

United States District Court  
For the Northern District of California

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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,

No. C 07-05923 WHA

Plaintiffs,

**ORDER GRANTING IN PART  
AND DENYING IN PART  
MOTION FOR JUDGMENT  
FOLLOWING REMAND**

v.

WELLS FARGO BANK, N.A.,

Defendant.

\_\_\_\_\_ /

**INTRODUCTION**

After a bench trial in this certified consumer class action, certain overdraft practices by Wells Fargo Bank, N.A. that imposed hundreds of millions of dollars in overdraft fees on depositors were held unfair and fraudulent. Our court of appeals affirmed in part and reversed in part. On remand, plaintiffs now move to reinstate the prior judgment on narrower grounds and request injunctive relief, restitution, and interest. For the reasons explained below, plaintiffs’ motion is **GRANTED IN PART AND DENIED IN PART**.

**STATEMENT**

Plaintiffs brought this class action to challenge a Wells Fargo bookkeeping device known as “high-to-low” posting. In practice, processing account debits received by the bank each day in high-to-low order multiplied the overdraft fees collected by the bank by depleting the account as fast as possible and turning what might otherwise be a single overdraft into as many as ten.

1 Following a two-week bench trial, the Court made the following rulings on class claims relevant  
2 to the instant motion:

3 (1) Wells Fargo’s decision to use high-to-low posting (along with certain allied  
4 practices) was made in bad faith with the sole object being to increase the overdraft fees charged  
5 to customers. This violated the “unfair” prong of Section 17200 of the California Business and  
6 Professions Code.

7 (2) Wells Fargo failed to disclose (or to do so adequately) the challenged resequencing  
8 practice. This violated the “fraudulent” prong of Section 17200.

9 (3) Wells Fargo made misleading statements to consumers regarding its resequencing  
10 practice in violation of the “fraudulent” prong of Section 17200.

11 (4) The deceptive conduct under the “fraudulent” prong of Section 17200 also  
12 established liability for plaintiffs’ false advertising claim under Section 17500 of the California  
13 Business and Professions Code.

14 (5) Wells Fargo was enjoined and thereby ordered to (a) cease the high-to-low posting  
15 practice, (b) reinstate an alternative posting method for all class members, (c) file a declaration  
16 on any new posting system so that it could be vetted by the Court prior to implementation, and  
17 (d) conform all agreements, disclosures, websites, online banking statements, and promotional  
18 materials provided to class members to the new system.

19 (6) Wells Fargo was ordered to pay restitution for its unfair competition under Section  
20 17200. Using a measurement method that tracked class members’ most likely expectations that  
21 debits would have been posted in chronological posting order, Wells Fargo was liable for  
22 restitution to class members totaling \$202,994,035.46 (as specified in the final judgment, Dkt.  
23 No. 498 at 1). This was based on the difference between the high-to-low method versus the  
24 chronological posting method.

25 The Findings did not reach the class claims for negligent misrepresentation and fraud  
26 because the injunctive relief sought thereunder would be duplicative.

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1 On appeal, the above-numerated rulings 1–2 and 5–6 were reversed; rulings 3–4 were  
2 affirmed. *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 725–30 (9th Cir. 2012).<sup>\*</sup> Our  
3 court of appeals specifically ruled that the National Bank Act preempts the application of the  
4 “unfair” prong of Section 17200 to a national bank’s order of posting. Both the posting order  
5 itself, and any requirement to make particular disclosures are within the exclusive purview of the  
6 National Bank Act. Liability based on failure to disclose was likewise preempted on the ground  
7 that it was tantamount to mandating specific disclosures.

8 Liability based on the “fraudulent” prong of Section 17200 for false and misleading  
9 statements, however, was held not preempted. Our court of appeals held that for these purposes  
10 Section 17200 is a non-discriminatory state law of general applicability that did not impose  
11 disclosure requirements in conflict with federal law. Rather, it prohibited statements that are  
12 likely to mislead the public. *Id.* at 726–27.

13 As set forth in the previous Findings — re-approved herein and incorporated by reference  
14 — Wells Fargo’s affirmative misrepresentations came in several forms:

15 A Wells Fargo marketing theme was that debit-card purchases  
16 were “immediately” or “automatically” deducted from an account.  
17 This likely led the class to believe: (1) that the funds would be  
18 deducted from their checking accounts in the order transacted, and  
19 (2) that the purchase would not be approved if they lacked  
20 sufficient available funds to cover the transaction. This language  
21 was present on Wells Fargo’s website (TX 129), on Wells Fargo’s  
22 Checking, Savings and More brochures from 2001 and 2005 (TX  
23 88, 89), and Wells Fargo’s New Account Welcome Jacket from  
24 2004 (TX 82).

21 ...

22 This order finds that these misrepresentations were placed in such  
23 a wide array of marketing documents and these documents were  
24 distributed in such a widespread manner that class members were  
25 likely to be misled by them.

26 (Findings, Dkt. No. 477 at 54–55).

27 Wells Fargo made misleading statements directly to customers, such as by telling them  
28 that “[c]heck card and ATM transactions generally reduce the balance in your account

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\* The opinion of our court of appeals did not expressly address the false advertising issue; the  
affirmance of this ruling is implicit in the affirmance of the Findings’ conclusions regarding fraudulent  
misrepresentations.

1 immediately,” that “the money comes right out of your checking account the minute you use  
2 your debit-card,” and that “[i]f you don’t have enough money in your account to cover the  
3 withdrawal, your purchase won’t be approved” (*ibid.*). In addition, the Wells Fargo online  
4 banking service displayed pending transactions to customers in chronological order, only to  
5 rearrange them in high-to-low order at the time of posting in order to maximize the number of  
6 overdraft fees (*id.* at 71–72).

7 In addition to marketing materials and its website, the 60-plus page Consumer Account  
8 Agreement (“CAA”) Wells Fargo distributed to its customers buried statements on posting order  
9 deep inside the thick document. The CAA was both difficult for consumers to understand and  
10 misleading. The CAA stated that the bank “if it chooses” might post transactions in high-to-low  
11 order, and that if it did so a high-to-low posting order “might” result in more overdraft and  
12 returned-item fees. The Findings specifically ruled that this language in the CAA, if it were ever  
13 discovered and read in the first place, affirmatively left the misleading impression with  
14 consumers that the bank had not yet implemented high-to-low posting (whereas, in fact, the  
15 posting practice was already in use). Such language also misled customers by suggesting that  
16 Wells Fargo might exercise discretion to modify the posting order on a case-by-case basis (*id.* at  
17 49–51, 70–71).

18 Our court of appeals held that the ruling that the named plaintiffs were misled was “well  
19 supported by the evidence,” that “[t]he misunderstanding that Wells Fargo’s misleading  
20 statements sowed among customers about its posting scheme was a significant cause of the  
21 magnitude of the harm experienced by Gutierrez and Walker,” and that “the district court’s  
22 finding that Wells Fargo made misleading statements is amply supported by the court’s factual  
23 findings.” The court of appeals further held that “[t]he pervasive nature of Wells Fargo’s  
24 misleading marketing materials amply demonstrates that class members, like the named  
25 plaintiffs, were exposed to the materials and likely relied on them.” *Gutierrez*, 704 F.3d at  
26 728–29.

27 The court of appeals vacated all relief prescribed by the Findings. Although the  
28 injunction was based on both unfair and fraudulent conduct and would be proper under the

1 fraudulent prong alone, it was vacated because all the injunctive relief related to posting order.

2 *Id.* at 727–28, 730.

3 Regarding restitution, our court of appeals stated:

4 Accordingly, we hold that Gutierrez’s claim for violation of the  
5 fraudulent prong of the Unfair Competition Law by making  
6 misleading misrepresentations with regard to its posting method is  
7 not preempted, and we affirm the district court’s finding to this  
8 extent. Consistent with the foregoing, the district court may  
9 provide . . . restitution against Wells Fargo.

10 . . .

11 The restitution order, which is predicated on liability for Wells  
12 Fargo’s choice of posting method and thus also preempted, is  
13 vacated as well. The district court’s finding of liability for Wells  
14 Fargo’s violations of the “fraudulent” prong of California’s Unfair  
15 Competition Law is affirmed, and we remand for the district court  
16 to determine what relief, if any, is appropriate and consistent with  
17 this opinion.

18 *Ibid.*

19 Plaintiffs now move for the injunction and restitution award to be reinstated in full under  
20 the claims that were affirmed on appeal, along with pre-judgment and post-judgment interest.

21 The proposed injunction would enjoin Wells Fargo from making false and misleading  
22 representations about its posting order. Wells Fargo opposes and concedes nothing. This order  
23 follows full briefing and oral argument on remand. For the following reasons, this order agrees  
24 that the injunction and restitution order should be reinstated and re-anchored solely in the  
25 fraudulent affirmative misrepresentation prong of Section 17200.

26 **ANALYSIS**

27 Wells Fargo raises two primary objections to plaintiffs’ motion: (1) plaintiffs waived any  
28 restitutionary relief for claims sounding in fraud; and (2) the damages study used at trial cannot  
be used to measure restitution for Wells Fargo’s misrepresentations. This order begins by  
addressing these two issues. This order will then consider the parties’ other arguments regarding  
pre/post-judgment interest and injunctive relief.

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**1. PLAINTIFFS DID NOT WAIVE RESTITUTION ANCILLARY TO AN INJUNCTION UNDER SECTIONS 17200 AND 17203.**

Wells Fargo argues that, in the runup to trial, plaintiffs’ counsel waived any claims to restitution based on classwide misrepresentation claims. Two months before trial, attorney Barry Himmelstein, on behalf of plaintiffs sent an email to Wells Fargo’s counsel regarding a revised report from plaintiffs’ damages expert, Mr. Arthur Olsen, and stated (Dkt. No. 293-11):

We agree that Mr. Olsen has not attempted to quantify the amount of damages or restitution resulting from any classwide misrepresentation-based claims, and we do not intend to seek such damages at the upcoming trial. Accordingly, it is not necessary for your motion to seek to preclude the recovery of classwide, misrepresentation-based damages based on Mr. Olsen’s failure to perform such calculations.

Wells Fargo argues that this passage waived all possible claims in the action involving deception or fraud and therefore removed the possibility of restitution for any claim involving misrepresentation. Plaintiffs respond that, understood in its proper context, the email reflected an understanding by counsel that plaintiffs would not seek damages or restitution for claims requiring individualized showings of reliance on the part of absent class members — that is, the common law claims for negligent misrepresentation and fraud. Otherwise, plaintiffs argue, both parties and the Court understood that restitution was still on the table in the event an injunction against the practice was entered. While the email was worded clumsily, this order finds that the intent of the parties and the scope of the issues to be tried were soon clarified before the trial itself, and plaintiffs view of the matter is correct, as now explained.

Under Sections 17200 and 17203, an injunction against an unfair or fraudulent business practice is usually accompanied by the ancillary equitable relief of restitution. Thus, for example, if a phony travel agent is caught taking deposits to reserve fictitious travel packages, relief normally includes an injunction to shut down the practice as well as ancillary equitable relief requiring the wrongdoer to restore the deposits to the victims. Such relief is not deemed to be “damages” for a conventional “fraud” claim — rather, it is equitable relief ancillary to the injunction suppressing the fraudulent practice. This distinction may seem odd to those unfamiliar with Section 17200 but the difference is generally known to California practitioners. To repeat, the first sentence of Section 17203 authorizes an injunction and the second sentence

1 provides that “[t]he court may make such order or judgments . . . as may be necessary to restore  
2 to any person in interest any money or property, real or personal, which may have been acquired  
3 by means of such unfair competition.”

4 Before trial, Wells Fargo appended the contested email as an exhibit to a summary  
5 judgment motion in February of 2010 (Dkt. No. 293-11). Wells Fargo contended that “plaintiffs  
6 have now conceded that they have not attempted to quantify the amount of damages or  
7 restitution resulting from any classwide misrepresentation-based claims and that they do not  
8 intend to seek such relief” (Dkt. No. 292 at 3). Wells Fargo did not specifically argue waiver of  
9 restitution. Rather, it used the email to support its (ultimately unsuccessful) contentions that (1)  
10 summary judgment had already been granted in part on the fraud claims, and (2) “if and to the  
11 extent that there may be any doubt that class claims might still exist for fraud, negligent  
12 misrepresentation, or false advertising, or under the ‘fraud’ prong of the UCL, summary  
13 judgment should be confirmed on any such claims” (*id.* at 22–23). In its opposition, plaintiffs  
14 disavowed only damages, stating “Plaintiffs have not, in Mr. Olsen’s latest report, attempted to  
15 quantify classwide damages on their misrepresentation-based claims. However, Plaintiffs may  
16 still seek injunctive relief based on these claims” (Dkt. No. 316 at 14). Plaintiffs did not concede  
17 restitutionary relief ancillary to an injunction. A subsequent order on the motion confirmed that  
18 plaintiffs’ deception-based claims were still in the case and declined to rule that Mr. Arthur  
19 Olsen’s report was inadmissible to prove restitution (Dkt. No. 338 at 19–20).

20 Next, the final pretrial order set the stage for the issues to be tried. Importantly, the order  
21 specifically stated (Dkt. No. 399 at 1):

22 The issues to be tried shall be those set forth in the joint proposed  
23 pretrial order except to the extent modified by order *in limine*.  
24 This final pretrial order supersedes the complaint, answer and any  
counterclaims, cross-claims or third-party complaints. Only the  
issues expressly identified for trial remain in the case.

25 In turn, plaintiffs’ section of the jointly-prepared pretrial order described Wells Fargo’s  
26 wrongdoing as a “carefully-orchestrated, multi-phase scheme to increase overdraft fee revenue at  
27 its customers’ expense” that included a combination of changes to the posting order of  
28 transactions, fraudulent omissions, and fraudulent misrepresentations (Dkt. No. 370 at 2–5). On

1 this basis, plaintiffs asserted class claims of unfair and fraudulent business practices under  
2 Section 17200, false advertising under Section 17500, and common law claims of fraud and  
3 negligent misrepresentation. In the section labeled “Plaintiffs’ Statement of All Relief Sought,”  
4 the joint pretrial order stated as follows:

5 *On each of the class claims*, Plaintiffs seek the difference between  
6 (1) the amount class members actually paid Wells Fargo in  
7 overdraft charges on debit card transactions, after accounting for  
8 reversals and charge-offs, and (2) the amount that class members  
would have paid Wells Fargo in overdraft charges on debit card  
transactions, had Wells Fargo not embarked on the Resequencing  
Scheme.

9 \* \* \*

10 Finally, on their UCL claims, Plaintiffs and the class seek a  
11 permanent injunction enjoining Wells Fargo from engaging in the  
unfair and fraudulent business practices alleged.

12 (*id.* at 12–13 (emphasis added)).

13 Wells Fargo’s statement on relief painted the rest of the picture.

14 Plaintiffs’ descriptions of requested relief were identified to Wells  
15 Fargo for the first time in sections of this document that were  
provided to Wells Fargo’s counsel at 6:14 p.m. on April 12, 2010,  
16 the date this submission was due. It is Wells Fargo’s position that  
plaintiffs are not entitled to any relief on their claims in this case.

17 (*id.* at 13).

18 Although the foregoing was stated by Wells Fargo, it did not raise any waiver objection  
19 at that time. Given Wells Fargo’s objection to the timing of plaintiffs’ section on relief, the  
20 Court would have at least entertained an objection to the restitution section within a reasonable  
21 time frame afterward and allowed further briefing on the issue. Wells Fargo did not so object.  
22 Thus, in the runup to trial, the *operative* statement of the claims and relief *expressly* sought  
23 restitution for the Section 17200 fraud and false advertising claims.

24 This same understanding is reflected in the brief Wells Fargo filed just one week before  
25 the trial began. In the section of its trial brief on “issues relating to the relief sought,” Wells  
26 Fargo stated that “[t]he only monetary relief available to the class is restitution, as the only  
27 remaining class damages claim is brought under the UCL, which permits only equitable  
28 remedies” (Dkt. No. 373 at 9). In an accompanying footnote, Wells Fargo referenced the



1 contested email and explained that “Plaintiffs have admitted that they lack evidence on *damages*  
2 for the class for any *legal* claim and that *no such claim* will be presented at trial” (*id.* at 9 n.3  
3 (emphasis added)). In this footnote, Wells Fargo circumscribed its understanding of plaintiffs’  
4 waiver to class damages for legal — as opposed to equitable — claims.

5 In pre-trial proposed findings of fact filed the next day, plaintiffs contended that “[a]s a  
6 result of Wells Fargo’s unfair and deceptive reordering practices, its failure to disclose such  
7 practices (whether or not intentional), and its misrepresentation related to such practices,” the  
8 class overpaid more than \$200 million in overdraft fees (Dkt. No. 375 at 8). Wells Fargo did not  
9 then retort that all restitution for deception-based claims had been waived.

10 The parties’ pre-trial and post-trial proposed findings equally reflected plaintiffs’  
11 interpretation of the contested email. Plaintiffs’ pre-trial proposed findings lumped restitution  
12 for both the unfair and fraudulent prong of the UCL into one section, and then addressed  
13 damages for the common law claims separately (*id.* at 22–25). Plaintiffs’ post-trial proposed  
14 findings took a simpler route and lumped damages and restitution into a single section (Dkt. No.  
15 453 at 34–35). Wells Fargo’s objection in its reply submission is now telling (Dkt. No. 454 at 67  
16 (emphasis added)):

17 There can be no class damages in this case, for multiple reasons.  
18 Indeed, plaintiffs conceded before trial that no award of class  
19 damages (*in contrast to restitution*) would or could be sought.  
20 Dkt. No. 316 at 14 (“Wells Fargo is correct that Plaintiffs have not  
21 ... attempted to quantify classwide damages on their  
22 misrepresentation-based claims.”); Dkt. No. 293 at 11 (plaintiffs  
23 “do not intend to seek such damages at the upcoming trial”). Nor  
24 could class damages be awarded, given the absence of class-wide  
25 proof of actual injury from any alleged misrepresentation.

22 Here, Wells Fargo itself cited the contested email for the proposition that plaintiffs waived  
23 claims to damages for their legal claims.

24 Consistent with plaintiffs’ interpretation of the contested email, the Court’s post-trial  
25 Findings likewise reflected an understanding that plaintiffs pursued only injunctive relief for  
26 their common law claims of negligent misrepresentation and fraud. The Findings addressed the  
27 classwide claims under the “fraudulent” prong of Section 17200 in a detailed subsection of the  
28

1 order (Findings 69–73). In a different subsection, the Findings addressed the “remaining  
2 deception claims” (*id.* at 73). That subsection stated (emphasis added):

3 Plaintiffs seek *only injunctive relief for their claims of negligent*  
4 *misrepresentation and fraud*. Given that such relief will be  
5 ordered under plaintiffs’ Section 17200 claims, it is unnecessary  
6 for this order to reach these claims. As for plaintiffs’ false  
7 advertising claim, since liability under the “fraudulent” restriction  
8 of Section 17200 has been established, liability for plaintiffs’ false  
9 advertising claim under Section 17500 — which is based upon the  
10 same deceptive conduct — has also been proven.

11 It was the understanding of the Court that full relief for the deception claims under  
12 Section 17200, relief under Section 17500, and relief under the common law were all separate,  
13 live issues at trial. The above-cited paragraph began by explaining that plaintiffs sought only  
14 injunctive relief on their common law claims. The issue of a waiver was restricted to that  
15 context — there was no reference to seeking “only” injunctive relief with respect to other claims.  
16 The Findings concluded that injunctive relief for the common law claims was not necessary  
17 because injunctive relief would be ordered under the Section 17200 claims — which included  
18 claims for both unfair practices and fraudulent practices. The paragraph then distinguished relief  
19 for these claims from the Section 17500 false advertising claim and found that the latter was  
20 proven by the same conduct. Thus, although each claim was a separate, live issue, it was not  
21 necessary to rule on them individually. Nowhere did the Court state that relief for all deception-  
22 based claims would be limited to an injunction without the possibility of the ancillary relief of  
23 restitution that usually accompanies an injunction pursuant to Sections 17200–03.

24 Wells Fargo argues that other findings demonstrate that the Court believed that relief for  
25 all deception claims would be limited to an injunction. In this regard, Wells Fargo compares the  
26 first line of the “Injunctive Relief” section of the Findings with the first line of the “Restitution”  
27 section (Findings 84–85). The former stated that plaintiffs sought an injunction enjoining Wells  
28 Fargo from engaging in “the *unfair and fraudulent* business practice found herein,” whereas the  
latter awarded restitution for Wells Fargo’s “*unfair practice as found herein*” (*ibid.* (emphasis  
added)). Wells Fargo’s conclusion from these two phrases (that restitution could only result  
from “unfair” practices) is incorrect. The Court was merely summarizing and avoiding  
unnecessary repetition.

1 Nor did Wells Fargo assert that restitution for liability based on fraud was waived during  
2 ensuing post-trial briefing. The Findings directed the parties to file a joint proposal on a variety  
3 of post-trial issues (Findings 90). There, both the parties and the Court treated the question of  
4 relief under the common law claims of fraud and misrepresentation as separate and distinct from  
5 restitutionary relief under Section 17200. Plaintiffs asserted that in the Findings “the Court  
6 declined to rule on Plaintiffs’ entitlement to damages under their common law fraud claims,  
7 noting, appropriately, that the restitution due under the statutory claim, Section 17200, directly  
8 corresponded to the amount of damages claimed under the common law theories” (Dkt. No. 490  
9 at 11). Wells Fargo did not object to this phrasing on the grounds that restitution was limited to  
10 the “unfair” prong of 17200 and had been waived under the “fraudulent” prong.

11 A subsequent post-trial order cited the email that now undergirds Wells Fargo’s waiver  
12 argument and denied punitive damages. The rationale was that plaintiffs’ “pre-trial concessions”  
13 led to an award of restitution under Section 17203 and “no award of compensatory or nominal  
14 damages” under plaintiffs’ common law claims of negligent misrepresentation and fraud (Dkt.  
15 No. 497 at 4). Once again, this history demonstrates that both the parties and the Court  
16 understood the waiver issue presented by the email to be limited to the common law claims.

17 Other than the contested email, Wells Fargo does not present any evidence of waiver.  
18 Wells Fargo now contends in the instant motion that:

19 In taking this course, plaintiffs prevented Wells Fargo from  
20 presenting its arguments on summary judgment as to why Olsen’s  
21 analysis was insufficient as a matter of law to support a restitution  
22 award on a misrepresentation theory. They also led Wells Fargo to  
23 tailor its trial presentation on the misrepresentation claim to focus  
solely on injunction issues, leaving Wells Fargo no reason either to  
dispute the applicability of Olsen’s analysis in the  
misrepresentation context or to offer evidence rebutting class  
members’ entitlement to restitution under this theory.

24 Wells Fargo, however, disputed the Olsen analysis at trial and had every opportunity to expose  
25 any flaws in the work done by Olsen. This contention by Wells Fargo is rejected.

26 In sum, by the time the case was tried, it was understood by the Court and should  
27 reasonably have been understood by all counsel that in the event an injunction was ultimately  
28 entered, restitution was a possible form of relief under Section 17203.

1           **2. THE RESTITUTION AWARD IS REINSTATED AS ANCILLARY TO AN INJUNCTION**  
2           **UNDER THE “FRAUDULENT” PRONG OF SECTIONS 17200–03.**

3           Our court of appeals affirmed the ruling in the Findings that Wells Fargo violated the  
4           unfair competition law by making misleading statements likely to deceive its customers.  
5           *Gutierrez*, 704 F.3d at 730. The court of appeals also implicitly upheld the ruling that Wells  
6           Fargo violated California’s false advertising law. Noting that “[r]estitution is available for past  
7           misleading representations,” our court of appeals remanded for a determination of whether and  
8           to what extent restitution should be awarded. *Id.* at 728, 730. This order finds that the full  
9           award should be reinstated.

10           Section 17203 provides that “[t]he court may make such orders or judgments . . . as may  
11           be necessary to restore to any person in interest any money or property, real or personal, which  
12           may have been acquired by means of such unfair competition.” “This language, providing  
13           restitution of funds which ‘may have been acquired,’ has been interpreted to allow recovery  
14           without proof that the funds were lost as a result of actual reliance on defendant’s deceptive  
15           conduct.” *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009) (citing *In re Tobacco II*  
16           *Cases*, 46 Cal. 4th 298, 320 (2009)). The policy behind this rule seems clear cut — once a  
17           wrongdoer is proven to have engaged in a fraudulent business practice whose whole point was to  
18           cheat consumers out of money, restitution may be used to restore the money to the victims of the  
19           practice. It is sufficient that plaintiffs proved that class members were likely deceived by Wells  
20           Fargo’s misleading statements, which finding has been affirmed on appeal. *Gutierrez*, 704 F.3d  
21           at 730. Nevertheless, there must be evidentiary support for the amount of recovery. *Colgan v.*  
22           *Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 697 (2006).

23           Wells Fargo now attempts to slice its “resequencing scheme” into separate practices and  
24           thereby reduce its liability for restitution. For example, Wells Fargo states (Dkt. No. 581 at 12  
25           (emphasis in original)):

26                     Plaintiffs presented Olsen’s analysis, and the Court accepted it, as  
27                     a measurement of amounts Wells Fargo received through its  
28                     practice of posting debit-card transactions in high-to-low order —  
                      a practice that has now been held lawful. Olsen did not pretend to  
                      have performed any measurement of amounts Wells Fargo  
                      unlawfully obtained by misrepresenting its posting order. Any  
                      such measurement requires answers to a different set of questions

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that would have been extremely difficult, if not impossible, to answer on a class-wide basis.

This argument is rejected. Plaintiffs’ allegation that Wells Fargo engaged in an integrated, multi-phase “Resequencing Scheme” was proven at trial. This scheme was not limited to changes to Wells Fargo’s posting method. Plaintiffs proved at trial — and our court of appeals affirmed — that Wells Fargo misled the class via affirmative misdirection that caused the class members to believe that their debits would be posted chronologically. Indeed, our court of appeals stated that for the named plaintiffs, “[t]he misunderstanding that Wells Fargo’s misleading statements sowed among customers about its posting scheme was a significant cause of the magnitude of the harm experienced by [class plaintiffs] Gutierrez and Walker.” *Gutierrez*, 704 F.3d at 728 n.9.

Even though liability may not now be predicated on the posting method itself, the result is the same. The harm from Wells Fargo’s affirmative misrepresentations came in the form of unexpected overdraft fees — the same harm wreaked by the unfair practice of manipulating the posting method. Restitution for this harm is likewise the same.

As plaintiffs point out, Wells Fargo attempted at trial to dissect the scheme into parts and thereby reduce liability for its wrongdoing. For example, Wells Fargo argued through its trial expert Dr. Alan Cox that the restitution calculations in Mr. Arthur Olsen’s report should be reduced based on assumptions about how much various categories of individuals were “on notice” of Wells Fargo’s practices (*see, e.g.*, Dkt. No. 441 at 1749–52, 1756–57, 1832–35). These efforts by Wells Fargo to reduce liability were rejected in the Findings. The Findings held that the appropriate measure of damages from the *resequencing scheme* was to restore the class members to a position consistent with their reasonable expectations induced by the affirmative misrepresentations (Findings 86). This was done by calculating overdraft fees using a methodology approximating chronological order. Wells Fargo’s affirmative misrepresentations are intertwined with the other elements of the scheme and cannot be meaningfully separated into discrete causes of harm.

In this regard, the facts herein are analogous to *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508 (2002). The plaintiffs in *Fremont Life* challenged, *inter*

1 *alia*, an annuity policy that included unusual premium charges. The trial court found that the  
2 annuity policy as a whole was misleading and ordered restitution by restoring any premium  
3 charges paid plus interest. Although the premium charge itself was lawful, the misleading  
4 annuity policy was not, and the restitution order properly returned the unexpected premium  
5 charges. *Id.* at 530–33.

6 In this action, it is likewise unnecessary to predicate liability on the posting order and  
7 resulting overdraft charges. Because Wells Fargo misrepresented the posting order and overdraft  
8 charges to its customers, the appropriate form of restitution is to restore the unexpected charges  
9 to Wells Fargo’s customers. This is exactly the calculation performed by plaintiffs’ damages  
10 expert report.

11 This order is not penalizing Wells Fargo for a practice protected by federal preemption.  
12 Instead, it is penalizing Wells Fargo for affirmatively misleading the class as to what the practice  
13 was, namely engaging in a practice likely to mislead the class to believe that processing would  
14 be done in chronological order when, in fact, processing was done in high-to-low, non-  
15 chronological order.

16 **3. PRE/POST-JUDGMENT INTEREST.**

17 A prior order denied pre-judgment interest on the ground that calculation of damages in  
18 this action “was only possible through trial and judgment. Under such circumstances, an award  
19 of prejudgment interest under [California Civil Code] Section 3287(a) is not appropriate” (Dkt.  
20 No. 497 at 2). For the same reason, the prior order denied pre-judgment interest under Section  
21 3288 (*id.* at 3). Plaintiffs argue that the equities have shifted in favor of pre-judgment interest  
22 post-appeal, but this is irrelevant to the question of when damages became calculable. Plaintiffs’  
23 argument also does not account for the fact that Wells Fargo’s appeal was partially successful.  
24 Plaintiffs’ request for pre-judgment interest is **DENIED**.

25 “The purpose of post-judgment interest is to compensate the successful plaintiff for being  
26 deprived of compensation for the loss from the time between the ascertainment of the damage  
27 and the payment by the defendant.” *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S.  
28 827, 835–36 (1990) (alteration omitted). Our court of appeals “may reverse and remand a

1 judgment without concluding that it is erroneous or unsupported by the evidence. When the  
2 legal and evidentiary basis of an award is thus preserved, post-judgment interest is ordinarily  
3 computed from the date of [the judgment’s] initial entry.” *Planned Parenthood of the*  
4 *Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 518 F.3d 1013, 1017–18 (9th Cir. 2008)  
5 (quotation and citations omitted) (alterations in original). “*Planned Parenthood* thus makes it  
6 clear that interest ordinarily should be computed from the date of the original judgment’s initial  
7 entry when the evidentiary and legal bases for an award were sound.” *Exxon Valdez v. Exxon*  
8 *Mobil*, 568 F.3d 1077, 1080 (9th Cir. 2009).

9 The evidentiary basis (Mr. Olsen’s report) and the legal basis (fraud) for the reinstated  
10 restitution award have not changed since the Findings. Plaintiffs’ request for post-judgment  
11 interest is accordingly **GRANTED**. Post-judgment interest should be computed based on the date  
12 of the original entry of judgment: October 25, 2010 (Dkt. No. 498).

13 **4. INJUNCTIVE RELIEF.**

14 Plaintiffs request that the Court “enter an injunction precisely as prescribed” by our court  
15 of appeals. In this regard, our court of appeals supplied the following guidance:

16 [T]he district court may provide injunctive relief . . . against Wells  
17 Fargo. Although the court cannot issue an injunction requiring the  
18 bank to use a particular system of posting or requiring the bank to  
19 make specific disclosures, it can enjoin the bank from making  
20 fraudulent or misleading representations about its system of  
21 posting in the future.

22 *Gutierrez*, 704 F.3d at 727–28. Nowhere in their moving papers do plaintiffs suggest any  
23 particular language for an injunction.

24 Wells Fargo objects to an injunction for two primary reasons. *First*, the injunction must  
25 be specific enough to put Wells Fargo on notice of what conduct is proscribed and minimally  
26 burden speech. This merits consideration, but Wells Fargo should not escape an injunction  
27 because its misconduct was multifarious. *Second*, Wells Fargo has voluntarily ceased posting  
28 debit-card transactions in high-to-low order and allegedly has no current intention of  
resuming the practice (Opp. 24). Absent an injunction, however, Wells Fargo would be able to  
return to its prior practice of misleading customers if it chose to implement modifications to its  
posting order.

1 The following classwide injunctive relief is hereby ordered: Wells Fargo is permanently  
2 **ENJOINED** from making or disseminating, or permitting to be made or disseminated, any false or  
3 misleading representations relating to the posting order of debit-card purchases, checks, and  
4 ACH transactions in its customer bank accounts. The effective date of this injunction shall be  
5 **JULY 15, 2013.**


6 **CONCLUSION**

7 For the foregoing reasons, plaintiffs' motion is **GRANTED IN PART AND DENIED IN PART.**  
8 Counsel shall meet and confer and recommend an updated, detailed plan of distribution and  
9 notice. Class counsel may also renew their motion for attorney's fees. Any such motion should  
10 account for the post-trial orders of this Court as well as the rulings of our court of appeals.  
11 Please recommend a form of judgment, reserving all substantive rights, that will capture the  
12 central points of this order and poise the action for any appeal.

13 The Court will retain jurisdiction to enforce this order.

14  
15 **IT IS SO ORDERED.**

16  
17 Dated: May 14, 2013.

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20 WILLIAM ALSUP  
21 UNITED STATES DISTRICT JUDGE  
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