customers (*id.* at 113, 160–61, 340). His objection was overruled. Thus,  
 5 the additional revenue expected from commingling was premised upon the adverse impact of  
 6 high-to-low posting.

7 111. In this connection, the February 2002 memo went on to cheer that “[t]he two most  
 8 important OD/NSF [revenue] drivers [we]re up significantly” following the December 2001  
 9 commingling change (TX 36). These “two most important OD/NSF drivers” were: (1) the  
 10 percentage of Wells Fargo checking accounts incurring overdraft fees and (2) the number of  
 11 overdraft items per overdrafted account. This is also clearly shown in another bank slide from the  
 12 February 2002 memo:



1           112. Based upon Wells Fargo’s own analysis of its California customers, the percentage  
2 of checking accounts incurring overdraft fees *rose* 7.8 percent after the commingling change. As  
3 telling, the number of overdraft items per overdrafted account *rose* 10.1 percent over that same  
4 time period (*ibid.*). The commingling of transactions to more closely mirror a “true High-to-Low  
5 sort order” was working as planned.

6           113. A separate internal bank memo dated April 2002 provided additional analysis and  
7 commentary on the effect of commingling (TX 37). After crunching the numbers over the prior  
8 year, the April 2002 analysis stated that the number of overdraft items per occurrence was up  
9 strongly due to the fact that debit-card transactions were “now commingled with checks in the  
10 processing stream.” Yet again we see that Wells Fargo knew and expected that commingling  
11 would further amplify the overdraft-multiplying effect of high-to-low posting.

12           114. In sum, this order finds that Wells Fargo intended to boost its overdraft revenue by  
13 \$40 million via the December 2001 commingling change, relying upon the overdraft-multiplying  
14 effect of high-to-low resequencing to generate this additional revenue.

15           115. Turning to the shadow line, the BSE timeline in the February 2002 memo also  
16 showed the May 2002 extension of the shadow line to debit-card purchases, labeled in the  
17 document as “BSE Phase 2a.” This was expected by Wells Fargo to generate yet another  
18 \$40 million annually in overdraft fees nationwide (on top of the \$40 million boost expected from  
19 commingling) (TX 36).

20           116. As with the commingling change, extracting more overdraft penalties was the  
21 motivation behind the extension of the shadow line to the authorization of debit-card purchases in  
22 May 2002. The additional \$40 million in overdraft revenue that the bank expected from this  
23 change was predicated upon the overdraft-multiplying effect of high-to-low posting.

24           117. At all relevant times, including now, the vast majority of debit-card purchases  
25 followed a two-step process during the class period: authorization and settlement. When a Wells  
26 Fargo debit-card holder used his or her card to complete a purchase at a store or restaurant, an  
27 authorization request was almost always submitted to the bank then and there. Within a matter of  
28 seconds, the authorization request was approved or declined by the bank. An occasional

1 exception to this rule occurred if the purchase was made from a merchant who lacked the  
2 capability to submit an electronic authorization request at the time of purchase — a rare event.  
3 For these merchants, there was no authorization step, only a settlement step.

4 118. Whether the authorization request was approved or declined by Wells Fargo, the  
5 merchant was notified within a matter of seconds at the point of sale. As stated, approval of an  
6 authorization request constituted a promise by Wells Fargo to pay the merchant the authorized  
7 amount — *i.e.*, the debit-card purchase became a “must pay” item.

8 119. If the debit-card transaction was approved, the merchant would obtain payment  
9 from the bank via a separate process called “settlement.” Once the merchant submitted the  
10 debit-card transaction to the bank for settlement, the transaction would be posted during the  
11 bank’s posting process in the wee hours after midnight, as described above.

12 120. The time period between authorization and settlement was very short. Wells  
13 Fargo’s own expert, Dr. Alan Cox, provided direct testimony at trial that for the vast majority of  
14 debit-card purchases, the merchant presented the transaction for settlement within two business  
15 days. Indeed, according to Dr. Cox, around 90 percent of debit-card purchases were presented  
16 within two business days of authorization, and over half actually cleared *on the same day* they  
17 were authorized (Tr. 1782). For PIN-based debit-card purchases (where the user provided her  
18 PIN number at the point of sale rather than her signature), settlement was even faster — it almost  
19 always occurred on the same day as the authorization (*id.* at 640–41, 1023–24).<sup>8</sup>

20 121. As stated, prior to May 2002, an authorization request for a debit-card purchase  
21 would be declined if the customer’s checking account lacked sufficient available funds and the  
22 customer did not have enough overdraft-protection funds to cover the purchase amount. No fees  
23 were charged for a declination. Given the extremely short time frame between authorization and  
24 settlement, this meant that any debit-card purchase that *was* approved by the bank prior to May  
25 2002 was unlikely to be assessed an overdraft fee when posted.

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26  
27 <sup>8</sup> There were two ways to make a debit-card purchase during the class period: (1) a signature-debit  
28 purchase or (2) a PIN-based purchase. The former used a credit-card network to process the transaction — *e.g.*,  
VISA — while the latter used a PIN-based network — *e.g.*, Interlink. The differences, however, are immaterial  
to the findings herein. Both signature-debit and PIN-based purchases were subject to the shadow line and high-  
to-low posting during the class period (TX 36).

1           122. After deployment of the shadow line in May 2002, however, Wells Fargo began  
2 authorizing previously declined purchases as prospective overdrafts, assessing an overdraft fee  
3 for each overdraft. This initiative was called “overdraft via POS” within the bank, meaning the  
4 bank had now found a way to rack up overdraft fees for point-of-sale purchases that previously  
5 were protected from overdrafts.

6           123. From the customer’s perspective — standing at the checkout counter — the  
7 shadow line was completely invisible. The bank would approve the purchase without any  
8 warning that an overdraft was in the making.

9           124. Given the extremely short time frame between authorization and settlement, by  
10 approving these debit-card purchases when the customer lacked sufficient funds, Wells Fargo  
11 expected a marked uptick in overdraft fees. An increase in the number of overdrafted  
12 accounts — upon which the high-to-low resequencing could work its magic to the tune of  
13 \$40 million in additional revenue — was the intended result. Exactly this occurred.

14           125. It is true, as Wells Fargo says, that when any specific shadow-line authorization is  
15 made, Wells Fargo does not know for sure that an overdraft will occur by the time the item is  
16 presented for settlement. It is theoretically possible that an intervening deposit may be made to  
17 save the day in the short interval between authorization and settlement. While this may  
18 occasionally occur, the bank specifically expected when it deployed the shadow line for  
19 debit-card purchases that it would generate \$40 million annually in additional overdraft revenue.

20           126. Yet another powerful item of evidence illustrating the bank’s motive with respect  
21 to high-to-low posting, the commingling change, and the extension of the shadow line to  
22 debit-card purchases was an April/May 2002 email exchange between Mr. Zimmerman and his  
23 boss, Les Biller (TX 38, 57).<sup>9</sup> The email exchange was also forwarded to Karen Moore, Senior  
24 Vice-President of Wells Fargo’s Consumer Deposits group, and other executives at the bank.  
25 These emails (and the PowerPoint presentation appended to them) were written by  
26 Mr. Zimmerman in the midst of an unexpected shortfall in overdraft fee revenue in early 2002.

27  
28           <sup>9</sup> These emails were *completely redacted* when first produced by the bank. Only after a Rule 37 motion was threatened did the bank relent and reveal their contents.

1 The exchange concerned the reasons for the decline, including whether the manipulations in  
2 question were driving away customers.

3 127. Highlights from the first of two emails in this exchange are reproduced below,  
4 with emphasis added to particularly relevant passages (TX 38):

5 From: Zimmerman, Ken A.  
6 Sent: Monday, April 15, 2002 5:59 PM  
7 To: Biller, Les S.

8 \* \* \*

9 Les,

10 As you are probably aware, we have been investigating a  
11 recent erosion in OD/NSF<sup>10</sup> revenue in the consumer deposits  
12 portfolio.

13 \* \* \*

14 A driver-based look at the weakness in OD/NSF revenue  
15 indicates that *reduced overdraft frequency . . . is responsible for*  
16 *the shortfall. . . . This decline was not anticipated in the 2002*  
17 *planning process.* This shortfall is even more concern [sic] when  
18 you consider the 50% haircut we applied to [revenue projections  
19 for] the BSE initiatives in the 2002 Plan. While an initial spike in  
20 revenue followed by a trough is not unusual . . . *the continued*  
21 *weakness . . . is cause for concern.*

22 \* \* \*

23 If the current . . . trend continues, we would expect a  
24 significant shortfall relative to Plan . . . despite *the positive . . .*  
25 *effect of the installation of BSE 2A (overdraft via POS) in May.*  
26 The anticipated lift of BSE2A totals \$24MM in 2002[.]

27 \* \* \*

28 We are currently analyzing the change in frequency of  
overdrafts and expect to have more information in 5–10 days. Our  
suspicion is that the BSE-related changes of late November  
(changes in sort order) may have driven accelerated attrition  
among high-OD customer segments. *Given our dependence on a*  
*small set of OD customers (4% generate 40% of total OD/NSF*  
*revenue), a small change in behavior within this group can cause a*  
*large change in revenue.*

<sup>10</sup> As a reminder, “OD/NSF” means overdraft/non-sufficient funds.





1 was significantly below Plan in Q1 [of 2002.] . . . Since the  
 2 problem was clearly related to the volume of accounts  
 3 overdrafting, we . . . investigated potential explanations for the  
 4 reduced frequencies. Candidates included:

- 5 • tax refunds (beyond normal seasonality expectations)
- 6 • price elasticity (tied to BSE 1A)
- 7 • increased attrition among heavy overdraft customers
- 8 • effect of increased sales of overdraft protection
- 9 • significant change in portfolio tenure (*because new  
 10 accounts generate the bulk of OD revenue*)

11 As you will see in the attached presentation, substantial  
 12 increases in the average size, volume, and Direct Deposit of tax  
 13 refunds appears to explain . . . the shortfall in Q1 2002 OD  
 14 revenue.

\* \* \*

15 In terms of future expectations, we have seen continued  
 16 strong electronic refund activity in each week in April, and know  
 17 that paper refunds are lagging electronic. *This would imply that  
 18 some weakness will continue into May and persist until the excess  
 19 balances are depleted. We are conducting additional analyses of  
 20 these accounts to hopefully gain some insight into the timing of a  
 21 resumption of normal OD behavior.*

22 133. In short, Mr. Zimmerman discovered that the decline in overdraft fee revenue in  
 23 early 2002 was attributable to the direct deposit of tax refunds into the checking accounts of  
 24 high-OD customers. This was “good news” for the bank, because it meant that its high-OD  
 25 customers would resume “normal OD behavior” once “the excess balances [created by the tax  
 26 refunds] [we]re depleted.” So, Wells Fargo was *relieved* that its high-to-low bookkeeping could  
 27 continue without driving away its high-OD depositors — *i.e.*, there was no “cause for concern.”

28 134. Also evident from both emails is that the bank maintained detailed information  
 regarding the overdraft behavior of its customers. In addition to knowing that its high-OD  
 customer segment “generated 40% of total OD/NSF revenue,” Wells Fargo also knew that “new  
 accounts generate[d] the bulk of OD revenue” (TX 38). This latter fact was also echoed in the  
 videotaped deposition of Les Biller that was played at trial.

135. The PowerPoint presentation appended to the second email offered additional  
 insights into the bank’s views regarding overdrafts and overdraft revenue. The presentation noted  
 that “attrition among ODRI accounts is *troubling*” and that “increased tax refunds” had produced

1 a “*negative* ORDI revenue impact” and “*negative* ODRI effect” — namely a “decline in the  
2 frequency of overdrafts” (TX 57) (emphasis added). This shows that Wells Fargo did not want its  
3 customers to stop overdrafting (contrary to its litigation stance) and wanted to retain its ODRI  
4 customers and the ODRI revenue they generated.

5 136. These internal documents along with the larger trial record demonstrate that  
6 Wells Fargo implemented high-to-low posting, the commingling change, and the extension of the  
7 shadow line to debit-card purchases to turn what would ordinarily be one overdraft — which  
8 Wells Fargo Senior Vice-President Karen Moore admitted at trial was already “expensive”  
9 (Tr. 1149) — into as many as ten, and did so to extract as much ODRI revenue as possible from  
10 its ODRI customer base.

11 137. During the class period, overdraft revenue was the second-largest source of  
12 revenue for the Wells Fargo “Consumer Deposits” group (now called the “Consumer and Small  
13 Business Deposits” group) (*id.* at 623, 1515).<sup>11</sup> During the class period, Wells Fargo posted  
14 \$1,772,193,757 — almost two billion dollars — in overdraft fees to the accounts of its California  
15 customers (TX 190).

16 138. Although Mr. Zimmerman testified at trial that it was not a “core strategy” of  
17 Wells Fargo to grow this massive source of revenue, the bank’s own internal memos and emails  
18 *he authored* directly contradicted this assertion. This testimony was not credible.

19 139. After resistance by the bank, a court order allowed plaintiffs’ expert Arthur Olsen  
20 to access Wells Fargo’s computerized customer data and crunch the numbers. Expert Olsen’s  
21 study shows that the high-to-low switch boosted overdraft fees by hundreds of millions of dollars  
22 for the California class during the class period. The high-to-low switch had a colossal impact on  
23 depositors.

24 140. Weighing all of the evidence presented at trial, this order finds that gouging and  
25 profiteering were Wells Fargo’s true motivations behind the high-to-low switch and the allied  
26 practices that soon followed. High-to-low posting was adopted exclusively to generate more

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27  
28 <sup>11</sup> The Consumer Deposits group is the unit within Wells Fargo that was and remains primarily responsible for managing consumer checking accounts. It is responsible for implementing the business practices challenged in this action (Tr. 59–60).

1 overdraft fees and fee revenue at the expense of depositors. The two closely allied practices that  
2 followed were similarly motivated by a singular desire to boost overdraft fee revenue using the  
3 bank's high-to-low bookkeeping device. While these changes occurred prior to the class period,  
4 they set the stage for the profiteering that ran rampant during the class period and continues even  
5 now.

#### 6 WELLS FARGO'S POST-HOC RATIONALIZATIONS

7 141. Two of the bank's key defenses in this action presuppose that its decision-makers  
8 based its practices on factors other than multiplying overdrafts and overdraft revenue. *First*,  
9 Wells Fargo argued at trial that customers *wanted* and *benefitted* from a high-to-low posting  
10 order. *Second*, to support its federal preemption defense, Wells Fargo argued at trial that its  
11 decision-makers anchored the decision in the four factors set forth in 12 U.S.C. 7.4002(b)(2).  
12 This order finds that these are post-hoc rationalizations merely invented for trial.

13 142. Starting with the argument that Wells Fargo customers "wanted" and "benefitted  
14 from" the challenged practices, no credible evidence was presented at trial to support the bank's  
15 argument that high-to-low resequencing was deployed for this purpose or that customers wanted  
16 or benefitted from it.

17 143. That the vast majority of debit-card purchases are "must pay" items constitutes a  
18 complete showstopper to this argument. The bank must pay them regardless, even as overdrafts.  
19 There are only two exceptions — rare in practice — where the bank can reject such an item: (1)  
20 if the merchant did not obtain authorization prior to presenting the transaction for settlement, or  
21 (2) the merchant fails to present the transaction for settlement within 30 days of authorization (*id.*  
22 at 592, 1021–22). Aside from these two rare exceptions, Wells Fargo is *required* to pay a  
23 customer's debit-card purchases whether or not the customer has sufficient available funds to  
24 cover them.

25 144. Thus, posting debit-card transactions in high-to-low order confers no benefit upon  
26 Wells Fargo customers. Unlike checks or ACH transactions, which the bank *can* return unpaid,  
27 there is *no risk* that Wells Fargo will reject a large debit-card purchase if it posts last rather than  
28

1 first. It is a “must pay” item. Again, this distinction is important because this lawsuit is  
2 concerned only with debit-card purchases.

3 145. Since there is no real benefit to Wells Fargo customers when debit-card  
4 transactions are in high-to-low order, the only impact of the bank’s posting practices was and  
5 remains to multiply the number of overdraft fees assessed on its customers. That is clearly not a  
6 “benefit” to any consumer. Indeed, this adverse impact is exactly why Mr. Zimmerman  
7 recommended *against* switching to a high-to-low posting order (but he was overruled).

8 146. Apart from the must-pay aspect, there is no correlation between the dollar amount  
9 of an item and its priority of payment for a depositor. From a depositor’s viewpoint, a small item  
10 may well be as or more important than a medium or large item. A smaller item to a local  
11 government, for example, may be of more importance than a larger item for magazine  
12 subscriptions. No study has ever been conducted, as far as the record shows, to establish any  
13 correlation between dollar amount and customer priority of payment. On the other hand, it is  
14 mathematically certain that posting in high-to-low order will result in more overdrafts than any  
15 other posting sequence.

16 147. It is extremely implausible that depositors would prefer a system guaranteed to  
17 turn what would ordinarily be one overdraft into as many as ten to merely improve the odds that a  
18 large item would be honored at the expense of others. Yes, it is possible to construct a  
19 hypothetical where a large rent *check* would be paid under a high-to-low scheme but not  
20 otherwise. But it is also possible to construct a hypothetical where a smaller but more important  
21 check (such as the payment of a traffic ticket) might go unpaid under a high-to-low regime. The  
22 supposed net benefit of high-to-low resequencing is utterly speculative. Its bone-crushing  
23 multiplication of additional overdraft penalties, however, is categorically assured. Thus, wholly  
24 apart from the fact that the rationalization has no applicability to debit-card transactions (due to  
25 their “must pay” aspect), the net harm to depositors from the practice is so plain and so vast that  
26 this order rejects completely that high-to-low resequencing is a net benefit to depositors or  
27 preferred by them. Customer complaints filed by Wells Fargo depositors, quoted elsewhere in  
28 this order, underscore this disapproval.

1           148. Turning to the actual considerations behind the bank’s decision, it is true that  
2 Wells Fargo witnesses vaguely testified that the high-to-low posting order was adopted to benefit  
3 customers so that their largest obligations would be paid first (Tr. 89, 653, 1459, 1473, 1556–58).  
4 Almost always, however, this testimony was specific to checks or ACH transactions. According  
5 to the argument, a customer’s largest expenditures “may be” the customer’s “most important”  
6 transactions, possibly rent checks or ACH mortgage payments. Thus, by paying largest items  
7 first, there would be less of a chance that such items would be returned unpaid due to insufficient  
8 funds. This check and ACH rationale, to repeat, has no applicability to must-pay items.

9           149. The bank produced no documentary evidence that this supposed “benefit” to  
10 customers was actually discussed or considered by Wells Fargo management when the bank made  
11 the decision to post debit-card transactions in California in high-to-low order.

12           150. The bank also produced no study or documentary evidence that any Wells Fargo  
13 customers preferred a high-to-low posting order for debit-card transactions (or *any* transactions  
14 for that matter). On this point, two Wells Fargo witnesses — Mr. Zimmerman and Mr. Biller —  
15 referred to a consumer survey supposedly performed by Norwest Bank, which Wells Fargo  
16 merged with in 1998, that allegedly evidenced a customer preference for high-to-low posting  
17 (Tr. 104). This survey proved to be an utter phantom. Despite calls for its production, it was  
18 never produced at trial and neither Mr. Zimmerman nor Mr. Biller (nor any other bank witness)  
19 knew where a copy of it could be found.

20           151. Given this lack of evidence and the compelling evidence of gouging in the bank’s  
21 internal memos, the Court is convinced and so finds that this customer “benefit” and “preference”  
22 rationale was invented merely for public consumption and was not an actual motivating factor at  
23 the time any high-to-low decision was made, much less the high-to-low decision for must-pay  
24 items.

25           152. It is true that the rationale later appeared in Wells Fargo argument pieces  
26 distributed after the fact as *scripts* to bank employees to help justify the high-to-low posting order  
27 to customers who complained (*see, e.g.*, TX 55, 56). These later scripts, however, were for public  
28 consumption and did not reflect the bank’s true motives.

1           153. In the totality of the pre-decision memos, the Court has found only one that  
2 arguably points to this rationale. In January 2001, Wells Fargo Senior Vice-President Karen  
3 Moore sent an email stating that *check* posting would be changed from serial to high-to-low order  
4 (after the decision to make the change had already been made). She stated “[t]his may assure that  
5 the customer’s most important check (perhaps their rent or mortgage) is paid first” (TX 48). The  
6 words “may” and “perhaps” exemplify the speculative nature of this rationalization. “May”  
7 necessarily implies “may not.” “Perhaps” necessarily implies “perhaps not.” This comment,  
8 moreover, pertained only to a change regarding *checks*, not debit-card transactions — the subject  
9 of the present challenge. Rent checks and mortgage payments, of course, were not and are not  
10 paid using debit cards. There are no emails or memoranda giving any reason for using high-to-  
11 low posting for debit-card transactions other than revenue enhancement. This isolated sentence  
12 cannot overcome the overwhelming evidence that high-to-low resequencing was applied to debit-  
13 card transactions in order to multiply the number of overdrafts.

14           154. A 2008 FDIC report introduced at trial shows that only about a quarter of surveyed  
15 FDIC-supervised banks posted consumer deposit transactions in high-to-low order (TX 184). If it  
16 were true that banking customers actually preferred a high-to-low posting order, one would  
17 expect that more banks would be doing it and indeed promoting it as a plus. Despite pretending  
18 that high-to-low posting was preferred by customers, Wells Fargo has never promoted high-to-  
19 low posting as a customer plus. Indeed, as will be touched upon soon, the bank took pains to  
20 obfuscate this practice. This is surely because high-to-low posting is *not* a customer plus. Rather,  
21 it was used and is still being used by Wells Fargo as a snare for the unwary.

22           155. A 2009 comment in the Federal Register proffered by Wells Fargo during trial  
23 lends the bank only superficial support. In deciding not to address high-to-low posting at that  
24 time, the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision,  
25 and the National Credit Union Administration stated:

26           The Agencies are not addressing transaction processing order at  
27 this time. The Agencies believe that it would be difficult to set  
28 forth a bright-line rule that would clearly result in the best outcome  
for all or most consumers. For example, requiring institutions to  
pay smaller dollar items first may cause an institution to return

1           unpaid a large dollar nondiscretionary item, such as a mortgage  
2           payment, if there is an insufficient amount of overdraft coverage  
3           remaining to cover the large dollar item after the smaller items  
4           have been paid.

74 Fed. Reg. 5498, 5548 (Jan. 29, 2009).

5           156. As set forth in the Federal Register, the agencies began the administrative  
6           proceeding in May 2008 by soliciting comment on whether institutions should be required to  
7           process in low-to-high order to minimize overdraft fees. Industry commentators made several  
8           arguments. *First*, they invoked Section 4-303 of the Uniform Commercial Code as conferring  
9           discretion on institutions with respect to posting order. (The legislative comment to Section  
10          4303(b) of the California Commercial Code was not referenced.) *Second*, some banks argued that  
11          most customers prefer high-to-low posting because it results in their largest bills being paid first.  
12          *Third*, some banks argued that there were various alternatives such as  
13          in-sequence processing and that they should retain flexibility on a bank-by-bank basis.

14          Rather than decide anything, the agencies chose not to make any decisions on this  
15          particular issue “at this time.” They said it would be difficult to set forth “a bright-line rule that  
16          would clearly result in the best outcome for all or most customers.” They noted that causing  
17          smaller items to be paid first “may cause” an institution to return unpaid a large dollar  
18          nondiscretionary item, such as a mortgage payment. This statement falls far short of validating  
19          high-to-low posting. At most, it merely said that low-to-high posting — the proposal on the  
20          table — was not invariably the best sequence, a truism, and that the agencies were not yet ready  
21          to decide one way or the other whether to impose it on all banks in all circumstances.

22          More to the point, this statement cannot overturn the extensive trial record herein. Wells  
23          Fargo, for example, has been given a full and fair opportunity to prove that depositors prefer  
24          high-to-low posting, yet the bank has utterly failed to do so. It has also been given a full and fair  
25          opportunity to find and procure the illusory “Norwest Study” or any other study but it has utterly  
26          failed to do so. This is not an administrative proceeding where any blurb and argument piece can  
27          be tossed into the bin. We have had a trial with evidence and safeguards for getting at the truth.  
28          It is now evident that the bank’s supposed studies and rationales have withered and vanished



1 under effective cross-examination. The trial record here demonstrates that depositors do not  
2 prefer high-to-low posting, that there is no net benefit, and that the bank's actual motive in  
3 imposing a high-to-low regime was to multiply the number of overdrafts and thereby increase its  
4 overdraft revenue.

5 157. Turning to the December 2001 commingling change, Wells Fargo witnesses  
6 testified that "one of the key motivations" behind commingling was the supposed "migration" of  
7 consumer and merchant behavior from one transaction type to another, *e.g.*, away from checks  
8 and towards debit-card and ACH transactions (Tr. 1164–65, 1415–16).

9 158. Due to these supposed trends, the bank allegedly decided to commingle checks,  
10 debit-card transactions, and ACH transactions because posting them separately had become  
11 "increasingly confusing" to customers and service personnel (*id.* at 1415–16).

12 159. Mr. Zimmerman also testified that by commingling debit-card transactions with  
13 checks and ACH transactions, the bank could honor more of its customers' high-dollar items in  
14 the form of checks and ACH transactions by "truly sorting transactions in a high to low manner"  
15 (*id.* at 1460). This testimony echoed a similar statement, referenced earlier, in the bank's internal  
16 BSE memos (TX 36).

17 160. Weighing the evidence, this order rejects the testimony provided by bank  
18 witnesses. *First*, no written evidence showed that Wells Fargo actually considered "migration  
19 trends" when it decided to commingle debit-card transactions with checks and ACH transactions.

20 161. *Second*, no written evidence showed that *any* Wells Fargo customers or service  
21 personnel were "confused" by the separate posting of checks, debit-card transactions, and ACH  
22 transactions. By contrast, the evidence presented at trial showed that most customers were not  
23 even aware of how transactions were posted by the bank. The bank did not notify customers  
24 about the old system, the new system, or the change in systems.

25 162. *Third*, the notion that customers preferred a high-to-low posting order has already  
26 been rejected by this order. Rather, by "truly sorting transactions in a high to low manner" via  
27 commingling, Wells Fargo actually *exacerbated the harm* that customers would suffer in the form  
28

1 of overdraft fees by using up their balances at a faster rate, thereby maximizing the number of  
2 items paid into overdraft.

3 163. This adverse impact is exactly why Mr. Zimmerman — who, as stated, had  
4 recommended against the high-to-low switch before being overruled — also recommended  
5 *against* the December 2001 commingling change when the decision was made. He knew that it  
6 would amplify the overdraft-multiplying effect of high-to-low posting on customers (Tr. 160,  
7 1551).<sup>12</sup> As before, he was overruled.

8 164. For these reasons, this order finds that customers did not prefer or benefit from the  
9 December 2001 commingling change, and that Wells Fargo did *not* consider any of the above  
10 factors when it decided to commingle debit-card transactions with checks and ACH transactions.  
11 Any testimony to the contrary was not believable.

12 165. As for the shadow-line extension, according to Mr. Zimmerman, one of the  
13 “key motivations” behind this change was to increase the approval rate of debit-card purchases.  
14 This begs an important question. The increase in approval rate was achieved *only by authorizing*  
15 *debit-card purchases into overdrafts*. The whole point of the shadow line was, as  
16 Mr. Zimmerman put it, to promote “overdraft via POS” (TX 38). This was not previously  
17 allowed. Declinations protected against overdrafts. By authorizing what the bank had previously  
18 declined, “overdraft via POS” was suddenly operational.

19 166. No written evidence showed that customers preferred or benefitted from this  
20 change. Rather, the documentary evidence presented at trial showed that the bank implemented  
21 this change for the main purpose of boosting overdraft revenue by \$40 million (TX 36).

22 167. When unwittingly using the secret shadow line of credit to approve transactions,  
23 customers standing at the checkout counter were not warned that an overdraft was in the making.  
24 It is very hard to believe that customers would have preferred such a system of “overdraft via  
25 POS.” This is why the Federal Reserve has recently outlawed the practice absent a customer’s  
26 affirmative opt-in consent, as will soon be discussed.

27  
28 

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<sup>12</sup> Mr. Zimmerman also recommended against the commingling of transactions because he was  
concerned that the change would result in litigation against the bank. This concern proved prescient (Tr. 161).

1           168. Turning to the bank's preemption defense and its supposed considerations under  
2 12 C.F.R. 7.4002, the regulation then stated (and continues to state) the following:

3                   A national bank establishes non-interest charges and fees in  
4 accordance with safe and sound banking principles if the bank  
5 employs a decision-making process through which it considers the  
6 following factors, among others:

7                   (i) The cost incurred by the bank in providing the service;

8                   (ii) The deterrence of misuse by customers of banking  
9 services;

10                   (iii) The enhancement of the competitive position of the  
11 bank in accordance with the bank's business plan and  
12 marketing strategy; and

13                   (iv) The maintenance of the safety and soundness of the  
14 institution.

15           169. As set forth in detail below, Wells Fargo did *not* actually consider any of these  
16 factors when implementing the challenged posting practices.

17           170. While Mr. Zimmerman testified that the April 2001 high-to-low posting order  
18 change in California was justified in part by cost considerations, his testimony was not credible  
19 (Tr. 1429–30).

20           171. No documentary evidence supported his assertion that Wells Fargo considered  
21 operating costs when deciding to post debit-card transactions from highest-to-lowest dollar  
22 amount. Moreover, much of Mr. Zimmerman's testimony on this matter was not anchored in any  
23 genuine recollection of what the bank actually considered when it made this decision (*see, e.g.,*  
24 *id.* at 1427–40).

25           172. It is true that when Wells Fargo deployed high-to-low posting for debit-card  
26 transactions in California in April 2001, it had already done so for debit-card transactions outside  
27 of California (*id.* at 1412). This is because Wells Fargo, following its merger with Norwest Bank  
28 in 1998, was at the tail end of an eighteen-month process of moving the two banks' accounting  
and deposit systems onto a single system (*id.* at 68, 1409–10). California was the last Wells  
Fargo region to move onto the new system (*id.* at 280–81, 1411).

1           173. Referencing this history, Mr. Zimmerman testified that the change in posting order  
2 in California in April 2001 “brought California into alignment with the rest of the bank, which  
3 was already processing debit cards from high to low,” and that this change saved Wells Fargo  
4 costs by ensuring bank-wide uniformity (*id.* at 1429–30).

5           174. This testimony is irrelevant, however, to whether the initial bank-wide decision by  
6 Wells Fargo to deploy high-to-low posting for debit-card transactions was motivated by cost  
7 considerations. Indeed, as explained at trial, Wells Fargo’s decision to post debit-card  
8 transactions in high-to-low order was made in early 1999, two years before it was actually  
9 deployed in California (*id.* at 1412).

10           175. One impetus for the decision in 1999 was Wells Fargo’s merger with Norwest  
11 Bank. At the time of the merger in 1998, Wells Fargo and Norwest were posting debit-card  
12 transactions in different sequences — Wells Fargo was posting in low-to-high order while  
13 Norwest was posting in high-to-low order. Thus, Wells Fargo had to decide, among other things,  
14 on a uniform posting order for the new merged entity. In this connection, Wells Fargo considered  
15 three different posting orders: (1) high-to-low, (2) low-to-high, and (3) sequential/chronological  
16 order. After considering these three options, Wells Fargo executives — overruling the objections  
17 of Mr. Zimmerman noted earlier — made the bank-wide decision to post debit-card transactions  
18 in high-to-low order (*id.* at 75–76).

19           176. The bank produced no documentary evidence, however, that Wells Fargo  
20 management considered the impact that these three sequencing orders would have had on the  
21 bank’s operating costs. Rather, the trial record shows that the bank only considered increased  
22 revenue.

23           177. In sum, this order finds that Mr. Zimmerman’s testimony that Wells Fargo  
24 considered operating costs when deciding to post debit-card transaction in high-to-low order was  
25 not credible. The bank did *not* consider operating costs when it made this decision.

26           178. Wells Fargo similarly produced no evidence at trial showing that the bank  
27 instituted high-to-low posting of debit-card transactions to deter customers from misusing  
28 banking services. By contrast, the trial evidence showed that Wells Fargo deployed its

1 high-to-low posting practices — including the commingling change and the extension of the  
2 shadow line to debit-card purchases — to significantly *increase* the number of overdrafts incurred  
3 by customers and further boost an already major source of fee revenue (TX 36, 38, 57, 61;  
4 Tr. 134–35, 237). In short, the bank’s intentions behind high-to-low resequencing were to  
5 promote — not deter — customer overdrafts.

6 179. As showcased in the April/May 2002 emails between Mr. Zimmerman and  
7 Mr. Biller, Wells Fargo became “concerned” when overdraft frequency unexpectedly declined  
8 (TX 38). Part of this concern was that the deployment of high-to-low posting had caused  
9 increased attrition among the bank’s coveted “high-OD customer segment” — the “4% [that]  
10 generate[d] 40% of total OD/NSF revenue” (TX 38). Attrition among these accounts was  
11 “troubling” to the bank (TX 57). Once the bank learned that tax refunds were to blame, however,  
12 the bank treated this as “good news” — it simply had to wait until the tax refunds were  
13 “depleted” before “normal OD behavior” would again resume (TX 38).

14 180. BSE documents similarly showed that Wells Fargo had no intention of deterring  
15 overdraft behavior — rather, the bank intended to promote overdrafts. The BSE initiatives were  
16 *dependent* upon an increase in customer overdrafts (*see, e.g.*, Tr. 134–35, 237; TX 36, 61). On  
17 this point, Wells Fargo’s own documents stated that “two most important OD/NSF drivers” for  
18 increasing OD/NSF revenue were: (1) the percentage of accounts incurring overdrafts and  
19 (2) the number of overdraft items per overdrafted account (TX 36).

20 181. This order rejects as untrue the testimony provided by bank witnesses that  
21 high-to-low posting was implemented to deter overdraft behavior and prevent the bank from  
22 attracting customers who would misuse bank services via overdrafting.

23 182. With respect to considering the “competitive position” of the bank, as already  
24 stated, Mr. Zimmerman’s testimony as to the posting orders of competing banks was unanchored  
25 in a specific recollection of what the bank *actually* considered when it decided to post debit-card  
26 transactions in high-to-low order (*see, e.g.*, Tr. 1427–40). Rather, Mr. Zimmerman opined at trial  
27 about what the bank “would have” considered when making such a decision, conveniently  
28 regurgitating language along the lines of 12 C.F.R. 7.4002.

1           183. When finally asked directly, Mr. Zimmerman confirmed that he had no specific  
2 recollection of whether the posting practices of competitors were specifically considered when  
3 Wells Fargo decided to post debit-card transactions in high-to-low order (*id.* at 1448).  
4 Mr. Zimmerman further testified that he did not recall any specific discussion about the posting  
5 practices of Wells Fargo's competitors when the decision to commingle transactions in April  
6 2001 was made (*id.* at 1449).

7           184. No documentary evidence showed that Wells Fargo considered its competitive  
8 position or even knew how its competitors were posting debit-card transactions when it made the  
9 decision to post these transactions from high-to-low.

10           185. This order finds that Wells Fargo did *not* consider the enhancement of its  
11 competitive position when it decided to post debit-card transactions in high-to-low order.

12           186. Finally, no documentary evidence supported Wells Fargo's argument that it  
13 changed its posting practices to maintain the safety and soundness of the bank. Wells Fargo  
14 changed its posting order to generate millions of dollars in additional revenue at the expense of its  
15 customers. True, this would enhance the balance sheet and thus arguably enhance the bank's  
16 financial strength. But are safety and soundness served by the *promotion* of overdrafts? The  
17 Court doubts that the OCC would agree with this view. Certainly, no OCC authorities have been  
18 supplied so stating.

19           187. The consistent lack of internal records evidencing the bank's supposed  
20 consideration of these factors is even more suspect given the nine- to twelve-month planning  
21 process required to deploy the challenged practices (*id.* at 1421, 1558). Given this lengthy time  
22 frame, there should have been *some* documents or emails showing that the bank considered these  
23 factors, especially if the bank was subject to federal oversight under 12 C.F.R. 7.4002 and other  
24 federal regulations. No such evidence was presented. While Wells Fargo asserted that it did not  
25 have document retention policies at the time for these types of documents, its retention policies  
26 were never offered at trial *despite an express invitation to present them at trial.*

27           188. In sum, this order finds that the bank did not actually consider any of the factors  
28 set forth in 12 C.F.R. 7.4002 when it decided to switch to high-to-low posting for debit-card

1 transactions, commingle transactions, and extend a “shadow line” of credit to debit-card  
2 purchases.

3 189. If high-to-low resequencing, the commingling change, and the shadow-line  
4 extension were subject to 12 C.F.R. 7.4002, the bank would have kept records to prove  
5 compliance with the regulation and for national bank examiners to review (*id.* at 1529).

6 190. The fact that no documents show that Wells Fargo was attempting to comply with  
7 12 C.F.R. 7.4002 shows that the federal regulation governing bank charges and fees was a  
8 non-factor in these decisions.<sup>13</sup> The vague testimony provided by bank witnesses to the contrary  
9 was not credible.

10 191. The only motives behind the challenged practices were gouging and profiteering.

11 192. The bank’s argument that its one-dollar “courtesy threshold” implemented during  
12 the tail end of the class period evidences its “good faith” towards its customers is rejected (*id.* at  
13 355–56). Similarly, the bank’s argument that after-the-fact fee reversals or posting credits before  
14 debits evidences the bank’s “good faith” is also rejected. These were non-factors when the bank  
15 decided to deploy the practices challenged herein.

16 **THE SETTLEMENT RELEASE IN *SMITH V. WELLS FARGO BANK, N.A.***

17 193. In December 2002, a class action lawsuit — *Sean M. Smith v. Wells Fargo Bank,*  
18 *N.A.* (Case No. GIC802664) — was brought against Wells Fargo in San Diego Superior Court  
19 over an alleged failure by the bank to adequately disclose the extension of the shadow line to  
20 debit-card purchases in a 2002 “Policy Change Notice.” Pillsbury Winthrop Shaw Pittman LLP  
21 represented the bank, while Finkelstein & Krinsk LLP served as class counsel.

22 194. A settlement agreement was reached in May 2007, and the class action settlement  
23 was approved in November 2007 by Judge Ronald S. Prager. Judgment was thereafter entered.  
24 Under the settlement agreement, class members were allowed to submit a claim form to Wells  
25 Fargo (postmarked by January 8, 2008) stating that they had incurred an overdraft fee during the  
26

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27 <sup>13</sup> A “pricing change” under 12 C.F.R. 7.4002 is also subject to the disclosure requirements of  
28 Regulation DD, 12 C.F.R. 230.3. Wells Fargo did not even attempt to comply with Regulation DD in  
connection with the challenged high-to-low practices (Tr. 1531–34). This provides additional support for this  
finding.

1 twelve-month period following May 24, 2002. Wells Fargo would then refund up to \$20 in  
2 overdraft fees to that class member, subject to an aggregate cap on total claims of three million  
3 dollars.

4 195. What Judge Prager did not know — since it only came to light in *this*  
5 proceeding — was that Wells Fargo paid merely \$2080 to 166 claimants. This is not a typo.  
6 Barely two thousand dollars were paid to class members.

7 196. By contrast, Wells Fargo agreed to pay Finkelstein and Krinsk \$2.2 million in  
8 attorney’s fees and costs.

9 197. On February 1, 2008, Judge Prager ruled on a motion concerning whether and how  
10 *Smith* encompassed the instant case. Judge Prager held that while our named plaintiff was a  
11 member of the settlement class in *Smith*, the claims in our case were *not* released by the *Smith*  
12 settlement. While Judge Prager noted that the release language in the *Smith* settlement agreement  
13 appeared quite broad, he found that the release was actually limited to the claims in the *Smith*  
14 complaint. (Judge Prager still, it should be noted, was not made aware of the minuscule amount  
15 paid to dispose of *Smith*.)

16 198. After examining the *Smith* complaint, Judge Prager concluded that the claims in  
17 the instant action — targeting Wells Fargo’s high-to-low posting practices — were *not* released  
18 because the claim in *Smith* was limited to disclosures in a 2002 “Policy Change Notice” and  
19 overdraft fees incurred during the twelve-month period between May 2002 and May 2003. In  
20 reaching this conclusion, Judge Prager noted that he did *not* agree with Wells Fargo’s argument  
21 that the *Smith* release barred the claims asserted herein.

#### 22 MISLEADING MATERIALS AND INADEQUATE DISCLOSURES

23 199. Given the harsh impact of the bank’s high-to-low practices, the bank was obligated  
24 to plainly warn depositors beforehand. Instead, the bank went to lengths to hide these practices  
25 while promulgating a facade of phony disclosure. The bank’s own marketing materials were  
26 deceptive in leading customers to expect purchases to be debited in the order made (rather than to  
27 be resequenced in high-to-low order). This order finds that these misleading materials and  
28 inadequate disclosures were likely to deceive reasonable depositors, as now covered in detail.



**THE CONSUMER ACCOUNT AGREEMENT AND OTHER INADEQUATE DISCLOSURES**

1           **THE CONSUMER ACCOUNT AGREEMENT AND OTHER INADEQUATE DISCLOSURES**  
2           200. The Wells Fargo Consumer Account Agreement (“CAA”) was and remains a  
3 lengthy document given to customers when opening a new account (Tr. 275). The trial record  
4 contains numerous versions of Wells Fargo’s CAA, including version from November 1999  
5 (TX 49), August 2000 (TX 75), April 2001 (TX 76); April 2002 (TX 13), October 2004 (TX 79),  
6 October 2005 (TX 81), October 2006 (TX 19), and November 2007 (TX 339). All of these CAAs  
7 were distributed nationwide, and each is approximately 60 pages in length (Tr. 1134–35).

8           201. While plaintiff Walker did not recall receiving a copy of the CAA when she  
9 opened her Wells Fargo bank accounts in July 2006, this order nevertheless finds that the CAA  
10 was customarily provided to all Wells Fargo customers when they opened a new account  
11 (Tr. 796). The CAA claims to “govern[] the relationship between the bank deposit account  
12 holder[] and the bank” and “outlines the terms and conditions that apply to [Wells Fargo]  
13 checking accounts, and outlines the contractual obligations both of the bank, as well as with  
14 [Wells Fargo] consumers” (Tr. 586, 1134; *see also* TX 13 at 4).

15           202. None of the CAAs introduced at trial adequately disclosed Wells Fargo’s posting  
16 practices. For example, the April 2002 CAA contained a section entitled “Debiting Your  
17 Account; Order of Posting” (TX 13 at 24–25). This section stated, in relevant part:

18  
19                           We may pay Items presented against your account in any order we  
20 choose, unless a particular order is either legally required or  
21 prohibited. In particular, we may choose to pay Items in the order  
22 of highest dollar amount to lowest dollar amount (unless such a  
practice is specifically prohibited by an applicable state or federal  
law, rule or regulation). We may change the order of posting  
Items to your account anytime without notice to you.

23           203. While the April 2002 CAA used the phrase “[w]e *may choose* to pay Items in the  
24 order of highest dollar amount to lowest dollar amount[,]” it is undisputed that Wells Fargo was  
25 then *actually* posting cash withdrawals, debit-card, check, and ACH transactions from  
26 highest-to-lowest dollar amount (*see* Dkt. No. 448; Tr. 2770–78).

27           204. The phrasing “[w]e may choose” suggested to customers that the bank would  
28 either exercise discretion or that it had not yet chosen to go to a high-to-low scheme. In fact,

1 the bank knew good and well that it was already imposing and would continue to impose  
2 high-to-low bookkeeping — the worst possible system from the customer’s perspective.

3 205. This phrasing was almost identical, in fact, to the phrasing used before the switch.  
4 No notice was ever given of the high-to-low change.

5 206. In the October 2004 CAA, Wells Fargo altered the prior language and added new  
6 language to the “Order of Posting” section of the CAA. The new language is highlighted below  
7 in italics (TX 79 at 23):

8  
9 The Bank may post Items presented against the Account in any  
10 order the Bank chooses, unless the laws governing your Account  
11 either requires or prohibits a particular order. For example, the  
12 Bank may, if it chooses, post Items in the order of the highest  
13 dollar amount to the lowest dollar amount. The Bank may change  
14 the order of posting Items to the Account at any time without  
15 notice. *If more than one Item is presented to the Bank for payment*  
16 *on a day the Bank determines there are sufficient funds to pay one*  
*or more but not all of the Items, the number of Items paid and the*  
*overdraft and returned Item fees assessed may be affected by the*  
*order that the Bank chooses to pay those Items . . . . For example,*  
*if the Bank pays Items in the order of highest-to-lowest dollar*  
*amount, the total number of overdraft and returned Item fees you*  
*are charged may be larger than if the bank were to pay the Items*  
*in the order of lowest-to-highest dollar amount.*

17 207. A similar explanation was included in Wells Fargo CAAs dated October 2005,  
18 October 2006, and November 2007 (TX 81, 19, 339). (The parties did not put a CAA from 2003  
19 into evidence.)

20 208. This revised language compounded the deception. It did not adequately disclose  
21 that the bank had *already adopted* the high-to-low scheme. Rather, a reasonable consumer would  
22 have been deceived — just as with earlier CAAs — by the bank’s representation that it “may, *if it*  
23 *chooses*, post Items in the order of the highest dollar amount to the lowest dollar amount.” This  
24 disclosure reinforced the misleading impression that Wells Fargo had not yet chosen to post in the  
25 order of the highest dollar amount to the lowest dollar amount or that it would exercise discretion  
26 on a case-by-case basis.

27 209. Apart from its content, the “disclosure” on posting order was buried within a sea of  
28 single-spaced text stretching over 60 pages in tiny ten-point font. For example, in the 2002 CAA,

1 the posting-order “disclosure” was 24 pages into the document. This order finds that no  
 2 reasonable depositor could be expected to read the entire document or locate the “disclosure”  
 3 within the bank’s CAA. Moreover, even if the customer read the CAA, no reasonable depositor  
 4 could be expected to understand the disclosure regarding posting order and overdraft fees,  
 5 especially given the deceptive use of “may” throughout the disclosure.

6 210. Tellingly, Wells Fargo’s *own* expert, Itamar Simonson, who spoke to the adequacy  
 7 of the bank’s disclosures regarding posting order, testified that the length and complexity of the  
 8 CAA made it “completely unrealistic to assume that . . . many consumers would actually read  
 9 those lengthy documents” (Tr. 977–78). Additionally, Mr. Simonson confirmed that the length  
 10 and complexity of the CAA made it “so difficult for consumers to understand” (*id.* at 982). This  
 11 remarkably candid opinion was echoed throughout Expert Simonson’s *direct* testimony (*id.* at  
 12 977, 979):

13 [E]ven if they were to read, word for word, in those — some of  
 14 those lengthy documents, such as the account agreement, which is  
 15 — I think we all agree, very few actually do that . . . it would be  
 16 impossible for [customers] to predict the exact balance [of their  
 17 checking accounts] at any particular point in time.

18 \* \* \*

19 [A]s I said, we all agree — and I noticed in Dr. Mandell’s  
 20 deposition that even he did — that very few people read, for  
 21 example, the account agreement, where this disputed statement  
 22 appears. So very few people read that.

23 211. This order also agrees with Expert Simonson on these points as well as his opinion  
 24 that those Wells Fargo customers who read the CAA “are probably not the same people who just  
 25 have \$20 in their bank account, and playing it close to the edge” (*id.* at 980).

26 212. The bank, however, knew — when it wanted — how to speak plainly. After the  
 27 fact, when a customer complained about getting hammered with overdraft fees, Wells Fargo  
 28 provided a clear explanation of its posting process. This explanation, however, would only be  
 provided once the customer submitted a written complaint expressing anger or confusion  
 regarding overdraft fees. Wells Fargo would send these customers a response letter containing

1 standard “form” language describing in very straightforward terms the *actual* posting order used  
2 by the bank (Tr. 1319–20; TX 127).

3 213. An example of this “form” language, found in a Wells Fargo letter dated  
4 February 26, 2008, in response to a customer complaint, is reproduced below (TX 127, BATES  
5 4387) (emphases in original):

6  
7 When checks or other items are presented against insufficient  
8 funds in your checking account, we pay or return them and assess  
9 handling fees the following *business* day. The decision to pay or  
10 return items is based on the number of overdraft occurrences in the  
11 preceding 12 months.

12 We pay items from highest-to-lowest dollar amount. Transactions  
13 are processed in the following order:

- 14 • Credits
- 15 • Fees from overdraft/or returned items of the previous day
- 16 • Previous day’s work — Items with an *as of date*<sup>14</sup>
- 17 • Cash withdrawals
- 18 • Checks, check card and POS purchases from highest-to-  
19 lowest to [sic] dollar amounts

20 214. In addition to these form-letter responses, Wells Fargo provided a similarly clear  
21 disclosure regarding posting order to customers if they went to the trouble of complaining about  
22 excessive overdraft fees over the phone (Tr. 1313–14).

23 215. The very existence of these clear *after-the-fact* explanations further highlights the  
24 bank’s before-the-fact obfuscation. Before the fact, the bank piled ambiguity onto vagueness and  
25 hit it all at page 27 of a 60-page document. Once the customer was hammered by the bank’s  
26 resequencing practice *and* went to the trouble of complaining, then *and only then* did the bank roll  
27 out the clear-cut script.

28 216. In sum, the bank intentionally made its disclosure in a way that was calculated to  
go unnoticed by class members and used language that, even if read, obfuscated the practices  
challenged herein.

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<sup>14</sup> These would include transactions that were presented for settlement after the batch processing cut-off time had expired on the prior business day.

1           217. Additionally, given that Wells Fargo’s own expert admitted that most bank  
2 customers did not read the CAA and, even if they did, the length and complexity of the document  
3 made it “so difficult for consumers to understand,” this order also finds that it was *not* within the  
4 reasonable expectations of class members that the bank had in fact already put in place a posting  
5 practice that could transform a single mistake into as many as ten overdrafts.

6           218. No other Wells Fargo documents adequately disclosed the challenged  
7 resequencing practices to the bank’s customers in California. With respect to Wells Fargo’s  
8 Consumer Account Fee and Information Schedule, which — like the CAA — was provided to  
9 Wells Fargo customers when they opened a new account, this document also failed to disclose  
10 how transactions were resequenced prior to batch posting or how a high-to-low posting order  
11 could impact the number of overdraft fees the bank could assess (Tr. 1159; *see, e.g.*, TX 343, 345,  
12 346, 347, 348, 349, 350, 352, 353, 354). In other words, while the Consumer Account Fee and  
13 Information Schedule was used “to disclose the amounts of [the bank’s] fees to customers,” it  
14 only disclosed the individual fee amounts (Tr. 1156). It did not disclose how posting order could  
15 dramatically multiply the number overdraft penalties a customer could be assessed.<sup>15</sup>

16           219. Nor did the bank’s account statements alert depositors. Throughout the class  
17 period, Wells Fargo separated credit transactions, debit-card transactions, and checks on its  
18 printed account statements. The separation of these transactions made it nearly impossible for a  
19 customer to determine the actual posting order being employed by the bank.

20           220. Further obfuscating the bank’s high-to-low posting order was the fact that certain  
21 “priority debit” transactions — like cash withdrawals and balance transfers — were always  
22 posted *before* debit-card transactions, checks, and ACH transactions. The account statement of  
23 Ms. Gutierrez discussed earlier in this order provided a clear example of this obfuscation, as her  
24 \$22 ATM withdrawal posted *before* her \$74.39 debit-card purchase at Albertsons supermarket  
25 (TX 1). Thus, even if a reasonable consumer viewed the actual order that his transactions were  
26 posted by the bank, a high-to-low ordering would not be self-evident.

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27  
28 <sup>15</sup> This failure also supports the prior finding that the challenged resequencing practice was not a  
“pricing decision” under 12 C.F.R. 7.4002. If the challenged practice was truly a pricing decision, the bank  
would have disclosed it in the Consumer Account Fee and Information Schedule.



1 Remember that whenever you use your debit card, *the money is*  
2 *immediately withdrawn from your checking account. If you don't*  
3 *have enough money in your account to cover the withdrawal, your*  
4 *purchase won't be approved* (TX 131) (emphasis added).

5 225. This order finds that these misrepresentations were placed in such a wide array of  
6 marketing documents and these documents were distributed in such a widespread manner that  
7 class members were likely to be misled by them.<sup>16</sup>

8 226. Furthermore, when a customer used Wells Fargo's online banking service, the  
9 bank would display "pending" debit-card purchases in chronological order, leading customers to  
10 believe that the processing would take place in that order. In reality, debit-card purchases were  
11 never posted in this order during the class period, as the bank well knew. Nothing on the bank's  
12 online-banking website warned customers that the pending transactions, displayed  
13 chronologically to them, would be resequenced behind the scenes and posted in high-to-low order  
14 to maximize overdrafts.

15 227. Finally, the trial record clearly shows that Wells Fargo encouraged its customers to  
16 keep track of their account balances using a register (*see, e.g.*, TX 131 at 48; Tr. 547, 1216).  
17 Indeed, this has been a theme of the bank in this litigation, and Wells Fargo account statements  
18 included this very recommendation (*see, e.g.*, TX 1). Pam Erwin, who handled Wells Fargo's  
19 financial literacy program to educate consumers about financial decision-making, explained at  
20 trial when discussing debit-card purchases that "it's the account holder's responsibility to track  
21 those transactions against their check register and/or savings register" (Tr. 547). A register,  
22 however, is chronological. It fosters the view that items are deducted in chronological order.

23 228. In this regard, a customer who faithfully uses a register to track items would know  
24 the exact point — indeed, the exact transaction — at which her account goes into overdraft. That  
25 faithful customer could not reasonably be expected to know that the bank would manipulate the  
26 order of her transactions so as to deplete her account balance faster than shown in her register,

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27 <sup>16</sup> In particular, the Checking, Savings and More brochure and the Wells Fargo Welcome Jacket were  
28 customarily given to all banking customers when they opened their accounts. That said, the "immediately" and  
"automatically" language was used in so many marketing pieces that it can be reasonably assumed that class  
members were exposed to them (*see, e.g.*, TX 116, 129, 131, 143, 501, 559).

1 triggering not one but as many as ten overdraft penalties, all due to the bank's high-to-low  
2 bookkeeping scheme. A precise register could never alert a customer who makes a mistake that  
3 her one overdraft will be converted into as many as ten overdrafts.

4 229. This order finds that Wells Fargo not only failed to adequately disclose its  
5 high-to-low posting practices but promoted a false perception that debit-card purchases would be  
6 deducted from their accounts in the order transacted.

#### 7 **INADEQUATE DISCLOSURES OF THE SHADOW LINE**

8 230. The shadow line itself has never been disclosed to customers — its specific  
9 workings remain shrouded in secrecy. At trial, witnesses for Wells Fargo refused to explain the  
10 details except to advise that it amounted to a computerized credit-risk assessment on an  
11 account-by-account basis.

12 231. The objective of the shadow line was to promote “overdraft via POS,” as the  
13 bank's internal memos explained, meaning to encourage more overdrafts — and thus more  
14 overdraft fees — through point-of-sale debit-card purchases. Instead of declining transactions  
15 when funds were too short, as it once did, the bank switched to approving them without warning  
16 to the customer standing in line at a coffee shop or elsewhere that an overdraft — and a  
17 \$34 overdraft fee — was in progress.

18 232. The available-balance information communicated online to customers was  
19 supposed to represent the amount of funds the bank would make available for their next  
20 transaction. Wells Fargo defined it as such. This, however, was not true. Wells Fargo allowed  
21 customers to spend *more* than their available balance using their debit cards via undisclosed  
22 shadow-line overdrafts.

23 233. In 2002, prior to adopting the shadow line for debit-card purchases, Wells Fargo  
24 put the following notice in its customers' monthly account statements and — for new customers  
25 — by an addendum to their customer account agreements (TX 364) (emphasis in original):

26 Wells Fargo is changing our approval criteria for Point-of-Sale  
27 (POS) transactions (e.g. when you use your ATM Card, ATM &  
28 Check Card or Gold ATM & Check Card to purchase goods and



1 services from affiliated merchants). If you perform a POS  
2 transaction *without* sufficient funds in your account to cover the  
transaction, we may:

- 3 • Cover the item if you have overdraft protection;  
4 • Pay the item and create an overdraft to your account; or  
5 • Decline the transaction.

6 If we authorize the transaction, you may be charged a fee, which  
will vary depending upon the action taken.

7 234. This was inadequate to fairly warn depositors.<sup>17</sup> *First*, at all times — before and  
8 after the shadow line — all banks had the option under commercial law to pay an item into  
9 overdraft or to decline to do so. *See* Cal. Com. Code § 4401; *see also Bank of America v.*  
10 *Universal Finance Co.*, 131 Cal. App. 116, 125 (1933). The insert made it appear as if the change  
11 was adding a new option when in fact the pay-into-overdraft option was already in place. The  
12 *real* change was an operations switch from routinely declining transactions to routinely approving  
13 them as overdrafts without point-of-sale notice. This was to promote “overdraft via POS.” This  
14 went undisclosed.

15 235. *Second*, the insert stated: “If we authorize the transaction, you may be charged a  
16 fee, which will vary depending upon the action taken.” In truth, however, it might not be “a fee”  
17 but as many as *ten* overdraft fees (at \$35 each). The same applied to the phrase “We may . . . pay  
18 the item and create an overdraft to your account.” In truth, it might not be “an overdraft” but as  
19 many as *ten* overdrafts. The word “may” was misleading, for it was *in truth* a certainty — not a  
20 maybe — that overdraft fees would be assessed barring an intervening deposit. In short, the  
21 insert vastly understated the risks of the bank’s “overdraft via POS” practice.

22 236. This order finds that these disclosures failed to warn or explain to reasonable  
23 depositors that the shadow-line extension would amplify the impact of high-to-low posting on  
24 overdraft fees (Tr. 1154; TX 90, 341, 408). This omission was likely to deceive class members.

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25  
26  
27 <sup>17</sup> While this 2002 notice was the subject of *Smith v. Wells Fargo Bank, N.A.*, that case involved the  
28 question of whether the notice adequately disclosed the shadow line itself. The claims herein are limited to the  
bank’s high-to-low practice. Thus, the 2002 notice is only being discussed to highlight the fact that it did not  
contain adequate disclosures regarding the impact that high-to-low posting would have on overdraft fees.

**COMPLAINTS FROM WELLS FARGO CUSTOMERS**

1  
2           237. Hundreds of customer complaints regarding overdraft fees were admitted at trial.  
3 These included many complaints written by California Wells Fargo customers who found  
4 themselves on the receiving end of a cascade of overdraft charges caused by high-to-low  
5 resequencing. These complaints expressed indignation that transactions were “re-dated,”  
6 “re-arranged,” and “manipulated” from the order in which they had occurred (*see, e.g.*, TX 127,  
7 BATES 4583, 4663, 4931, 5241, 5269, 5957).<sup>18</sup> For example, one customer complained (*id.* at  
8 BATES 4726):

9  
10           They took the extra 100 that would have paid some of the other  
11 debits, and put through the largest amounts first. This caused me  
12 to be overdraft 10X's in one day for 5 and 10 charges. . . . This is  
13 over 340.00 in over draft.

14           238. One handwritten complaint from a customer who had been “a loyal Wells Fargo  
15 customer for almost 8 years, starting at age 18,” stated (*id.* at BATES 5148):

16           I'm facing additional fees of over \$500. I cannot afford that at this point in my  
17 life. This is a lot of money for me.

18           There are a lot of ways to get trapped in overdraft that's unnecessary. The  
19 processing of larger debits much time before several smaller ones, which will  
20 accrue a significantly larger overdraft fee build up, which is exactly what  
21 happened to me.

22           239. This order agrees that Wells Fargo constructed a trap — a trap that would escalate  
23 a single overdraft into as many as ten through the gimmick of processing in descending order. It  
24 then exploited that trap with a vengeance, racking up hundreds of millions off the backs of the  
25 working poor, students, and others without the luxury of ample account balances.  
26

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27           <sup>18</sup> The bank's hearsay objections to these particular complaints are overruled. The complaints are  
28 admissible to show that depositors were assessed large overdrafts and that customers — once informed of the  
bank's rationale — disagreed that high-to-low resequencing was for the depositor's benefit. For these purposes,  
the complaints are admissible and probative.

**OTHER STATE LAWS TARGETING POSTING ORDER**

1  
2           240. This order further finds that enforcement of plaintiffs' claims would have only an  
3 incidental effect on the bank's ability to engage in the business of banking. It would also not  
4 "obstruct, impair, or condition" the bank's ability to exercise its deposit-taking powers. For many  
5 years, the bank used low-to-high processing and other posting methods. Doing so did not impair  
6 the bank's abilities.

7           241. For years, moreover, Wells Fargo has complied with far more restrictive laws in  
8 Nevada barring high-to-low posting of checks (TX 59):

9                   2. A fee or charge for the presentation for payment, on a single  
10 business day, of multiple checks drawn by a customer on an  
11 account for which there is an insufficient balance to pay all of the  
12 checks, must be determined as if the checks drawn in a single  
13 series or class were presented:

- 14                   (a) In the order the checks were written;  
15                   (b) From the lowest check number to the highest check number;  
16                   (c) In order of ascending amounts, the check for the smallest sum  
17 being presented first.

18 N.R.S. 657.120 (1999).<sup>19</sup>

19           242. Wells Fargo has complied with this restrictive law by simply posting transactions  
20 differently in Nevada than in California (since 2001) (TX 59). This has not disturbed the bank's  
21 ability to engage in the business of banking and exercise its deposit-taking powers.

22           243. Additionally, Wells Fargo has also been posting transactions differently in  
23 New Mexico and Washington "for at least a couple of years" (Tr. 1502-08). In these states, the  
24 bank has been operating a "pilot program" where all "prior day" credits and debits are posted  
25 before credits and debits presented on the "current day." This provides further proof that posting  
26 order variances do *not* more than incidentally affect the bank's ability to engage in the business  
27 of banking.

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28           <sup>19</sup> The original 1989 version of the statute was even more restrictive. It did not include a serial or  
chronological option and forced banks to post checks in low-to-high order. *See* N.R.S. 657.120 (1989).

1 **ANALYSIS AND CONCLUSIONS OF LAW**

2 The legal analysis will proceed in two steps: *First*, this order will address plaintiffs' claim  
 3 that Wells Fargo's high-to-low posting practice was "unfair" under Section 17200. *Second*, this  
 4 order will address whether that practice was "fraudulent" under Section 17200. With respect to  
 5 Wells Fargo's defenses on these claims, most will be addressed with the merits of each claim.  
 6 This order, however, will separately address Wells Fargo's preemption defense and "no standing"  
 7 defense. Finally, this order will consider the impact of the release in *Smith v. Wells Fargo*  
 8 *Bank, N.A.*

9 **1. "UNFAIR" BUSINESS PRACTICES UNDER SECTION 17200.**

10 Section 17200 of the California Business and Professions Code prohibits business acts or  
 11 practices that are "unlawful," "unfair," or "fraudulent." Each of these three restrictions  
 12 constitutes a separate and independent claim. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular*  
 13 *Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (citations omitted). Only "unfair" and "fraudulent" business  
 14 practices are at issue in this litigation.

15 For an "unfair" business practice under Section 17200, the undersigned judge previously  
 16 held herein that plaintiffs had to (1) identify an unfair policy or practice *tethered to a legislatively*  
 17 *declared policy* or (2) show an actual or threatened impact on competition (Dkt. No. 246). *Id.* at  
 18 185–88. The claim that Wells Fargo's "resequencing" practices are "unfair" under Section 17200  
 19 is properly "tethered" under *Cel-Tech* to the legislative comment expressed under California  
 20 Commercial Code Section 4303(b), as now detailed.

21 **A. The "Tethering" Requirement Under *Cel-Tech* is Satisfied by the Legislative**  
 22 **Comment to California Commercial Code Section 4303(b).**

23 Adopted in 1963, California Commercial Code Section 4303(b) is California's version of  
 24 Section 4-303 of the Uniform Commercial Code. It addresses the relationship between the bank  
 25 and presenters of items for payment and states:

26 Subject to subdivision (a) [of this section], items may be accepted,  
 27 paid, certified, or charged to the indicated account of its customer  
 28 in any order.

1 Cal. Com. Code § 4303(b). In other words, as between a bank and various merchants presenting  
2 items for payment, the bank has discretion to choose whom to pay when funds are insufficient to  
3 pay all of them. This provision came into play in this litigation when Wells Fargo raised it to  
4 argue that state law authorized banks to post transactions, including debit-card transactions, in  
5 any order they wished.

6 The California legislature, however, expressly disavowed such unfettered discretion. As  
7 part of the 1992 amendments to the California Commercial Code, a legislative comment was  
8 added to Section 4303 that stated:

9 The only restraint on the discretion given to the payor bank under  
10 subsection (b) is that the bank act in good faith. *For example, the*  
11 *bank could not properly follow an established practice of*  
12 *maximizing the number of returned checks for the sole purpose of*  
*increasing the amount of returned check fees charged to the*  
*customer.*

13 Cal. Com. Code § 4303(b), Calif. cmt. 7 (emphasis added).<sup>20</sup> Thus, banks were *required* to act in  
14 good faith when exercising discretion vis-a-vis posting order and could not, for example, establish  
15 posting practices for the sole purpose of maximizing penalties imposed on customers.

16 The same legislative comment also made clear that “discretion” as used in Section  
17 4303(b) meant *item-by-item* discretion:

18 For example, three checks drawn on a customer’s account are  
19 presented for payment to the payor bank as follows: an \$850  
20 check to the Internal Revenue Service, a \$300 check to a  
21 department store and a \$200 check to John Doe. The balance of  
22 available funds in the customer’s account is \$900. Since the three  
23 checks overdraw the customer’s account by \$450 the payor bank  
24 has no duty to the customer to pay all three checks.

25 Under subsection (b) if the bank chooses not to pay all of the  
26 checks, it may either pay the \$850 check to the IRS and return the  
27 other two smaller checks or pay the two smaller checks and return  
28 the \$850 check.

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<sup>20</sup> Another section of the California Commercial Code states that “[i]f a receiving bank has received more than one payment order of the sender or one or more payment orders and other items that are payable from the sender’s account, the bank may charge the sender’s account with respect to the various orders and items in any sequence.” Cal. Com. Code § 11504(a). This section does not change the fact that California legislators clearly imposed a duty of good faith on the bank when exercising discretion with respect to posting order.

1 In this example, it may well be that the customer would prefer that  
 2 the check to the IRS be paid because nonpayment may have more  
 3 serious consequences than nonpayment of the other two checks,  
 4 but that is not necessarily true. Payment of one of the smaller  
 checks may be more vital or the customer may prefer to minimize  
 the number of checks returned because the payor bank normally  
 charges a fee with respect to each returned check.

5 The bank has no way of knowing the wishes of the customer, *but it*  
 6 *may be able to identify a check that appears to be particularly*  
 7 *important. It is necessary to give discretion to the payor bank*  
 8 *because it is impossible to state a rule that will be fair to the*  
 9 *customer in all cases, having in mind the almost infinite number of*  
 combinations of large and small checks in relation to the available  
 balance on hand in the drawer's account; the possible methods of  
 receipt; and other variables.

10 Cal. Com. Code § 4303(b), Calif. cmt. 7 (emphasis added). In other words, the legislature  
 11 recognized that a bank may exercise individualized discretion to prioritize a payment that  
 12 “appears to be particularly important.” A computer-driven high-to-low, one-size-fits-all  
 13 resequencing of transactions does *not* employ any such item-by-item discretion. This point is *not*  
 14 that banks must go back to manual sorting. Rather, the point is that, contrary to Wells Fargo's  
 15 argument, the posting discretion afforded by Section 4303 must be exercised in good faith  
 16 towards the customer and may not be exercised solely to drive up overdraft fees.

17 While on its face this comment only refers to checks, it plainly covers debit cards as well.  
 18 The comment was approved when depositors only used checks in lieu of a cash payment. Since  
 19 then, debit cards have arrived as another way to make such payments. The comment applies with  
 20 full force to both. Indeed, Wells Fargo itself argued that Section 4303(b) applied to both checks  
 21 and debit cards when it raised this section as a shield to liability — albeit without expecting  
 22 anyone to read the legislative comment. Wells Fargo does not argue to the contrary even now,  
 23 but this point should be made lest the question suggest itself on appeal. (That the bank once relied  
 24 so vigorously on the California Commercial Code, moreover, belies its supposed faith in federal  
 25 preemption.)

26 **B. The Requirement That the Bank Act in “Good Faith” Also Flows**  
 27 **from the Implied Covenant of Good Faith and Fair Dealing.**

28 Apart from this provision of the UCC, California's civil law governs the relationship  
 between a bank and a customer. In *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923 (1985),

1 a decision specifically addressing overdraft fees, the California Supreme Court held that “where a  
2 contract confers on one party a discretionary power affecting the rights of the other, a duty is  
3 imposed to exercise the discretion in good faith and in accordance with fair dealing.”

4 Throughout trial, Wells Fargo stated that the CAA was its “contract with the customer”  
5 that “govern[ed] the relationship” between the bank and deposit-account holders. The CAA itself  
6 contained such language (*see, e.g.*, TX 3 at 4). Unlike the simple one-page agreements that were  
7 used at the time of *Perdue*, the Wells Fargo CAA weighs in at over 60 pages, each page  
8 containing single-spaced text in ten-point font. Buried deep within this document in substantially  
9 the same form in all versions was the statement that Wells Fargo “may, if it chooses, post items in  
10 the order of the highest dollar amount to the lowest dollar amount” (*see, e.g.*, TX 13 at 24–25,  
11 TX 79 at 23). Passing over momentarily the fact that even the bank’s own expert conceded that  
12 few consumers would ever read or understand it, this phrasing called for the exercise of  
13 discretion, as the bank’s own internal memos recognized (TX 48). And, having delegated itself  
14 discretion, *Perdue* imposed on the bank the duty to exercise that discretion in accordance with the  
15 covenant of good faith and fair dealing. This precludes exercising that discretion to turn what  
16 would ordinarily be one overdraft into as many as ten.

17 Citing *Carma Developers v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373–74 (1992),  
18 Wells Fargo argues that this language allowed the bank to exercise its discretion to adopt  
19 high-to-low posting — even if in bad faith. In *Marathon*, the California Supreme Court held that  
20 while the implied covenant of good faith and fair dealing was read into every contract, it could  
21 not create obligations different from or inconsistent with the *express* terms of the contract. That  
22 said, *Marathon* emphasized that express grants of discretion were still subject to “the reasonable  
23 expectations of the parties.” *Id.* at 374.

24 Based on the trial record, this order finds that class members could not reasonably have  
25 expected that the bank would transform what would ordinarily be one overdraft into as many as  
26 ten. As stated, the bank’s *own* expert on disclosures, Itamar Simonson, explained at trial that the  
27 majority of consumer checking-account holders would not and could not be expected to read the  
28 CAA. In his own words, it is “completely unrealistic to assume that . . . many consumers would

1 actually read those lengthy documents” (Tr. 977–78). Moreover, even if they read the section on  
2 posting order, Expert Simonson noted that most consumers would not be expected to understand  
3 how posting order could impact overdraft fees (*id.* at 976–78, 982). Indeed, both plaintiffs who  
4 testified at trial — Ms. Gutierrez and Ms. Walker — stated that they did not understand how  
5 changes in posting order could impact the number of overdraft fees they could be assessed.

6 At least with the freely negotiated lease-termination provision in *Marathon*, both sides  
7 reasonably expected and understood the impact of the discretion. Here, even Wells Fargo’s own  
8 expert, Itamar Simonson, admitted that it was “difficult for consumers to understand,” based  
9 upon the CAA disclosure, how the exercise of discretion by a bank to post transactions from  
10 highest-to-lowest dollar amount would impact them (*id.* at 982).

11 An important factor in determining the reasonable expectation of the parties in the context  
12 of adhesion contracts is “the extent to which the contract affects the public interest.” *Allan v.*  
13 *Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 1375–76 (1996). The legislative comment to Section  
14 4303(b) of the California Commercial Code evidences a policy of California to ensure that banks  
15 act with good faith when re-ordering transactions during the posting process and *not* post in a way  
16 to ramp up overdraft fees. Here, the contractual language regarding posting order was ambiguous  
17 at best. The bank stated in every version of its CAA that it “may, *if it chooses*, post items in the  
18 order of the highest dollar amount to the lowest dollar amount” (*see, e.g.*, TX 79 at 23) (emphasis  
19 added). Even a sophisticated customer could reasonably have understood this to mean that the  
20 bank had *not* yet chosen to implement such a change or would exercise discretion on an  
21 item-by-item basis as expressly contemplated by the legislative comment to Section 4303.  
22 Ambiguities should be resolved against the drafter, especially where contracts of adhesion are  
23 involved. *See* Cal. Civ. Code § 1654; *see also* *Goddard v. South Bay Union High School Dist.*,  
24 79 Cal. App. 3d 98, 105 (1978).

25 Finally, the same section of the CAA also noted that “[t]he Bank may post Items presented  
26 against the Account in any order the Bank chooses, *unless the laws governing your Account*  
27 *either requires or prohibits [sic] a particular order*” (*see, e.g.*, TX 79 at 23) (emphasis added).  
28 The “good faith” limitation found in the legislative comment of Section 4303(b) imposed such a



1 restriction. That section (and the comments thereto) prohibited certain posting orders — namely,  
2 those implemented for the purpose of increasing the number of overdraft penalties inflicted on  
3 customers. Thus, by the bank’s own terms, it subjected itself to the “good faith” limitations of  
4 Section 4303(b).

5 In sum, customers reasonably expect, of course, that if they overdraft their accounts, they  
6 will have to pay an overdraft fee. They do not, however, reasonably expect that they will have to  
7 pay up to ten overdraft fees when only one would ordinarily be incurred. This severe result is so  
8 pernicious that it should be allowed, if at all, only upon a showing that it was within the  
9 reasonable expectations of the parties. Here, the proof is the opposite. The bank went to great  
10 lengths to bury the words deep in a lengthy fine-print document and the words selected were too  
11 vague to warn depositors, as even the bank’s own expert conceded. These circumstances  
12 preclude the *Marathon* exception to *Perdue*.

13 **C. Wells Fargo Acted in Bad Faith When it Posted Debit-Card Transactions**  
14 **in High-to-Low Order.**

15 Based on the legal standards above, this order concludes that the revenue initiatives  
16 implemented by Wells Fargo in 2001 and 2002 — all of which ran rampant during the class  
17 period and indeed through at least the end of trial — violated the “unfair” restriction of  
18 Section 17200. The trial record and findings herein show that these initiatives had an immediate,  
19 intended, and material impact on increasing the number of overdraft fees that Wells Fargo could  
20 assess customers. All three initiatives were motivated by avarice at the depositor’s expense.  
21 No credible evidence — indeed, no *written* evidence — points to any other rationale.

22 To recap these facts, the first initiative was the high-to-low switch. Before, Wells Fargo  
23 used low-to-high posting, which minimized overdrafts. The switch to high-to-low posting  
24 maximized overdrafts. This was mathematically guaranteed. No notice was given that the switch  
25 had occurred.

26 None of the bank’s proffered justifications are credible. *First*, as found above, the bank  
27 did not act out of solicitude for customers and any supposed belief that customers would prefer  
28 high-to-low posting. That is a post-hoc rationalization. Among other reasons, the vast majority  
of debit-card purchases are “must pay” transactions. As such, posting order would make no

1 difference to the customer — the bank is required to honor a debit-card purchase whether it posts  
2 first, last, or somewhere in between. *Second*, as found above, the bank did not base its decision  
3 on the factors set forth in 12 C.F.R. 7.4002. Wells Fargo considered nothing other than  
4 increasing overdraft revenue when deciding to post debit-card transaction in high-to-low order.

5 The initiatives challenged herein required nine to twelve months of planning and  
6 implementation. Many emails and reports would have been generated over this extended time  
7 period. The trial record, however, is devoid of written documents showing that Wells Fargo  
8 implemented the high-to-low change for any purpose other than profiteering. While Wells Fargo  
9 asserted that it did not have document retention policies at the time for these types of documents,  
10 its retention policies were never offered at trial *despite an express invitation to present them*.  
11 And, if Wells Fargo had truly believed that its initiatives were subject to federal oversight under  
12 12 C.F.R. 7.4002 and other federal regulations, it *would normally have* prepared and retained  
13 written records to show compliance. The absence of any such records speaks volumes.

14 In sum, Wells Fargo’s decision to post debit-card transactions in high-to-low order was  
15 made for the sole purpose of maximizing the number of overdrafts assessed on its customers,  
16 exactly what Section 4303 and *Perdue* bar. Accordingly, the decision was not made in good  
17 faith.

18 **D. Wells Fargo Acted in Bad Faith When it Commingled**  
19 **Debit-Card Transactions With Checks and ACH Transactions.**

20 The second initiative, implemented in December 2001, was the commingling of debit-card  
21 transactions with checks and ACH transactions in the posting process. Once commingled, these  
22 transactions were posted together in high-to-low order.

23 Before, all debit-card transactions were posted ahead of checks, and all checks were  
24 posted ahead of ACH transactions. There was a purpose behind this separation. Unlike  
25 debit-card transactions, checks and ACH transactions were *not* “must pay” transactions. In other  
26 words, the bank had discretion to return them unpaid. Because of this, Wells Fargo had a  
27 legitimate business reason to pay “must pay” items first (*e.g.*, process checks and ACH  
28 transactions *after* all debit-card transactions). On this point, the legislative comment to

1 Section 4303(b) states that “[t]he bank has the right to pay items for which it is itself liable ahead  
2 of those for which it is not.”

3 This, however, was thrown aside in December 2001. The commingling change had the  
4 intended effect of multiplying the number of debit-card transactions for which the bank could  
5 assess an overdraft fee. Through commingling, the typically larger checks and ACH items used  
6 up the accounts faster so that there would be more overdrafts when the typically smaller value  
7 debit-card items were paid. Wells Fargo’s own words summed this effect up best: the  
8 commingling change was designed to “more-closely mirror true High-to-Low sort order”  
9 (TX 36), *i.e.*, to eat the account up as soon as possible and thus yield more overdraft fees.

10 The internal Wells Fargo documents quoted in the findings show that overdraft revenue  
11 was the sole motivating factor, predicting a “lift” in overdraft revenues by \$40 million. The  
12 April/May 2002 email exchange between Mr. Zimmerman and Mr. Biller graphically confirmed  
13 this profiteering motive.

14 Given the evidence, this order concludes that the decision to commingle debit-card  
15 transactions with checks and ACH transactions was made solely to gouge the customer, exactly  
16 what the legislative comment barred.

17 **E. Bad Faith and the Shadow Line.**

18 The third initiative was “overdraft via POS” — the extension of the shadow line to  
19 debit-card purchases in May 2002. As a result of this change, Wells Fargo began authorizing  
20 debit-card purchases even though the account was already overspent. Before, if an account holder  
21 had insufficient available funds to cover a debit-card purchase, the bank would decline the  
22 transaction, thereby protecting the customer from further unintended overdrafts. After, the bank  
23 authorized the transaction without informing anyone that an overdraft was in progress.

24 Profiteering was the sole motive behind this revenue initiative. On this point, BSE  
25 documents clearly showed that the extension of the shadow line to debit-card purchases in  
26 May 2002 was — like the commingling change — expected to increase fee revenues by  
27 \$40 million. (In other words, this \$40 million increase was above and beyond the separate  
28

1 \$40 million in revenue expected from commingling.) Mr. Zimmerman called this initiative  
2 “overdraft via POS” — a telling label capturing the true motive. No credible or written evidence  
3 showed that this initiative was implemented for any other reasons.

4 In sum, Wells Fargo used bad faith to deploy high-to-low posting of debit-card  
5 transactions, commingle debit-card transactions with checks and ACH transactions, and extend  
6 the shadow line to debit-card purchases. The commingling and shadow-line decisions were  
7 closely allied with the bank’s high-to-low bookkeeping scheme. Together, they formed a  
8 “one-two-three” punch to maximize the overdraft-multiplying effect of a high-to-low posting  
9 order — all at the expense of customers.

10 For these reasons, the bank’s high-to-low initiatives were “unfair” under Section 17200.  
11 These practices were adopted solely to maximize the number of overdraft items assessed on  
12 customers (over all other possible orderings) and for the sole purpose of increasing revenue. This  
13 not only violated the “good faith” requirement of California Commercial Code § 4303(b) and the  
14 good faith requirement under *Perdue*.

15 Wells Fargo’s counter-arguments are unpersuasive. *First*, Wells Fargo argues that it did  
16 not seek to “maximize” the number of overdraft items for the “sole purpose” of assessing  
17 overdraft fees. To support this argument, the bank points to its overdraft-protection services, its  
18 limitation of *ten* overdraft items per day, and its one-dollar overdraft “courtesy threshold.” In the  
19 same vein, Wells Fargo also argues that by posting a customer’s credits first (rather than last), this  
20 reduced the number of overdraft items it could have potentially assessed customers.

21 These arguments are rejected. That Wells Fargo could have gouged even worse than it  
22 has hardly alters the fact that it has gouged badly. Plaintiffs do not need to prove that the bank  
23 mistreated depositors in every way possible in order to show that they were mistreated. The  
24 presence of an extraordinarily high *ten*-item cap on daily overdraft fees, as well as a minuscule  
25 one-dollar courtesy threshold, do not change the fact that Wells Fargo deployed the challenged  
26 practices for the sole purpose of multiplying overdrafts to increase fee revenue. Additionally, the  
27 mere continued availability of overdraft-protection services — another profit center for the bank  
28

1 that benefits from increased overdraft activity — does not change the fact that high-to-low  
2 posting had the intended effect of squeezing more overdrafts out of its customers.

3 *Second*, this order rejects Wells Fargo’s argument that because class members could have  
4 avoided overdraft fees if they simply had managed their accounts with precision, its practices  
5 cannot be deemed “unfair.” Even the most precise register could not have predicted that what  
6 appeared to be a single overdraft would be converted to ten by the artifice of high-to-low  
7 resequencing. Of course it is true that we should all live within our means and avoid overdrafts.  
8 That is a given. And, of course it is true that when we overdraft, whether by accident or not, we  
9 must expect to pay a fee. That is also a given. This, however, cannot justify turning what would  
10 ordinarily be one overdraft into as many as ten. Such a severe result should only be tolerated  
11 after clear-cut warnings and consent.

12 *Third*, contrary to Wells Fargo’s characterization of this litigation, plaintiffs are not  
13 challenging a simple “price” increase. Nor are plaintiffs arguing that “making money” is  
14 unlawful. Rather, plaintiffs’ claims are properly tethered to a “good faith” limitation set forth by  
15 the California legislature in a comment to California Commercial Code § 4303(b) limiting a  
16 bank’s ability to increase its revenues through resequencing schemes.

17 **2. “FRAUDULENT” BUSINESS PRACTICES UNDER SECTION 17200.**

18 To establish liability under the “fraudulent” restriction of California Business and  
19 Professions Code Section 17200, “it is necessary only to show that members of the public are  
20 likely to be deceived.” *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (2009) (internal quotations  
21 and citations omitted). Unlike common law fraud, which requires proof of falsity, scienter, and  
22 actual reliance, it is not necessary for a plaintiff to prove that a fraudulent deception under  
23 Section 17200 was actually false, known to be false by the perpetrator, or reasonably relied upon  
24 by a victim who incurs damages. *Ibid.*; *see also Clemens v. DaimlerChrysler Corp.*,  
25 534 F.3d 1017, 1025–26 (9th Cir. 2008) (“Unlike a common law fraud claim, a UCL fraud claim  
26 requires no proof that the plaintiff was actually deceived.”). Rather, “[t]he determination as to  
27 whether a business practice is deceptive is based on the likely effect such [a] practice would have  
28

1 on a reasonable consumer.” *Morgan v. AT&T Wireless Services, Inc.*, 177 Cal. App. 4th 1235,  
2 1256 (2009).

3 A claim that a business practice is (or was) “fraudulent” under Section 17200 can be based  
4 upon representations that deceive because they are untrue as well as representations that may be  
5 accurate on some level but nonetheless tend to mislead or deceive. As such, a perfectly true  
6 statement couched in such a manner that it is likely to mislead or deceive the consumer, such as  
7 by failure to disclose *other* relevant information, is actionable under Section 17200. *Id.* at 1255  
8 (citation omitted). As now detailed, Wells Fargo’s deceptive practices were and continue to be in  
9 violation of the “fraudulent” restriction of Section 17200.

10 **A. The Wells Fargo Consumer Account Fee and Information Schedule**  
11 **Did Not Disclose the Bank’s Posting Practices.**

12 Fees associated with individual overdraft items were disclosed to Wells Fargo customers  
13 through a document called the Consumer Account Fee and Information Schedule. This  
14 document, which was provided to customers when they opened an account, not only explained the  
15 per-item fee that would be assessed per overdraft item, but set forth the ten-item daily cap on  
16 overdraft and NSF fees. Wells Fargo used this document to disclose all relevant information for  
17 account-related fees, and reasonable consumers would have understood this document to contain  
18 all relevant information pertaining to overdraft fees.

19 Significantly, the Consumer Account Fee and Information Schedule did *not* disclose the  
20 high-to-low posting order or its impact. It did not tell customers that frequent use of a debit card  
21 for small-valued purchases could result in an avalanche of overdraft fees for each of those  
22 purchases due to the high-to-low posting order. It also failed to cross-reference any information  
23 on posting order in the CAA.

24 **B. The Consumer Account Agreement Failed to Adequately Disclose**  
25 **the Challenged Resequencing Practices.**

26 In shaping the reasonable expectations of its customers, the bank should have prominently  
27 disclosed its high-to-low scheme and its ability to transform a single mistake into as many as ten  
28 overdrafts. The bank’s “disclosures” on posting order, however, were buried 20-or-so pages into  
a 60-plus-page document of single-spaced, ten-point font text. As stated, Wells Fargo’s own trial

1 expert, Itamar Simonson, affirmatively testified on direct examination that customers would *not*  
2 and could *not* be expected to read the lengthy document (Tr. 977–78). And, even if it was read,  
3 the statements therein on posting order were “difficult for consumers to understand,” as the  
4 bank’s own expert confirmed (*id.* at 982).

5 For example, the October 2004 CAA stated that “the Bank may, *if it chooses*, post  
6 [transactions] in the order of the highest dollar amount to the lowest dollar amount” (*see, e.g.*,  
7 TX 79 at 23) (emphasis added). This statement — if it was ever read — would have been  
8 understood by an ordinary consumer to mean that Wells Fargo had *not yet chosen* to post  
9 transactions in high-to-low order. This was misleading, for the bank well knew that it already had  
10 chosen and indeed was already processing in high-to-low order. Versions of the CAA given to  
11 customers after October 2004 did not resolve these deficiencies. While these copies of the CAA  
12 stated that a high-to-low posting order, *if used, might* result in the imposition of more overdraft  
13 and returned-item fees than a low-to-high posting order, the CAA continued the misleading  
14 implication that the bank *had yet to choose* a high-to-low scheme or would exercise discretion on  
15 a case-by-case basis.

16 **C. Wells Fargo Only Disclosed its Posting Practices to Customers**  
17 **After They Were Blind-Sided by Multiple Overdraft Fees.**

18 The closest Wells Fargo got to an accurate and understandable disclosure of its posting  
19 practices was after the fact and, even then, only to those who complained (*see, e.g.*, TX 127,  
20 BATES 4387). Wells Fargo provided its tellers and phone-bank employees with a clear script to  
21 respond to customers who protested after receiving multiple overdraft fees caused by high-to-low  
22 resequencing. These explanations were in plain English. At least for those angry few lucky  
23 enough to qualify for these responses, they provided a comprehensible disclosure of the bank’s  
24 actual posting practices — *after the fact*.

25 **D. The Dissemination of Misleading Information Enhanced the Likelihood**  
26 **That Wells Fargo Customers Would be Deceived.**

27 Wells Fargo directed misleading propaganda at the class that likely led class members to  
28 expect that the actual posting order of their debit-card purchases would mirror the order in which  
they were transacted. For example, the “account activity” information provided to customers

1 through online banking — a service made available to all Wells Fargo depositors — displayed  
2 “pending” debit-card transactions *in chronological order* (*i.e.*, the order in which the transactions  
3 were authorized by Wells Fargo). When it came time to post them during the settlement process,  
4 however, the same transactions were *not* posted in chronological order but were posted in  
5 high-to-low order.

6 Misleading marketing materials promoted the same theme of chronological subtraction.  
7 A number of Wells Fargo marketing materials, including the Wells Fargo Welcome Jacket that  
8 was customarily provided to all customers who opened a consumer checking account, contained  
9 misleading representations regarding how debit-card transactions were processed. Specifically,  
10 these various materials — covered in detail in the findings of fact — communicated that  
11 debit-card POS purchases were deducted “immediately” or “automatically” from the user’s  
12 checking account (*see, e.g.*, TX 116, 129, 131, 143, 501, 559). Such representations would lead  
13 reasonable consumers to believe that the transactions would be deducted from their checking  
14 accounts in the sequence transacted.

15 This deception was then exploited by the shadow line. As Wells Fargo Senior  
16 Vice-President Karen Moore testified at trial, “[t]he available balance is created for the bank to  
17 understand the amount of money that we would make available to the customer for their next  
18 transaction” (Tr. 593). Wells Fargo’s own website defined the term “available balance” to  
19 customers as “the most current picture of funds you have available for withdrawal” (*id.* at  
20 1220–21). Once the shadow line was extended to debit-card purchases in May 2002, Wells Fargo  
21 began using it to approve into overdraft purchases that were previously declined. Customers who  
22 relied upon the online available balance would be deceived into thinking that a debit-card  
23 purchase would be *declined* if they did not have sufficient funds to cover the transaction.

24 Finally, Wells Fargo encouraged the use of registers in its marketing materials. This  
25 promoted the idea that transactions would be deducted chronologically.<sup>21</sup> Registers necessarily  
26 rely upon a chronological accounting of transactions and reinforce a natural expectation by a  
27

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28 <sup>21</sup> Indeed, plaintiff Gutierrez utilized such a register to keep track of her purchases until she began  
relying upon Wells Fargo’s phone-bank services and online banking services to track her “available balance.”



1 customer that transactions will subtract chronologically. But, Wells Fargo did *not* subtract items  
2 in chronological order; it subtracted them artificially in high-to-low order. Even the most  
3 exacting register could not anticipate that a single overdraft would be turned into ten through the  
4 magic of high-to-low resequencing. To be clear, there is nothing wrong with promoting the use  
5 of check registers. It is wrong, however, to lead customers to expect items will be deducted in  
6 chronological order only to surprise them with a different sequence that generates an avalanche of  
7 unexpected overdrafts.

8 In sum, Wells Fargo affirmatively reinforced the expectation that transactions were  
9 covered in the sequence made while obfuscating its contrary practice of posting transactions in  
10 high-to-low order to maximize the number of overdrafts assessed on customers.

### 11 **3. REMAINING DECEPTION CLAIMS.**

12 Plaintiffs seek only injunctive relief for their claims of negligent misrepresentation and  
13 fraud. Given that such relief will be ordered under plaintiffs' Section 17200 claims, it is  
14 unnecessary for this order to reach these claims. As for plaintiffs' false advertising claim, since  
15 liability under the "fraudulent" restriction of Section 17200 has been established, liability for  
16 plaintiffs' false advertising claim under Section 17500 — which is based upon the same deceptive  
17 conduct — has also been proven. *See Tobacco II*, 46 Cal. 4th at 312 ("A violation of the UCL's  
18 fraud prong is also a violation of the false advertising law.").

### 19 **4. PREEMPTION.**

20 Wells Fargo argues that the National Bank Act and the implementing regulations of the  
21 Office of the Comptroller of the Currency (OCC) preempts all of the foregoing (Dkt. Nos. 38,  
22 323). 12 U.S.C. 24 (Seventh); 12 C.F.R. §§ 7.4002, 7.4007, 7.4009. The undersigned rejected  
23 this argument on two prior occasions (Dkt. Nos. 98, 337). Based on a full trial record, this order  
24 again rejects it.

25 The Act vests national banks such as Wells Fargo with authority to exercise "all such  
26 incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24  
27 (Seventh). The Supreme Court has "repeatedly made clear that federal control shields national  
28 banking from unduly burdensome and duplicative state regulation." *Watters v. Wachovia*

1 *Bank, N.A.*, 550 U.S. 1, 11 (2007). That said, “[s]tates are permitted to regulate the activities of  
2 national banks where doing so does not prevent or significantly interfere with the national bank’s  
3 or the national bank regulator’s exercise of its federal powers.” *Id.* at 12. However, “when state  
4 prescriptions significantly impair the exercise of authority, enumerated or incidental under the  
5 [NBA], the state’s regulations must give way.” *Ibid.*

6 The OCC has the primary responsibility for the surveillance of the “business of banking”  
7 authorized by the Act. *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251,  
8 256 (1995). To carry out this responsibility, the OCC has the power to promulgate regulations  
9 and to use its rulemaking authority to define the “incidental powers” of national banks beyond  
10 those specifically enumerated in the statute. *See* 12 U.S.C. 93a. OCC regulations enjoy the same  
11 preemptive effect as the Act itself. *See Martinez v. Wells Fargo Home Mortg., Inc.*,  
12 598 F.3d 549, 555 (9th Cir. 2010).

13 The Act and OCC regulations do *not* “preempt the field” of banking in its entirety.  
14 “Federally chartered banks are subject to state laws of general application in their daily business  
15 to the extent such laws do not conflict with the letter or the general purposes of the [Act].”  
16 *Watters*, 550 U.S. at 11 (citations omitted). The Ninth Circuit recently emphasized this limitation  
17 on preemption, stating that “[s]tate laws of general application, which merely require all  
18 businesses (including national banks) to refrain from fraudulent, unfair, or illegal behavior, do not  
19 necessarily impair a bank’s ability to exercise its [federally-authorized] powers.” *Martinez*,  
20 598 F.3d at 555.

21 As the *Martinez* decision explained, “the OCC has specifically cited [Section 17200] in an  
22 advisory letter cautioning banks that they may be subject to such laws that prohibit unfair or  
23 deceptive acts or practices.” *Ibid.* (citing OCC Advisory Letter, Guidance on Unfair or Deceptive  
24 Acts or Practices, 2002 WL 521380, at \*2, \*7 n.2 (Mar. 22, 2002)). The Ninth Circuit then listed  
25 a number of decisions exemplifying this limitation on preemption, including *White v. Wachovia*  
26 *Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008), which held that a claim under the Georgia  
27 Fair Business Practices Act that a bank engaged in unfair or deceptive business practices by  
28

1 manipulating the posting of transactions to an account in order to impose overdraft fees was *not*  
 2 preempted by the Act or OCC regulations.

3 **A. The Resequencing Practice Was Not a Pricing Decision**  
 4 **Under 12 C.F.R. 7.4002.**

5 Wells Fargo's preemption defense focuses on three OCC regulations: 12 C.F.R. 7.4002,  
 6 7.4007, and 7.4009. This order will first address 12 C.F.R. 7.4002, which targets "National bank  
 7 charges." Section 7.4002 — formerly Section 7.8000 prior to 1996 — was most recently  
 8 amended in 2001.<sup>22</sup> Since 2001, this regulation has stated in relevant part (emphasis added):

9 (a) *Authority to impose charges and fees.* A national bank may  
 10 charge its customers non-interest charges and fees, including  
 11 deposit account service charges.

12 (b) *Considerations.*

13 \* \* \*

14 (2) The establishment of non-interest charges and fees,  
 15 their amounts, and the method of calculating them are business  
 16 decisions to be made by each bank, in its discretion, according to  
 17 sound banking judgment and safe and sound banking principles. A  
 18 national bank establishes non-interest charges and fees in  
 19 accordance with safe and sound banking principles *if the bank*  
 20 *employs a decision-making process through which it considers the*  
 21 *following factors, among others:*

22 (i) The cost incurred by the bank in providing the service;

23 (ii) The deterrence of misuse by customers of banking  
 24 services;

25 (iii) The enhancement of the competitive position of the  
 26 bank in accordance with the bank's business plan and  
 27 marketing strategy; and

28 (iv) The maintenance of the safety and soundness of the  
 institution.

\* \* \*

(d) *State law.* The OCC applies preemption principles derived  
 from the United States Constitution, as interpreted through judicial  
 precedent, when determining whether State laws apply that purport  
 to limit or prohibit charges and fees described in this section.

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<sup>22</sup> The 2001 amendment was intended to clarify the preemption language used in the prior version. It did not substantively change the regulation. As such, the holdings herein are equally applicable to the version of Section 7.4002 in effect between 1996 and 2001.

1 Wells Fargo says that the resequencing practice challenged by plaintiffs is a component of  
2 “pricing” (*i.e.*, is part of establishing “non-interest charges and fees” under this regulation) under  
3 12 C.F.R. 7.4002. This is rejected.

4 There is a material difference between the bank’s authority to establish overdraft fees —  
5 which includes the authority to set the amount of each fee and the method of calculating each  
6 fee — versus bank practices aimed at multiplying the number of overdrafts during the posting  
7 process. The recent *Martinez* decision illustrates the former situation. In *Martinez*, the plaintiffs  
8 challenged the alleged “overcharging of underwriting fees and the marking up of tax service fees”  
9 by Wells Fargo Home Mortgage. The plaintiffs argued that the bank’s underwriting fees were  
10 excessive because they were not reasonably related to the bank’s actual costs of performing the  
11 underwriting. The bank’s tax service fees were argued as being “excessive” for analogous  
12 reasons. The Ninth Circuit held that both challenges were preempted by 12 C.F.R. 7.4002  
13 because plaintiffs were “[i]n essence, . . . argu[ing] that these fees [were] too high, and [were]  
14 ask[ing] the court to decide how much an appropriate fee would be.” *Martinez*, 598 F.3d at 556.

15 By contrast, plaintiffs in the instant case are neither challenging Wells Fargo’s right to  
16 establish overdraft fees nor claiming that the amount of each *individual* overdraft fee is somehow  
17 excessive. Rather, plaintiffs target a practice whereby debit-card transactions are manipulated  
18 immediately prior to being posted so as to skyrocket the number of overdraft *items* posted against  
19 a customer’s account. In other words, plaintiffs challenge bookkeeping practices that convert  
20 what is really one overdraft to count as ten overdrafts. This is a classic state law issue. Indeed, it  
21 was Wells Fargo that first raised California Commercial Code Section 4303 in its defense  
22 herein — only to learn that the legislative comment thereto barred the very practice at issue.

23 Equally fatal to this defense is an utter failure of proof. For preemption to possibly apply,  
24 12 C.F.R. 7.4002 *requires* national banks to actually use a four-factor decision-making process  
25 when establishing non-interest charges and fees. Specifically, to invoke preemption under this  
26 regulation, a national bank *must* consider: (1) the cost incurred by the bank in providing the  
27 service, (2) the deterrence of misuse by customers of banking services, (3) the enhancement of the  
28

1 competitive position of the bank in accordance with the bank's business plan and marketing  
2 strategy, and (4) the maintenance of the safety and soundness of the institution.

3 As stated, however, Wells Fargo did not consider *any* of these factors when it decided to  
4 resequence debit-card transactions from highest-to-lowest dollar amount, commingle debit-card  
5 transactions with checks and ACH transactions, and extend the shadow line to the authorization  
6 of debit-card purchases. That no documentary evidence supported the bank's supposed  
7 consideration of these factors shows it was a feigned pretense contrived for the trial. The bank  
8 also admittedly failed to disclose these various practices to its customers pursuant to  
9 Regulation DD, which would have applied to these decisions if they were truly "pricing changes"  
10 under 12 C.F.R. 7.4002.

11 **B. The Regulation Recognizes That State Law May Nonetheless Apply.**

12 Even if the practices challenged herein were somehow "pricing changes" under  
13 12 C.F.R. 7.4002, a number of OCC interpretive letters recognize that state law still regulates  
14 conduct like that at issue here. For example, in OCC Interpretive Letter #916 (May 22, 2001), the  
15 OCC expressly stated that the certain acts of misrepresentation by a bank could warrant a finding  
16 that the "good faith" limitation set forth in the comment to Section 4303(b) of the California  
17 Commercial Code was violated:

18 On this point, Federal law governing national bank fees, as  
19 embodied in section 7.4002(a), is consistent with the check-posting  
20 provision of the California Commercial Code cited by the Bank,  
21 which permits the Bank to post checks "in any order." The  
22 Commentary to the California provision glosses this provision with  
23 the application of a "good faith" standard.

24 While this letter does not address the applicability to the Bank of  
25 the California Commercial Code check-posting provision or the  
26 standard articulated in the Commentary, we note that a relevant  
27 factor in evaluating good faith would be whether a bank's actions  
28 were inconsistent with the practices it had represented to its  
customers that it would follow.

26 Similarly, in OCC Interpretive Letter #997 (April 15, 2002), the OCC noted that "a  
27 relevant factor in evaluating good faith [under Texas Commercial Code § 4.303] may be whether  
28

1 a bank's actions were inconsistent with the practices it had represented to its customers that it  
2 would follow."

3 Both of the above interpretive letters expressly noted that *state* laws based upon  
4 UCC 4-303, including California Commercial Code § 4303, were "consistent with" and therefore  
5 did *not* conflict with federal laws governing national bank fees. Additionally, a number of OCC  
6 advisory letters militate against preemption. In Advisory Letter AL 2002-3, the OCC warned  
7 federal banks of the ramifications of engaging in unfair or deceptive practices that were in part  
8 violations of state law:

9  
10 Generally, a deceptive act or practice involves a representation or  
11 omission that is likely to mislead a reasonable consumer in some  
12 material way. Whether particular conduct constitutes an unfair act  
13 or practice would depend on the particular facts and circumstances  
14 presented, but generally would involve acts or practices that are  
15 unscrupulous, unconscionable, or contrary to public policy, and  
16 that harm consumers.

17 The letter went on to explain that the consequences of engaging in practices that may be  
18 unfair or deceptive under federal *or state law* can include litigation, enforcement actions,  
19 monetary judgments, and harm to the institution's reputation. The letter also stated that "[a]  
20 number of state laws prohibit unfair or deceptive acts or practices, *and such laws may be*  
21 *applicable to insured depository institutions.*" Thus, the OCC itself contemplated that such suits  
22 will occur from time to time. In sum, the state-law restrictions applied herein are not preempted  
23 by 12 C.F.R. 7.4002.

24 **C. Plaintiffs' Claims are Not Preempted Under 12 C.F.R. 7.4007 or 7.4009.**

25 Similarly, Wells Fargo has not proven preemption under 12 C.F.R. 7.4007 or 7.4009. As  
26 12 C.F.R. 7.4007 explains, "[a] national bank may receive deposits and engage in any activity  
27 incidental to receiving deposits, including issuing evidence of accounts[.]" The regulation further  
28 states that "[a] national bank may exercise its deposit-taking powers without regard to state law  
limitations concerning" checking accounts, disclosure requirements, and funds availability. That  
said, the regulation also carves out the following exceptions: "[s]tate laws on [contracts and torts]  
are not inconsistent with the deposit-taking powers of national banks and apply to national banks

1 to the extent that they only incidentally affect the exercise of national banks' deposit-taking  
2 powers[.]”

3 Furthermore, as held in a prior order (Dkt. No. 98), 12 C.F.R. 7.4007 only relates to a  
4 bank's deposit-taking powers and *not* to a bank's ability to reorder transactions in order to  
5 maximize overdraft fees during the posting process. None of the evidence presented at trial  
6 warrants a departure from this ruling. Additionally, the trial record is devoid of any credible  
7 evidence demonstrating that the state-law claims asserted in this action would impose more than  
8 an incidental effect on the exercise of Wells Fargo's deposit-taking powers or — as covered by  
9 12 C.F.R. 7.4009 — any other power authorized under the Act or OCC regulations.

#### 10 **5. STANDING UNDER SECTION 17200.**

11 Due to the passage of Proposition 64 in November 2004, a plaintiff must prove “actual  
12 reliance” to have standing to bring fraud-based Section 17200 claims on behalf of absent class  
13 members. *See* Cal. Bus. & Prof. Code § 17204. As explained by the California Supreme Court in  
14 *Tobacco II*, a plaintiff must show that the defendant's deceptions were “an immediate cause of the  
15 plaintiff's injury-producing conduct.” The deception, however, does not have to be “the sole or  
16 even the predominant or decisive factor influencing [the plaintiff's] conduct.” Instead, “it is  
17 enough that the representation . . . played a substantial part, and so had been a substantial factor,  
18 in influencing [the plaintiff's] decision.” Additionally, where a plaintiff has been exposed to “an  
19 extensive and long-term advertising campaign,” proof of individualized reliance on specific  
20 misrepresentations or false statements is not required. *Tobacco II*, 46 Cal. 4th at 326–28  
21 (citations and internal quotations omitted).

22 As explained in the *Tobacco II* decision, Proposition 64 was directed at “unscrupulous  
23 lawyers who exploited the generous standing requirement of the UCL to file ‘shakedown’ suits to  
24 extort money from small businesses.” *Id.* at 316 (citation omitted). As such, the “intent of  
25 California voters [in passing Proposition 64] was to limit such abuses by ‘prohibiting private  
26 attorneys from filing lawsuits for unfair competition *where they have no client who has been*  
27 *injured in fact.*”” *Id.* at 316–17 (citation omitted) (emphasis added). Proposition 64 amended  
28 Section 17204 of the California Business and Professions Code to authorize suits by any person

1 “who has suffered injury in fact and has lost money and property as a result of such unfair  
2 competition.” This changed the prior language, which granted standing to any plaintiff “acting  
3 for the interests of itself, its members or the general public[.]” In sum, the intent and effect of  
4 Proposition 64 was to “prevent *uninjured* private persons from suing for restitution on behalf of  
5 others.” *Id.* at 314 (citation omitted) (emphasis added).

6 In the instant case, it is clear that both Ms. Gutierrez — the class representative — and  
7 Ms. Walker have alleged and proven that they were harmed as a result of misrepresentations and  
8 omissions by Wells Fargo. Moreover, they have shown that they, “in all reasonable probability[,]”  
9 would not have engaged in the injury-producing conduct” if Wells Fargo had disclosed its posting  
10 practices (and their intended effect on manufacturing overdraft fees) in a non-deceptive fashion.  
11 As such, this is not a situation where “uninjured private persons” have “su[ed] for restitution on  
12 behalf of others[,]” or where a lawsuit has been filed where “no client has been injured in fact.”  
13 The abuses targeted by Proposition 64 are not present in the instant litigation.<sup>23</sup>

14 Additionally, Wells Fargo’s argument that the class-wide misrepresentation claims (and  
15 the exact documents they pertain to) must be surgically and precisely limited to those asserted by  
16 the class representative is *not* supported by the *Tobacco II* decision. The California Supreme  
17 Court clearly stated that “[r]epresentative parties who have a direct and substantial interest have  
18 standing; the question whether they may be allowed to present claims on behalf of others who  
19 have *similar, but not identical, interests depends not on standing, but on an assessment of*  
20 *typicality and adequacy of representation.*” *Id.* at 319–20 (emphasis added). Moreover, “there is  
21 nothing in . . . Proposition 64 that purports to alter accepted principles of class action procedure  
22 that treat the issue of standing only to the class representative and not the absent class  
23 members[.]” *Id.* at 321.

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24  
25  
26 <sup>23</sup> The undersigned judge recognizes that Section 17200 has been much abused and overused, as noted  
27 by the proponents of Proposition 64 and the California Supreme Court in *Tobacco II*. Indeed, the undersigned  
28 judge has regularly dismissed meritless Section 17200 claims in other actions. *See, e.g., Lopez v. Wachovia*  
*Mortgage*, 2010 WL 2836823, at \*6 (N.D. Cal., 2010); *Halton Co. v. Streivor, Inc.*, 2010 WL 2077203, at \*5  
(N.D. Cal., 2010); *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1204 (N.D. Cal., 2008); *Parrish v.*  
*National Football League Players Ass’n*, 534 F. Supp. 2d 1081, 1092–94 (N.D. Cal., 2007). The instant case,  
however, presents the type of pernicious practice that the legislature meant to prevent.



1 Here, both Ms. Gutierrez and Ms. Walker have standing to bring claims under Section  
2 17200. Both relied upon the bank's deceptive omissions and marketing materials — including  
3 the Wells Fargo “Welcome Jacket” and CAA — that promoted the idea that transactions would be  
4 deducted chronologically rather than in high-to-low order. Both Ms. Gutierrez and Ms. Walker  
5 suffered actual losses of money as a result of the unfair and deceptive business practices  
6 discussed herein. As such, having met the “injury in fact” requirement imposed by  
7 Proposition 64, both Ms. Walker and Ms. Gutierrez have standing to bring their individual claims,  
8 and Ms. Gutierrez may properly present claims on behalf of class members with “similar, but not  
9 identical, interests.”

10 **6. THE SMITH V. WELLS FARGO BANK, N.A. SETTLEMENT.**

11 Throughout this litigation, Wells Fargo has argued that *any* claims related to the extension  
12 of the shadow line to the authorization of debit-card purchases were foreclosed by the settlement  
13 and release negotiated in *Smith v. Wells Fargo Bank, N.A.* As noted in the findings, the  
14 settlement was approved by Judge Ronald S. Prager of the San Diego County Superior Court in  
15 November 2007 (Dkt. No. 431-1). Following the close of trial, both sides were invited to submit  
16 further briefing on this issue.

17 This order concludes that the *Smith* release does not bar any of the claims resolved herein.  
18 In their respective briefs, both Wells Fargo and plaintiffs *agreed* that this case is and has always  
19 been about the bank's high-to-low posting practices and their impact on customers. Judge Prager  
20 reached the same conclusion, ruling that the release in *Smith* did not encompass high-to-low  
21 posting and was limited to the substantive claims in the *Smith* complaint. As such, to the extent  
22 that the claims and findings herein involve the shadow line and its related “disclosures,” it is only  
23 to highlight their role in exacerbating the bank's high-to-low scheme. Liability, however, is tied  
24 solely to the bank's high-to-low posting practices. Relief will also be so limited.<sup>24</sup>

25  
26  
27 <sup>24</sup> After closely scrutinizing the *Smith* settlement, this order suggests that the agreement reached in  
28 *Smith* between class counsel and Wells Fargo Bank was almost certainly collusive. The class received merely  
\$2,080 in settlement money while class counsel received over two million dollars in fees, a fact Judge Prager  
was surely never told and which the undersigned judge had to ask Wells Fargo repeatedly to disclose. This  
point, however, is not determinative of any aspect of the present litigation.

1           **7. SUBJECT-MATTER JURISDICTION.**

2           Despite conceding that “the jurisdictional requirements of 28 U.S.C. § 1332(d)(2) are  
3 satisfied” in its answer (Dkt. No. 16), Wells Fargo recently filed a “notice” of a “potential  
4 jurisdictional defect” under the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4  
5 (codified in scattered sections of 28 U.S.C.) (Dkt. No. 465). In its notice, the bank cited and  
6 attached the recent Eleventh Circuit decision in *Cappuccitti v. DirecTV, Inc.*, --- F.3d ---,  
7 2010 WL 2803093, at \*3 (11th Cir. 2010), which held that “in a CAFA action originally filed in  
8 federal court, at least one of the plaintiffs must allege an amount in controversy that satisfies . . .  
9 28 U.S.C. § 1332(a).” Plaintiffs filed a response a few days later (Dkt. No. 471).

10           Although no motion has been filed challenging subject-matter jurisdiction in this action,  
11 and the bank has clarified that it is *not* challenging jurisdiction herein (Dkt. No. 475), this order  
12 nevertheless concludes that the requirements for jurisdiction under CAFA have been met. The  
13 applicable code section clearly states:

14                           The district courts shall have original jurisdiction of any civil  
15 action in which the matter in controversy exceeds the sum or value  
16 of \$5,000,000, exclusive of interest and costs, and is a class action  
in which—

17                           (A) any member of a class of plaintiffs is a citizen of a State  
different from any defendant;

18                           (B) any member of a class of plaintiffs is a foreign state or a  
19 citizen or subject of a foreign state and any defendant is a citizen  
of a State; or

20                           (C) any member of a class of plaintiffs is a citizen of a State and  
21 any defendant is a foreign state or a citizen or subject of a foreign  
state.  
22

23 28 U.S.C. 1332(d)(2). Nowhere in Section 1332(d) are the jurisdictional requirements of  
24 Section 1332(a) cross-referenced, *except* for the removal of “mass actions” from state court. *See*  
25 28 U.S.C. 1332(d)(11)(B)(i) (defining a “mass action” as any civil action *except a class action*  
26 *filed in district court under FRCP 23* in which monetary relief claims of 100 or more persons are  
27 proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of  
28

1 law or fact). The instant action was not removed from state court as a “mass action,” but filed  
 2 originally in district court as a class action under FRCP 23. Jurisdiction is therefore proper.

3 **RELIEF GRANTED**

4 **1. “NEW” REGULATION E.**

5 While this action has always been about Wells Fargo’s high-to-low resequencing  
 6 practices, the shadow line — as this order has shown — played a supporting role in exacerbating  
 7 the adverse impact of high-to-low posting on class members. That said, plaintiffs’ claims did *not*  
 8 target the legality of the shadow line but were limited strictly to high-to-low posting and its  
 9 impact on overdraft fees. As such, the relief granted herein will be limited to the bank’s high-to-  
 10 low resequencing practices.

11 The shadow line, however, has met its own fate. The Federal Reserve — through recent  
 12 amendments to 12 C.F.R. 205 (“Regulation E”) that have been effective since July 1, 2010 —  
 13 forced financial institutions like Wells Fargo to provide consumers with a choice regarding  
 14 whether they wanted debit-card purchases to be authorized into overdrafts. This went far beyond  
 15 simply requiring banks to provide a clear disclosure of their fees and terms associated with  
 16 overdrafts. Rather, new Regulation E bars all shadow lines on debit-card purchases unless the  
 17 customer *opts in and affirmatively consents* to having her debit-card purchases subject to shadow  
 18 lines of credit.<sup>25</sup> And, customer consent can only be obtained after full and fair disclosure of the  
 19 downsides of the practice. Importantly, a customer is free *not* to opt in. *See* 12 C.F.R. 205.17.

20 The Board of Governors of the Federal Reserve System, who issued Regulation E  
 21 pursuant to the Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*), explained the need for  
 22 these changes as follows:

23 The Board believes that, on balance, an opt-in rule creates the  
 24 optimal result for consumers with respect to ATM and one-time  
 25 debit card transactions. First, the cost to consumers of overdraft  
 26 fees assessed in connection with ATM and debit card overdrafts is

27 <sup>25</sup> The amended regulation further prohibits financial institutions from tying the  
 28 payment of overdrafts for checks and other transactions to the consumer opting into the  
 overdraft service for debit-card transactions. New Regulation E ensures that consumers who  
 do not opt in are provided with the same account terms, conditions and features, including  
 price, as provided to consumers who do opt in. *See* 12 C.F.R. 205.17.

1 significant. For one-time debit card transactions in particular, the  
 2 amount of the fee assessed may substantially exceed the amount  
 3 overdrawn. If the consumer incurs multiple debit card overdrafts in  
 one day, fees may accrue into the hundreds of dollars. Many  
 consumers may prefer such transactions not to be paid.

4 Second, an opt-in rule that is limited to ATM and one-time debit  
 5 card transactions may result in fewer adverse consequences for  
 6 consumers than a rule applicable to a broader range of  
 transactions. While a check or ACH transaction that is returned for  
 7 insufficient funds might cause the consumer to incur a merchant  
 fee for the returned item, in addition to an insufficient funds fee  
 8 assessed by the consumer's financial institution, a declined ATM  
 or debit card transaction does not result in any fees to the  
 consumer.

9 Third, available research indicates that the large majority of  
 10 overdraft fees are paid by a small portion of consumers who  
 frequently overdraw their accounts. These consumers may have  
 11 difficulty both repaying overdraft fees and bringing their account  
 current, which may in turn cause them to incur additional overdraft  
 12 fees. An opt-in approach could therefore best prevent these  
 consumers from entering into a harmful cycle of repeated  
 13 overdrafts.

14 Fourth, many consumers may not be aware that they are able to  
 15 overdraft at an ATM or POS. Debit cards have been promoted as  
 budgeting tools, and a means for consumers to pay for goods and  
 16 services without incurring additional debt. Additionally, the ability  
 to overdraft at an ATM or POS is a relatively recent development.  
 17 Consequently, consumers may unintentionally overdraw their  
 account based on the erroneous belief that a transaction would be  
 18 paid only if the consumer has sufficient funds in the account to  
 cover it. With an opt-in approach, consumers who do not opt in  
 will be less likely to incur unanticipated overdraft fees.

19 Official Staff Commentary to Regulation E, 74 Fed. Reg. 59033, 59038–39 (Nov. 17, 2009).

20 In sum, the Federal Reserve recognized nearly all of the abuses found herein and  
 21 concluded that if consumers *truly* wanted a service that subjected many customers to costly  
 22 overdraft fees, they should be given a clear disclosure *and the choice to affirmatively opt-in*.  
 23 While Regulation E did not address the high-to-low resequencing practices at issue in this class  
 24 action, it is instructive for the relief now ordered.

## 25 2. INJUNCTIVE RELIEF.

26 Plaintiffs and the class seek a permanent injunction enjoining Wells Fargo from engaging  
 27 in the unfair and fraudulent business practice found herein. This order finds that such relief is  
 28 appropriate and authorized under Section 17203 of the California Business and Professions Code,

1 and necessary to prevent further harm to Wells Fargo's customers. The Effective Date shall be  
 2 **NOVEMBER 30, 2010**. This date is fixed far enough out to give time to plan for an orderly  
 3 implementation of injunctive relief and to allow the bank to seek a stay from the court of appeals  
 4 (if it elects to appeal). The following class-wide relief is therefore ordered:

5           1. By the Effective Date, defendant Wells Fargo is ordered to cease its  
 6 practice of posting in high-to-low order for all debit-card transactions for all class  
 7 members.

8           2. On or before the Effective Date, defendant Wells Fargo must, for all  
 9 class members, either reinstate a low-to-high posting method or use a  
 10 chronological posting method (or some combination of the two methods) for the  
 11 posting of debit-card transactions for class members.<sup>26</sup>

12           3. Before implementing any posting system, defendant Wells Fargo  
 13 must file a declaration explaining the specifics of how it will work in order to  
 14 allow counsel and the Court to vet it. This filing must be made 49 calendar days  
 15 before the Effective Date.

16           4. All agreements, disclosures, websites, online banking statements,  
 17 and promotional materials provided to class members must be conformed to the  
 18 new posting system.

19  
 20 **3. RESTITUTION.**

21 In addition to injunctive relief, this order finds that an award of restitution is warranted  
 22 under Section 17203 to restore those overdraft fees paid by class members that were wrongfully  
 23 extracted by Wells Fargo through its unfair practice as found herein.

24  
 25  
 26 \_\_\_\_\_  
 27 <sup>26</sup> This order finds that the bank's deposit system is able to post transactions in different sequences on  
 28 an account-by-account basis. For example, transactions for Wells Fargo depositors with accounts in New  
 Mexico and Washington are posted in a different order than accounts in California (Tr. 1504–05). Similarly,  
 transactions for Wells Fargo depositors with accounts in Nevada are posted in a different order than accounts in  
 California (*id.* at 263–64). There are no technical restrictions preventing the bank from posting transactions  
 differently for individual account holders.

1 Section 17203 states that “[t]he court may make such orders or judgments . . . as may be  
2 necessary to restore to any person in interest any money or property, real or personal, which may  
3 have been acquired by means of such unfair competition.” The California Supreme Court has  
4 repeatedly construed this language, in light of the “concern that wrongdoers not retain the benefits  
5 of their misconduct” to mean that “relief under the UCL is available without individualized proof  
6 of deception, reliance and injury if necessary to prevent the use or employment of an unfair  
7 practice.” See, e.g., *Tobacco II*, 46 Cal. 4th at 320; *Bank of the West v. Superior Court*,  
8 2 Cal. 4th 1254, 1267 (1992); *Committee on Children’s Television, Inc. v. General Foods Corp.*,  
9 35 Cal. 3d 197, 211 (1983); *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 452  
10 (1979). In other words, absent class members on whose behalf a Section 17200 action is  
11 prosecuted need *not* show on “an individualized basis that they have ‘lost money or property as a  
12 result of the unfair competition[.]’” *Tobacco II*, 46 Cal. 4th at 320.

13 That said, an award of restitution must be limited to “return[ing] money obtained through  
14 an unfair business practice to those persons in interest from whom the property was taken, that is,  
15 to persons who had an ownership interest in the property or those claiming through that person.”  
16 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144–45 (2003) (citation omitted).

17 While a wide range of restitution scenarios were presented at trial by both sides, this order  
18 concludes that the proper measure of restitution must be measured from a posting order that most  
19 closely tracks a chronological posting order for debit-card transactions. Rejected is plaintiffs’  
20 argument that restitution should be based on the low-to-high ordering used by Wells Fargo prior  
21 to the high-to-low switch in May 2001. True, low-to-high posting is more favorable to depositors  
22 and was the system used before the bank switched to high-to-low resequencing. A main theme of  
23 plaintiffs’ case, however, is that the bank promoted the expectation that debit-card transactions  
24 would post *chronologically*. As such, restitution based on chronological posting of these  
25 transactions will most closely track depositors’ expectations.

26 This order finds that plaintiffs’ expert Arthur Olsen has convincingly shown that it is  
27 entirely practical to re-run the computerized data in storage for each class members’ account and  
28 determine how many overdrafts were added by the high-to-low practice for debit-card

1 transactions during the class period. Indeed, he has already done so, using various alternate  
 2 posting sequences. This has been done by him on an account-by-account, day-by-day, and  
 3 transaction-by-transaction basis, using the bank's own real-world data. Court orders were needed  
 4 to provide him access to this data, but — after much work and time — this order finds that Expert  
 5 Olsen has done a professional and careful job in laying out the impacts of various alternative  
 6 posting protocols. This work has not only demonstrated the enormous impact of the high-to-low  
 7 scheme, but it has demonstrated that it is possible, in considering relief and restitution, to add  
 8 back to depositors' specific accounts the amounts that were wrongfully taken by Wells Fargo,  
 9 using posting protocols that this order finds would have tracked the ordinary and reasonable  
 10 expectations of depositors.

11 In the Court's judgment, restitution should be made based on the following sequence:

- 12 1. Credits
- 13 2. Priority debit transactions<sup>27</sup>
- 14 3. Debit-card transactions with date/time information in  
 15 chronological order
- 16 4. Debit-card transactions without date/time information in  
 17 low-to-high order
- 18 5. Checks and ACH transactions in high-to-low order

19 This corresponds exactly to Olsen Scenario No. 2A (TX 212-G; Tr. 911–12).

20 This order finds that Olsen Scenario No. 2A properly posted credits and priority debit  
 21 transactions in their usual and customary order — namely, first and second, before all debit-card  
 22 transactions, checks, and ACH transactions (*id.* at 74, 287, 885–86; Dkt. No. 448-1). This order  
 23 also finds that Wells Fargo has *never* posted checks and ACH transactions ahead of credits, or  
 24 checks and ACH transactions ahead of all debit-card transactions within California (Dkt. No. 448-  
 25 1). Rather, checks and ACH transactions were customarily posted *after* debit-card transactions  
 26 prior to commingling, as done in Olsen Scenario No. 2A (*ibid.*). The only reason that Wells  
 27 Fargo now suggests radical rearrangements and manipulations of credits, checks, and ACH  
 28 transactions is to artificially *minimize* the restitution awarded to the class.

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<sup>27</sup> The "priority posting group" included cash withdrawals and equivalents, such as wire transfers, ATM withdrawals, and money orders (Tr. 336, 1256).

1 With respect to the fourth item above, it is worth noting that the bank did not maintain  
2 date/time information for a small percentage of its customers' debit-card transactions.<sup>28</sup> As such,  
3 a "perfect" chronological ordering could not be reconstructed due to these gaps in the bank's data.  
4 This order finds, however, that it makes very little difference in the aggregate whether these  
5 transactions without date/time information are posted before or after the chronologically  
6 sequenced debit-card transactions that *did* have date/time information. The bank's own expert  
7 confirmed this finding on direct examination at trial (Tr. 720).

8 In his analysis, Expert Olsen calculated the differential between the number of overdraft  
9 fees that were *actually* assessed on customers during the class period and the number of overdraft  
10 fees that *would have been* assessed on customers using the above sequence. Overdraft fees that  
11 would have been assessed on customers no matter what ordering was used by the bank were  
12 excluded from the differential. For example, overdraft fees solely attributable to purchases  
13 authorized by the shadow line and *not* caused by high-to-low resequencing were excluded.  
14 Additionally, Expert Olsen considered uncollectibles — meaning overdraft fees that the bank was  
15 unable to collect from a particular account — in reducing restitution awards. Class members who  
16 had opted out were also excluded from his analysis (Tr. 894). This order finds that these  
17 adjustments were accurate and proper.

18 Expert Olsen also took into account overdraft fee reversals credited against each  
19 individual account using two different methods: (1) a last-in-first-out (LIFO) method, where any  
20 fee reversal was credited against the last overdraft fee assessed prior to the reversal, and (2) a  
21 30-day reversal period, where any fee reversal credited within a 30-day period following an  
22 unfairly assessed overdraft fee was deducted from any restitution calculated for that particular  
23 account. These alternative methods were employed because the bank's transaction data did not  
24 contain information tying specific fee reversals to particular overdraft fees. In other words, it was

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25  
26 <sup>28</sup> As stated, 84 percent of debit-card transactions had date/time information (Tr. 879–80). Class  
27 members, of course, should not be penalized for data deficiencies in the very computer systems used to power  
28 the bank's unlawful practices. It would not be equitable to allow the bank to extract hundreds of millions of  
dollars through unfair and fraudulent business practices and then use the supposed inadequacies of its own  
record-keeping system to shield itself from restitution. *See, e.g., Bigelow v. RKO Radio Pictures*, 327 U.S. 251,  
264 (1946) (setting forth the familiar proposition that where a defendant has done wrong, the defendant, as the  
wrongdoer, cannot object to a damage study that is the best possible with the data available).



1 often impossible for Expert Olsen to tell from the bank's data whether a fee reversal was directed  
2 at the most recent overdraft fee or one that had been assessed weeks earlier. This is another  
3 instance where the bank's data prevented a perfect calculation of restitution.

4 With respect to fee reversals, this order finds that a 30-day reversal period provides the  
5 fairest and proper method of restitution. Of the two methods employed by Expert Olsen to  
6 account for fee reversals, it is the most generous to the bank and, as the bank's own expert  
7 testified on direct examination, is the "superior" approach to crediting fee reversals against an  
8 award of restitution (*id.* at 1748).

9 Finally, this order finds that the shadow line *per se* has been properly ignored in Expert  
10 Olsen's analysis. While Wells Fargo argued at trial that plaintiffs' restitution studies failed to  
11 take into account the impact of the shadow line on returned-item fees, this is a red herring. *First*,  
12 given the secrecy of the shadow line, plaintiffs and their expert were never provided with the  
13 proper tools to apply the shadow line in their restitution studies. Instead, they were provided with  
14 a bare algorithm — without any accompanying instructions — that would take years to decipher  
15 and many guesses along the way. Even the bank's own restitution expert was not up to the task of  
16 programming the shadow line from scratch. Instead, the bank's expert relied upon Wells Fargo's  
17 internal risk management group and pre-programmed computer system to perform his forensic  
18 shadow-line calculations — a luxury denied to plaintiffs' expert. *Second*, all of the bank's  
19 analyses were based upon a mere ten days worth of customer data (as compared to the 43-months  
20 of data analyzed by Expert Olsen). This strips the bank's arguments of all weight and credibility.

21 Restitution must be paid by the bank on a class-member-by-class-member basis, based  
22 upon the difference between the foregoing posting sequence versus the result of the high-to-low  
23 system used during the class period. The Olsen study demonstrates that this amount, in total, will  
24 be close to \$203 million.

25 The next question is how procedurally to refund the money. For accounts due restitution  
26 and still open at Wells Fargo, the bank shall simply post a credit to the accounts. For accounts  
27 that have been closed but whose owner still banks with Wells Fargo in any capacity, the bank  
28 shall credit one of the owner's active accounts. For class members no longer doing business with

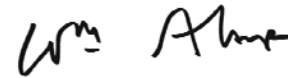
1 Wells Fargo and to whom restitution is owed, the bank shall provide class counsel with their last  
2 known U.S. mail address, last known email address, and last known telephone number.

3 Counsel shall meet and confer and recommend a detailed plan of distribution and notice,  
4 including a plan to track down class members for whom the available contact information is  
5 inadequate, such plan to include use of the National Change of Address Registry and published  
6 notice. Counsel shall also meet and confer and produce a computerized listing of each class  
7 member and the amount of restitution due to each using the foregoing posting protocol, reserving  
8 all objections as to substance. Counsel should consider whether restitution should be extended up  
9 to the date of the injunction's Effective Date rather than merely up to the end of the class period.  
10 A procedure to determine attorney's fees and non-cost expenses should also be recommended.  
11 This joint recommendation shall be filed no later than 42 days before the Effective Date. Please  
12 recommend a form of judgment, reserving all substantive rights, that will capture the central  
13 points of this order and poise the action for any appeal.

14 The Court will retain jurisdiction to enforce this order.

15  
16 **IT IS SO ORDERED.**

17  
18 Dated: August 10, 2010.



19 \_\_\_\_\_  
20 WILLIAM ALSUP  
21 UNITED STATES DISTRICT JUDGE  
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