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

DONNA MCMILLAN, TERRY
DAGENHART and KRISTY
DAGENHART as husband and wife,
WILLIAM KETTERHAGEN, DOLORES
GUTIERREZ, MARC MARTINEZ,
Individually and on Behalf of all others
similarly situated,

No. C 08-05739 WHA

**ORDER RE DEFENDANT’S
MOTION TO DISMISS FOR
IMPROPER VENUE**

Plaintiffs,

v.

WELLS FARGO BANK, N.A.

Defendant.

_____ /

INTRODUCTION

In this putative class action, defendant Wells Fargo Bank, N.A. moves to dismiss for improper venue or in the alternative for failure to state a claim. For the reasons stated below, defendant’s motion to dismiss for improper venue is **GRANTED**.

STATEMENT

Plaintiffs filed an amended complaint on February 11, 2009, alleging claims based on California statutory law including violations of the Consumer Legal Remedies Act, Unfair Business Practices Act, and False Advertising Law. Claims are also asserted for breach of contract, unjust enrichment, and conversion. The six plaintiffs are Wells Fargo customers who live in different parts of the United States — but none in California: (1) Donna McMillan resides in St. Louis Park, Minnesota; (2) Terry and Kristy Dagenhart, husband and wife, reside

1 in Austin, Texas; (3) Marc Martinez resides in Albuquerque, New Mexico; (4) William
2 Ketterhagen resides in Gunnison, Colorado; and (5) Dolores Gutierrez resides in Salem,
3 Oregon. The state where each plaintiff lives is also the state where each plaintiff opened their
4 respective accounts. As stated, none of the six plaintiffs are residents of California or opened
5 their accounts in California. Plaintiffs seek to assert claims on behalf of a class of consumers
6 but would exclude customers in certain other pending class actions against Wells Fargo.

7 Headquartered in San Francisco, California, Wells Fargo is one of the nation’s largest
8 banks and financial institutions and it serves millions of customers nationwide. In conjunction
9 with its banking services, Wells Fargo issues debit cards to its checking-account customers.
10 Such a card allows a customer electronic access to his or her checking account and to debit
11 funds directly from his or her account for purchases, cash withdrawals, and other electronic
12 debit transactions.

13 When an account is opened with Wells Fargo, the bank provides the customer with a
14 standardized consumer account agreement. That agreement contains the following language
15 (Chavez Exh. A at 33–34) (emphasis in original):

16 **Laws Governing Your Account.** Your Account is governed by
17 the laws and regulations of the United States and, to the extent
18 applicable, the laws of the state in which the office of the Bank
19 that maintains your Account is located (unless the Bank has
20 notified you in writing that the laws of another state shall govern
21 your Account), without regard to conflicts of laws principles, or
22 clearing house rules and the like. If you were not physically
present at an office of the Bank when you opened your Account
(for example if you opened your Account by phone, through the
mail, or over the Internet), your Account will be governed by the
laws of the state in which the main office of the Bank is located
unless the Bank notifies you that your Account has been assigned
to a particular office of the Bank. . . .

23 **The Bank and you agree that any lawsuits, claims, or other**
24 **proceedings arising from or relating to your Account or this**
25 **Agreement, including without limitation, the enforcement of**
26 **the Arbitration Agreement in this Agreement and the entry of**
27 **judgment on any arbitration award, shall be venued**
28 **exclusively in the state or federal courts in the state whose**
laws govern your Account (unless the Bank has notified you
that your Account will be assigned to a particular office, in
which case, it shall be venued exclusively in the state or
federal courts located in the state in which that office is
located), without regard to conflict of laws principles.

1 At pages 8 and 9 is the following language in a class action waiver and arbitration provision
2 (emphasis in original):

3 **Non-Judicial Resolution of Disputes.** If you have a dispute with
4 the Bank and you are not able to resolve the dispute informally,
5 you and the Bank agree that any dispute between or among you
6 and the Bank, regardless of when it arose shall be resolved by the
7 following arbitration process. **You understand and agree that
8 you and the Bank are each waiving the right to a jury trial or
9 a trial before a judge in a public court.**

10 **Disputes.** A dispute is any unresolved disagreement between or
11 among you and the Bank (and its employees, officers, directors,
12 attorneys, and other agents), arising out of or relating in any way
13 to your Account and/or Services. It includes any dispute relating
14 in any way to your Accounts and Services; to your use of any
15 Bank location or facility; or to any means you may use to access
16 the Bank, such as an automated teller machine (ATM) or Online
17 banking.

18 This provision not only requires a waiver of class actions but it also requires arbitration of
19 disputes. It is Wells Fargo’s policy and practice to provide all customers with a copy of the
20 consumer account agreement at the time they open their account or are added to an existing
21 account (Chavez Decl. at ¶ 7). All six plaintiffs allege that they did not have an opportunity to
22 review and negotiate the terms of the agreement before they opened their respective accounts
23 (Compl. at ¶¶ 34, 42, 43, 57, 67, 76).

24 Wells Fargo also has a website that provides customers with online banking services.

25 Although not referenced in the complaint, the website, it turns out, has a General Terms of Use
26 page with the following language (Brown Exh. D at 1–2):

27 This Site and any of the services provided by Wells Fargo in
28 connection with this Site (the “Services”) are being provided to
you expressly subject to these Terms of Use. Please read these
Terms of Use carefully. By accessing this Site you agree to be
bound by these Terms of Use.

“Services” under these Terms of Use include financial services
for consumers and businesses and business services offered to you
directly by Wells Fargo, and additional services available to you
from independent third party service providers accessed through
navigation from the Site.

* * *

These Terms of Use constitute a contract between you and Wells
Fargo governed by the laws of the State of California, with the
exception of its conflicts of laws provision.

1 In other words, the customer account agreement invokes non-California law but the website
2 agreement invokes California law. Several plaintiffs use Wells Fargo’s website for online
3 banking services, for example, to make online payments.

4 This action challenges two bank practices. The first is the bank’s practice of reordering
5 the transactions posted each day so that overdraft fees can be charged for multiple transactions
6 even though there were sufficient funds in the account to cover many of the transactions at the
7 time they were made (“re-sequencing scheme”). The second is the bank’s failure to notify
8 customers when an electronic debit transaction they are about to enter may cause them to incur
9 an overdraft fee thereby giving the customer the opportunity to avoid the fee (“undisclosed
10 overdraft scheme”).

11 ANALYSIS

12 Wells Fargo moves to dismiss for improper venue under Rule 12(b)(3) or in the
13 alternative to dismiss under Rule (12)(b)(6). “A motion to enforce a forum selection clause is
14 treated as a motion to dismiss pursuant to Rule 12(b)(3); pleadings need not be accepted as true,
15 and facts outside the pleadings may be considered.” *Doe I v. AOL LLC*, 552 F.3d 1077, 1081
16 (9th Cir. 2009). Because the motion for improper venue is dispositive, this order does not
17 address the bases for Wells Fargo’s motion in the alternative.

18 As a threshold matter, the parties dispute what contract governs forum selection and
19 choice of law. Wells Fargo contends that the forum-selection clause and choice of law clause in
20 the consumer account agreement bars suit in California and application of California law;
21 whereas, for the first time now that they are faced with a motion to dismiss, plaintiffs maintain
22 that the general terms of use on Wells Fargo’s website govern substantial parts of this action
23 and that the terms of use designate California law to apply to services offered in connection
24 with the website.

25 The forum-selection clause of the consumer account agreement says lawsuits relating to
26 the accounts shall be venued in the state or federal court in the state whose laws govern the
27 account and the choice of law clause states that such governing law is the law of the state where
28 the bank that maintains the account is located (Chavez Exh. A at 33–34). According to Wells

1 Fargo, the relevant state happens to be where each plaintiff resides. So, this means that plaintiff
2 McMillan, who opened her account in Minnesota, can only bring a suit relating to her account
3 in Minnesota; plaintiff Martinez, who has an account maintained in New Mexico, can only
4 bring suit in New Mexico; and so forth, at least this is so when the contract provision is timely
5 raised. As none of plaintiffs has an account maintained in California, under the consumer
6 account agreement alone, they can not properly bring suit in California. In contrast, the website
7 terms of use provide that the terms are governed by California law. The terms of use, however,
8 do not contain a forum-selection clause.

9 A review of the allegations in the complaint shows that the complaint is wholly
10 concerned with the consumer account agreement including its various provisions and
11 definitions. The complaint specifically refers to the consumer account agreement at least
12 nineteen times. In sharp contrast, the complaint neither references Wells Fargo’s terms of use
13 nor states Wells Fargo’s website is the basis for venue or the application of California law in
14 this action. Given that the focus of the complaint is the consumer account agreement, and the
15 agreement, in turn, specifically provides a forum-selection clause and choice of law clause, this
16 order must focus on the consumer account agreement and grant the motion to dismiss for
17 improper venue.

18 Plaintiffs next argue that the forum-selection clause in the consumer account agreement
19 is unenforceable. “A forum selection clause is presumptively valid; the party seeking to avoid a
20 forum selection clause bears a heavy burden to establish a ground upon which we will conclude
21 the clause is unenforceable. . . . [A] forum selection clause is unenforceable if enforcement
22 would contravene a strong public policy of the forum in which suit is brought.” *Doe I*, 552 F.3d
23 at 1083 (internal citation and quotation omitted).

24 The forum-selection clause in the consumer account agreement does not call out a
25 specific state but rather designates the venue as the state or federal court in the state whose laws
26 “govern” the account. Based on this language, plaintiffs argue that this Court must first
27 determine which state law governs the claims. Plaintiffs further argue that, under California
28 choice of law, California would choose to apply its own law in order to protect consumers from

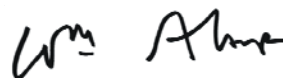
1 the class action waiver and arbitration provision in the consumer account agreement.
2 Conceding for the purpose of argument that California law is more pro-consumer than the laws
3 in Texas, Colorado, and Minnesota and that those states would in fact uphold a class action
4 waiver and arbitration provision, the fact remains that those states have a greater interest in the
5 treatment of their own residents than does California. For example, Minnesota may have an
6 interest in being a pro-business haven receptive to large companies by minimizing consumer
7 rights. This might arguably attract large companies to come into the state to serve its residents,
8 albeit on onerous terms. While this may be hard to swallow in California as to California
9 residents, the consumers in question are *not* in California. The proper law choice still must be
10 the local law where those customers reside, not California law.

11 Furthermore, while there is a California public policy against consumer class action
12 waivers that applies to *California residents* bringing class action claims under California
13 consumer law, plaintiffs are not California residents. *See Doe 1*, 552 F.3d at 1083. No decision
14 has been cited where out-of-state residents in places, such as Texas, Colorado, or Minnesota,
15 were allowed to escape anti-consumer policies in those jurisdictions by bringing a class action
16 in California to defeat application of a forum-selection clause, a class action waiver and
17 arbitration provision.

18 Accordingly, Wells Fargo's motion to dismiss for improper venue under Rule 12(b)(3)
19 is **GRANTED**. The action is **DISMISSED WITH LEAVE TO AMEND**. Plaintiffs are hereby granted
20 an opportunity to amend their complaint and assert the alternate theory that the website terms of
21 use govern this action, a possibility that surfaced only in the briefing and was omitted from the
22 complaint. This order does not intimate positively or negatively on that issue. Within fourteen
23 calendar days, plaintiffs may file a motion on a normal 35-day track seeking leave to amend and
24 appending to the motion a proposed amended complaint. The motion should explain why the
25 foregoing deficiencies would be cured and should plead plaintiffs' best case.

26 **IT IS SO ORDERED.**

27 Dated: April 17, 2009



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE