**Nos. 10-16959, 10-17468 & 10-17689**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

VERONICA GUTIERREZ, *ET AL.*,

*Plaintiffs-Appellees-Cross-Appellants*,

v.

WELLS FARGO BANK, N.A.,

*Defendant-Appellant-Cross-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

# BRIEF AND CROSS-APPEAL OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS VERONICA GUTIERREZ, *ET AL.*

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### RULES

# INTRODUCTION

This is an appeal from a judgment entered on behalf of a certified class of California customers of Appellant Wells Fargo Bank, N.A. ("Wells Fargo") after a bench trial.

The evidence at trial established that Wells Fargo employed a "bookkeeping device" of re-sequencing debit card transactions from their naturally occurring chronological order to a "high-to-low" order, for the purposes of "profiteering and gouging" customers through the assessment of additional overdraft fees on more transactions. The District Court held that Wells Fargo's accounting methods constituted unfair and deceptive trade practices under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"). Plaintiffs showed at trial that the certified class of California consumers paid Wells Fargo $203 million in overdraft fees attributable to the additional overdraft occurrences Wells Fargo generated by its "high-to-low" ordering. The District Court accordingly entered a judgment for restitution to the class in that amount and enjoined further use of the unfair bookkeeping practice.

The District Court found that Wells Fargo failed to put forward sufficient credible evidence in support of its defenses or justifications for its "high-to-low" reordering of debit card transactions. Indeed, upon review of the evidence, the court determined that Wells Fargo's "post-hoc rationalizations" of its "high-to-low" ordering were "invented for trial." This includes Wells Fargo's asserted preemption defense, for which the District Court found there was an "utter failure of proof." The District Court correctly found that federal regulatory law expressly provides that national banks are subject to state laws prohibiting unfair or deceptive practices if their application does not significantly interfere with banking functions. Because the trial record was "devoid of any credible evidence" that the state-law claims in this case would impose more than an incidental effect on Wells Fargo's deposit-taking activities, there was no basis for the preemption defense.

The trial record below amply supports the entry of judgment on behalf of the certified class and against Wells Fargo. The trial evidence overwhelmingly demonstrated that Wells Fargo's "bookkeeping device"—which could turn one overdraft into as many as ten overdrafts—was hidden from customers through a "facade of phony disclosure." Therefore, the District Court properly found that such practices violated California's UCL.

At trial, Plaintiffs proved the specific amount of restitution to which each and every one of the over one million account holders in the certified class was entitled. An analysis of the entire transactional data for the class period supported the restitution award. This analysis reliably compared, on an account-by-account basis, the overdraft fees actually charged with the lesser amount of fees that would have been charged had the debit card transactions been posted chronologically.

Although the District Court's restitution award is fully supported, it could have awarded restitution under the *status quo ante* principle applicable to claims brought under the UCL. Such an award would be based upon a comparison to the practices Wells Fargo engaged in prior to adopting the offending practice of "high-to-low" reordering of debit card transactions, *i.e.*, the reverse, "low-to-high" ordering. Plaintiffs submitted sufficient proof to establish the certified class's entitlement to this greater restitution award.

The District Court did err in declining to award the certified class pre-judgment interest on the restitution award. The interest owed is certain because the amount of each overdraft charge is known and interest can be calculated by a simple calculation made from the date of the actual offending overdraft charges identified by the expert damage analysis. Accordingly, this Court should remand this case with instructions that that the pre-judgment interest be calculated on the restitution award.

The judgment should be affirmed, with instructions that the District Court calculate the amount of pre-judgment interest due on the restitution award.

## JURISDICTIONAL STATEMENT

The District Court exercised jurisdiction under 28 U.S.C. § 1332(d)(2). On October 28, 2010, Wells Fargo filed a notice of appeal from the District Court's final judgment of October 25, 2010. (Wells Fargo's Excerpts of Records ("ER")

207.) On November 24, 2010, Plaintiffs filed a timely notice of cross-appeal (Plaintiffs' Supp. Excerpts of Record ("PER") 27) from the final judgment (ER 214) and the District Court's October 25, 2010 Order, *inter alia*, denying pre-judgment interest. (PER 1.) This Court has jurisdiction under 28 U.S.C. § 1291.

## ISSUES PRESENTED

1. Whether, in light of the record adduced at trial, the District Court clearly erred in holding that federal law does not preempt Plaintiffs' claims.

2. Whether the District Court clearly erred in holding that Wells Fargo violated the UCL.

3. Whether the District Court's restitution award constitutes clear error.

4. Whether Plaintiffs and the class are entitled to pre-judgment interest.

5. Whether the District Court erred in denying further proceedings on punitive damages.

## STATEMENT OF THE CASE

On September 11, 2008, the District Court certified a class of:

> all Wells Fargo customers from November 15, 2004 to June 30, 2008, who incurred overdraft fees on debit card transactions as a result of the bank's practice of sequencing transactions from highest to lowest.

(PER 24.)

In the same pretrial Order, the District Court rejected—for the first of three times—Wells Fargo's argument that Plaintiffs' claims are preempted by the

National Bank Act ("Bank Act" or "NBA"). (PER 13-20.) Scrutinizing the factual allegations of how Wells Fargo manipulated "Gutierrez's own" transactions, the court found that "[t]he record sheds no light on the state laws in question and whether such laws only incidentally affect federal-banking law." (PER 16, 18.) The court also parsed Wells Fargo's deposit account agreement, and found that the agreement itself provided that the bank's sequencing of debit transactions remains subject to state law. (PER 18.)

On May 5, 2009, the District Court issued a series of Orders addressing Wells Fargo's summary judgment motions. (ER 136, 147, 163.) The court rejected the bank's contention that California Commercial Code section 4303(b) authorized the re-sequencing of debit transactions. The court explained that this provision incorporates a Legislative Comment stating that banks must exercise their check-posting discretion "in good faith." (ER 152–56.)

In March 2010, Wells Fargo sought reconsideration of the District Court's September 2008 preemption ruling, arguing that this Court's decision in *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549 (9th Cir. 2010), compelled a different result. By Order dated March 26, 2010, the District Court denied the motion for reconsideration. (PER 7.)

The District Court presided over a two-week bench trial beginning on April 26, 2010. Wells Fargo requested and was given an opportunity to offer evidence at trial to support its preemption defense. (PER 438-40) The court heard closing arguments on July 9, 2010.

On August 10, 2010, the District Court issued its Findings of Fact and Conclusions of Law After Bench Trial. (ER 1–90.) The District Court issued extensive factual findings and held that Wells Fargo's re-sequencing and related misconduct violated both the "unfair" and "fraudulent" prongs of the UCL. (ER 60–73.) The court rejected Wells Fargo's preemption defense, in part because the defense lacked any record support. (ER 43–47, 73–79.) The court ordered Wells Fargo to pay restitution to the class of approximately $203 million. (ER 85–89.) This amount corresponded to a restitution analysis presented by Plaintiffs' expert which, using available transactional data from Wells Fargo, compared the overdraft fees Wells Fargo actually assessed to the fees it would have assessed under a chronological posting order. (ER 86–89.)

The court also enjoined Wells Fargo from re-sequencing its California customers' debit card transactions in high-to-low order. (ER 84–85.) The court took care not to dictate how Wells Fargo *should* post the transactions, but permitted the bank to select its own method from the other methods available for posting debit card transactions—chronological, low to high, or some combination of the two. Nor did the court dictate how various transaction types must be posted relative to each other. (ER 85.)

In compliance with the District Court's Order, Wells Fargo implemented a posting order in California whereby debit card transactions are not posted high to low. Under its new protocol, the bank posts debit card transactions chronologically, ahead of checks and ACH transactions. PER 48, 51.)

## STATEMENT OF FACTS

### A. Wells Fargo Manipulated Class Members' Transactions to Increase Overdraft Occurrences.

This case concerns Wells Fargo's intentional and hidden manipulation of California customers' debit card transactions. Throughout the class period, Wells Fargo exercised its contractual discretion regarding the daily "posting" of debit card transactions by re-sequencing the transactions in the order of highest-to-lowest in dollar amount to drain customers' accounts as quickly as possible, to artificially increase the number of overdraft occurrences.

Overdraft fees represented the second largest source of revenue for Wells Fargo's consumer business, behind only "spread" income—money generated using deposited funds. (ER 1, 35; Reporter's Transcript ("RT") 623–24.)[1] During the class period of fewer than four years, Wells Fargo assessed *over $1.7 billion* in

[1] All cited excerpts from the bench trial transcript (cited as "RT") are included in Volumes 2 and 3 of Plaintiffs' Supplemental Excerpts of Record at PER 65-436.

overdraft fees on *California customers alone*.[2] (ER 35.) A significant portion of that revenue derived from high-to-low re-sequencing.

### 1. **Authorization, Settlement, and Posting of Debits.**

During the class period, with the initiation of each debit card transaction, Wells Fargo applied an automated process to approve or decline it. (ER 29–30, RT 1012–15, 1082–84, 1104–06.) Where insufficient funds were available, Wells Fargo exercised discretion to approve the transaction via an undisclosed "Shadow Line" of credit that it set for each customer. (ER 6; RT 191:9–22, 1104–06.) Not only was the Shadow Line not disclosed, but Wells Fargo did not inform customers that it had approved a transaction via the Shadow Line. (ER 6, 30–31.) Upon authorization of a debit card transaction, Wells Fargo committed to pay the merchant for the transaction, *i.e.*, it became a "must pay" transaction. (ER 24, 36; RT 203:24–204:8, 1019:9–18, 1124:7–21, 1248–52.) Wells Fargo's processing systems received and maintained information regarding each authorized transaction, including, for all but a small number of transactions, the date and time the transaction was authorized. (RT 616:9–618:6, 1017:21–1018:14, 1085:7–16, 1088:13–16, 1093:9–1095:6; ER 88.)

[2] This figure is especially breathtaking considering that banks rarely used to permit overdrafts at all. "In the past century, overdrafts have gone from the banker's scourge to the banker's profit center as bankers have learned that there is much to be made on these short term loans and breathtaking interest rates." James J. White, *NSF Fees*, 68 Ohio St. L.J. 185, 185-86 (2007).

After authorization, the transaction "settles," *i.e.*, the merchant sends another electronic message to Wells Fargo by which it presents the transaction for payment. Settlement of a debit card transaction usually occurs the same day (for "PIN-based" transactions), though it sometimes takes one or two days (for "signature-based" transactions). (RT 1022–23, 1056:22–1057:10, 1106; PER 742.)

"Posting" is the daily, automated process where settled transactions are presented for payment against a customer's account. (ER 4, 23; RT 606:23–609:7, 1112–13, 1122:8–14, 1364; PER 742.) All types of debit transactions (*i.e.*, debit cards, cash withdrawals, checks, and "ACH" or "automated clearing house") are posted.[3] Wells Fargo "batch posted" all debit transactions: it ordered all these debit transactions "high-to-low" as single batch. (ER 23.) The resulting "posting order" was therefore "high-to-low" for debit transactions.

The order in which transactions are "posted" is the order by which funds are deducted from the customer's account. (ER 23–24.) Transactions posted first reduce the balance available for subsequent transactions. The posting order can significantly influence the number of overdraft *occurrences* a customer experiences and, thus, the number of fees imposed.[4] (ER 4.)

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[3] ACH transactions are typically monthly payments, like recurring bills, arranged in advance. (ER 5.)

[4] The posting order does not affect the amount charged for each overdraft fee. The fee per overdraft ranged from $18 to $35 during the class period. The amount of the individual fee, however, is not at issue in this case. (ER 2, 76.)

Upon posting the day's transactions, the occurrences of overdrafts are determined. If insufficient funds are available to cover a transaction presented for settlement, overdraft fees may be assessed for every transaction which exceeds the funds.[5] Because they are "must-pay," Wells Fargo funded debit card transactions even if the account had insufficient funds, and imposed an overdraft fee. (ER 24–25; RT 1112, 1124.) For non-"must pay" transactions (checks, ACH), Wells Fargo exercised discretion to invoke the customer's "Shadow Line" of credit and either honor the transaction or "return" it and charge a "non-sufficient funds" fee ("NSF"). (ER 24–25; RT 1112–13, 1161.)

Wells Fargo was capable of chronologically posting the debit card transactions posted on a given calendar day—based on the date and time the transactions were authorized. (RT 616:9–618:6, 1017:21–1018:14, 1085:7–16, 1088:13–16, 1093:9–1095:6; ER 86–88.) Wells Fargo failed to present evidence supporting its assertion that it did not *receive* authorization date and time information for a significant number of transactions. Rather, the evidence showed, at most, that Wells Fargo failed to *maintain* authorization time information for a

[5] When insufficient funds are available to cover a transaction at the time of "posting," before assessing an overdraft fee, Wells Fargo first accesses any other "linked" account (*e.g.*, savings account) the customer may have to determine if such account has sufficient funds to cover the transaction. If such funds are present, Wells Fargo transfers them to the primary account and the customer is charged an "overdraft protection" fee, even though the cost to the bank of transferring funds between accounts is negligible. (ER 24; RT 1147, 1364:7–1368:23.) This "overdraft protection" fee is *not* the type of "overdraft fee" at issue in this litigation.

limited number of transactions. (*Ibid*; RT 602:18–603:2.)[6] For several years, in Washington State and New Mexico, Wells Fargo posted transactions chronologically by authorization date. (ER 59; RT 685–86, 1502–05, 1508; PER 616 (TX 51).) Since November 2010, Wells Fargo has posted debit card transactions in California chronologically. (PER 48, 51.)

Wells Fargo applied different posting practices in different states during the class period: (a) voluntarily in Washington and New Mexico, in a pilot program; and (b) on a compulsory basis in Nevada, to comply with a state law prohibiting high-to-low posting of checks. (ER 59; PER 616, 648, 681 (TX 51, 55, 59); RT 685–86, 1502–05, 1508.) Wells Fargo's Consumer Account Agreement ("CAA") acknowledges that its posting order is subject to state law and may vary by state. (PER 648-49 (TX 55); ER 817.) Wells Fargo's use of different posting practices in these states did not significantly burden Wells Fargo or disturb its ability to engage in the business of banking. (ER 59; PER 608 (TX 48); RT 606–09, 658:22–659:23, 1112–13, 1122, 1364.)

### 2. <u>Wells Fargo's High-to-Low Re-Sequencing.</u>

Wells Fargo's practice in California throughout the class period was to post debit transactions each day in high-to-low order. (ER 4; PER 63.) That wasn't

[6] To the extent Wells Fargo did not receive authorization time information for a small percentage of debit card transactions, there were intuitive ways for the bank to incorporate those transactions into a chronological posting order that fairly approximated the order in which all transactions occurred. (RT 891–96, 911–14, 916; ER 88.)

always the practice. Before its 1998 merger with Norwest Bank, Wells Fargo posted debits in the order of *lowest-to-highest* in dollar amount. (*Ibid*.; RT 68.) Low-to-high posting minimized the number of overdraft occurrences because the customer's balance was used up as slowly as possible. (ER 4.) Most banks post debit transactions in low-to-high order. (ER 23; PER 568 (2008 FDIC Study).)

After the Norwest merger, Wells Fargo switched to high-to-low posting. (ER 4, 43–44; PER 63.) Wells Fargo decided on this change in 1999. High-to-low was then rolled out, with California the last Wells Fargo region to move to high-to-low, in April 2001. (*Id*.; RT 280–81, 1409–12.) Wells Fargo consciously decided not to inform California customers about the change to high-to-low posting. (RT 251:7–10, 256:22–258:18, 285:9–25, 286:10–287:24, 290:8–25; PER 607 (TX 48); *cf*. PER 616, 648.)

Wells Fargo's switch to high-to-low had the immediate effect of maximizing the number of overdraft occurrences because it assured customers' balances would be used up as quickly as possible. As Wells Fargo's former President, Leslie Biller, explained: "It's just a fact of pure mathematics." (TX 220–B at 39:20–23; ER 4, 27–28; RT 622:12–623:8, 654–55, 1864:2–4.)

To illustrate, suppose a customer has $100 in her account at the beginning of March 5, and the following eleven debit card transactions post to her account that day: (a) ten small purchases, authorized between March 3 and March 4, totaling

\$95; and (b) one \$100 purchase, authorized on March 5. If the transactions were posted low-to-high or in chronological order based on the time Wells Fargo authorized them, the customer would incur one overdraft—the one triggered by the \$100 purchase. Under Wells Fargo's high-to-low re-sequencing, however, the same customer incurs *ten* overdrafts, as the \$100 purchase drains the account balance first and the ten smaller transactions each trigger an overdraft. (ER 5, 9–12, 17–20.)

The evidence at trial—including internal bank memoranda and correspondence, and the testimony of Wells Fargo's witnesses—confirmed that Wells Fargo implemented the high-to-low re-sequencing to artificially increase the number of overdraft occurrences in order to increase overdraft revenue. (ER 25–36 (summarizing evidence and finding that "gouging and profiteering were Wells Fargo's true motivations behind the high-to-low switch"); RT 113–114).[7]) Before deploying high-to-low re-sequencing, Wells Fargo performed targeted financial analyses to project the revenue boost of the change as compared with its then-existing practice and with other alternatives, determining that high-to-low would cause the most overdrafts and the greatest increase to revenue. (RT 75–81, 84–85, 109, 113–14, 1418–19.) These results were presented to Wells Fargo's decision makers. (RT 113–14.)

[7] *See also* RT 74–78, 80–81, 84–85, 109:4–18, 113:15–114:2, 1340:7–1341:13, 1341:25–1342:4 1418:15–1419:20; TX 220-B at 39:20–23, 41:2–5.

The head of Wells Fargo's Consumer Deposit Group, Kenneth Zimmerman, recommended against high-to-low re-sequencing because of its adverse impact on customers. His recommendation was overruled by his superiors, including Wells Fargo President Biller. (ER 28; RT 84–85, 113–14, 340.)

### 3. Wells Fargo Implements "Commingling" and the "Shadow Line" to Accentuate the Impact of High-to-Low Posting.

After deploying high-to-low re-sequencing, Wells Fargo implemented several allied initiatives, which it referred to collectively as the Balance Sheet Engineering ("BSE") plan. (ER 25–33; *e.g.*, PER 574 (TX 36) (timeline of BSE phases); PER 584, 609, 622, 652; RT 134, 242–47.) This plan featured two "phases" that poured fuel on the fire sparked by high-to-low re-sequencing.

The first change (known as BSE Phase 1) was "Sort Order Optimization," or, "commingling." (ER 5–6, 27; PER 585.) Previously, Wells Fargo posted debit card transactions in advance of checks and ACH. (ER 5; PER 63.) This made sense from a risk perspective because debit card transactions, unlike checks and ACH, are "must pay" transactions. (ER 24, 27; RT 74:4–7 ("cash-out-the-door, must-pay transactions" posted first), 1124:7–21, 1472:21–1473:8.) Starting in December 2001, Wells Fargo began "commingling" debit card transactions with checks and ACH in a single posting group *before* high-to-low reordering and posting. (ER 5–6, 27; RT 73:15–74:19; PER 650.) Commingling was designed to exacerbate the effect of high-to-low posting on the number of overdraft occurrences by, in the bank's words, "more closely mirror[ing] true High-to-Low sort order." (PER 583 (TX 36); ER 27–29; RT 167:23–168:8.) Because checks and ACH transactions tend to be larger dollar items in comparison to debit card transactions, commingling assures that balances are consumed even more rapidly. (*Ibid*.; RT 1421:23–1422:19 (heightened revenue was "one of the significant factors in the decision-making"), 1551:9–1552:14; PER 620 (TX 52) (commingling a "Fee Income Opportunity").)

Wells Fargo consciously decided to not disclose the commingling change to customers. (RT 249:22–251:10, 258:19–259:7.) As with re-sequencing, Wells Fargo's Kenneth Zimmerman recommended against commingling because he knew it would adversely affect customers. Again, he was overruled. (ER 42; RT 160:7–161:8, 1551:9–1552:14.)

The second change (referred to as BSE Phases 2A, 2B) occurred when Wells Fargo implemented a secret program called the "Shadow Line." (ER 6, 29–31; PER 610 (TX 50).) Before, the bank's practice was to decline point-of-sale debit card purchases and ATM withdrawals if the customer's account had insufficient funds at the time of authorization. Therefore, an authorized debit card transaction could only cause an overdraft when an intervening debit caused the customer's balance to decrease before the transaction in question settled. (*Ibid*.) Through the Shadow Line, Wells Fargo began authorizing customers' point-of-sale and ATM transactions into overdraft up to a secret "limit" that it pre-determined for each customer. (*Ibid*; RT 191:9–22.) Wells Fargo determined each customer's Shadow Line automatically, through an algorithm that calculated the risk of non-payment. (ER 6, 29–31; RT 1347:20–1348:17, 1564:11–1565:22, TX 220–B at 50:5–16; TX 224.)

Wells Fargo failed to adequately warn customers about the Shadow Line or its amplifying effect on overdraft occurrences. (ER 56–57.) Throughout the class period, Wells Fargo did not disclose to customers the amount of their Shadow Line credit limit. (ER 6, 31; RT 608:9–20, 1184:14–16; TX 219–B at 27:17–24.) Moreover, customers were not informed at the point of sale when a purchase was being approved into overdraft via the Shadow Line. (ER 6.) Nor were customers allowed to opt out of the Shadow Line regime. (RT 686:13–21.)

Wells Fargo adopted the Shadow Line to significantly increase the number of overdraft transactions it would then post high to low. (ER 29–31 (citing evidence; finding "the bank had now found a way to rack up overdraft fees for point-of-sale purchases that previously were protected from overdrafts. . . . [B]y approving . . . purchases when the customer lacked sufficient funds, Wells Fargo expected a marked uptick in overdraft fees. An increase in the number of overdrafted accounts . . . upon which the high to low resequencing could work its magic . . . was the intended result. Exactly this occurred.").)

As with high-to-low re-sequencing, internal documents show that Wells Fargo performed targeted financial analyses to project the revenue "lift" from the BSE initiatives. Wells Fargo projected the BSE initiatives would boost revenue by more than $100 million annually, including by over $24 million annually in California. (ER 25–29; PER 574 (TX 36) (timeline of BSE phases with estimates of annual revenue "lift"); PER 625 (TX 54); PER 683 (TX 61) (projections for several phases); PER 584, 603, 609, 652 (TX 37–38, 50, 57); TX 62–71; RT 1631–32, 1636.)

Wells Fargo projected the December 2001 commingling change would "lift" overdraft revenue by $40 million annually, above and beyond the millions in revenue the high-to-low change was already pulling in. (ER 27; PER 574, 585, 625, 687 (TX 36, 37, 54, 63); PER 702 (TX 64) (analyzing "Incremental Opportunity of Posting Order Change"); RT 138:11–139:5, 1421:23–1422:19, 1636:14–23.) And, according to the bank's projections, applying the Shadow Line to point-of-sale purchases would increase annual revenue by an additional $40 million. (ER 29; PER 574, 610, 625 (TX 36, 50, 54); RT 247:18–248:18, 1638:8–20.)

### 4. Wells Fargo Closely Tracked the Revenue Impact of Its Revenue Enhancement Initiatives.

After implementation, Wells Fargo closely monitored the results of the three initiatives. The bank found that, as expected, they had drastically multiplied overdraft frequency and increased overdraft revenue by many millions of dollars annually. (ER 28–35; PER 574, 625 (TX 36, 54).) Internally, Wells Fargo cheered that the commingling change increased "the two most important OD/NSF drivers"—the percentage of accounts incurring overdrafts and the number of overdrafts per overdrawn account—reporting a $40 million annual revenue "lift" from commingling, as internal studies had projected. (ER 28–29; PER 573, 584, 628 (TX 36, 37, 54).) Likewise, the bank found that extending the "Shadow Line" to point-of-sale purchases had drastically multiplied overdraft occurrences and increased overdraft revenue by tens of millions of dollars annually. (PER 632 (TX 54).)

Perhaps most revealing about Wells Fargo's motives were internal documents related to an unexpected shortfall in overdraft revenue in early 2002—many of which documents Wells Fargo at first inexplicably produced in redacted form.[8] These documents, described and quoted in the District Court's findings (ER 31–35), show that Wells Fargo's executives (a) viewed increased overdraft occurrences as a "positive"; (b) considered a decline in overdrafts to be "troubling" and a "cause for concern," even with the "positive effect" on overdraft revenue of "the installation of BSE 2A (overdraft via POS) in May [2002]"; and (c) believed the suspected reason for the decline—larger tax refunds than prior years—

[8] ER 31; PER 603, 605, 652, 665; RT 232:15–234:9 ("Maybe our position was not well taken").

constituted "good news" since those "excess balances" would eventually be "depleted," leading to "a resumption of normal OD behavior." Additionally, the bank was concerned that it might be losing its "high OD" customers through attrition as a consequence of its Balance Sheet Engineering changes. (ER 31–35; PER 603, 652 (TX 38, 57).)

### B. No Documents or Other Credible Evidence Supported Wells Fargo's *Post-Hoc* Rationalizations.

Faced with overwhelming evidence that its re-sequencing practices were motivated by profiteering, Wells Fargo attempted at trial to put forward alternative justifications. However, as the District Court found, no documentary evidence, and indeed no credible evidence of any kind, supported any of these *post-hoc* rationalizations. (ER 36–47.)

Wells Fargo was unable to produce or identify any contemporaneous documents evidencing that it considered various "pros and cons" of high-to-low reordering, as it attempted to argue at trial, even though it was concerned at the time that this policy change could prompt litigation. (RT 76:18–23, 342:25–344:15, 1433:2–1436:4, 1443:8–1444:13, 1551:9–1554:4.)

Wells Fargo's primary rationalization was that it implemented high-to-low re-sequencing because customers supposedly "preferred" it, on the theory that it helped ensure their most important transactions would be paid. Multiple Wells Fargo witnesses regurgitated this excuse, yet Wells Fargo neither produced—nor could its witnesses identify—a *single* contemporaneous document showing that Wells Fargo actually considered this theory. (ER 38–41.)

As the District Court found, this attempted justification is wholly inapplicable to debit cards. Because nearly all debit card transactions are "must pay" transactions, there is *no* risk the bank will not pay those transactions *regardless* of the posting order used—and hence, no possible benefit to customers from a high-to-low posting order. (ER 36–37; RT 203:24–204:6, 1124:7–21, 1248–55, 1472:21–1473:8.) Wells Fargo itself conducted no research on this issue, and produced no evidence at trial supporting its argumentative premise that customers prefer high-to-low posting.[9] (RT 85:9–20, 94:6–12, 682:7–685:3, 1560:10–1561:1; TX 219–B at 17:9–18:10.) In fact, the evidence—including numerous documented customer complaints that Wells Fargo received—demonstrated customers (quite understandably) do *not* prefer an accounting trick

[9] The lone basis offered at trial for Wells Fargo's "customer preference" defense was a purported Norwest study. (ER 38.) The Norwest study was not produced at trial, and there was no evidence that Wells Fargo actually considered the study when it adopted high-to-low re-sequencing. (*Id*.; Docket 489.) Five months after trial, Wells Fargo submitted what it said was the elusive Norwest study, which purportedly turned up in the Wisconsin garage of a former Norwest executive. (Docket 481, 483-1.) As it developed, the 1995 study Wells Fargo proffered after trial was limited to the issue of posting *checks*, and bore no resemblance to the study its witnesses described. In fact, the proffered study concludes that customers prefer that checks be paid in the order written—that is, chronologically—and endorses chronological posting of checks. Thus, the actual study directly contradicts Wells Fargo's testimony that customers prefer high-to-low posting and supports the District Court's findings that (a) Wells Fargo's "customer preference" defense was manufactured for trial and (b) its witnesses' testimony was not credible. (Dockets 483-1, 489.)

that artificially causes more overdraft fees. (ER 37–41, 58; TX 126, 127.) Wells Fargo's similar *post-hoc* justifications for commingling and the Shadow Line were also contrived for trial. (ER 41–42.)

### C. Wells Fargo Did Not Consider Any of the Factors in 12 C.F.R. § 7.4002 When It Adopted High-to-Low Re-Sequencing.

In an effort to support its preemption defense, Wells Fargo attempted to show that it considered the factors in 12 C.F.R. § 7.4002 when implementing high-to-low re-sequencing and the allied practices. But, the District Court found that "Wells Fargo did *not* actually consider any of these factors when implementing the challenged posting practices." (ER 43–47; Argument Section I.B.2.b, *infra*.)

The bank presented no credible evidence that it considered any of the section 7.4002 factors for making a "pricing decision." (*Ibid*.; RT 1526–30 (no documents exist in these areas), 1552–54 (same), 1433–34 (no documents memorialize consideration of factors), 1448:15–1449:1 (no specific recollection about whether bank considered its competitors' posting orders), 1521–23 (no documents reflect that Wells Fargo considered posting-order change a "pricing" decision).)

Although it took the bank nearly a year to propose, forecast, approve and implement each change, and despite the fact that banks would normally be expected to keep careful records to show compliance with federal regulations, there was not a shred of documentary evidence to show that Wells Fargo actually considered any of the section 7.4002 factors. (ER 43–47; RT 1433–49, 1508–09, 1526–30.) To the contrary, the documentary evidence overwhelmingly demonstrated that Wells Fargo's sole consideration was increasing revenue. (ER 43–47; Facts Sections A.2–4, *supra*.)

### D. Wells Fargo Deceived Customers Regarding Its Re-Sequencing Practice.

Wells Fargo consistently misled customers about how transactions were posted and reinforced their expectations that transactions would post chronologically. (ER 48–56; RT 1474:1–2; Argument Section II.B, *infra*.)

#### 1. Wells Fargo Failed to Disclose High-to-Low Re-Sequencing or Its Implications.

Wells Fargo generally provided its Consumer Account Agreement ("CAA") to customers when they opened a new account. (ER 49.) Throughout the class period, the CAA was a lengthy, single-spaced document. (ER 49; *e.g.*, ER 793.) Wells Fargo's own expert testified that ordinary consumers could not be expected to read this imposing document. (ER 50–51; RT 977–82.)

The CAA did not disclose Wells Fargo's actual re-sequencing practice but, rather, claimed to give Wells Fargo broad discretion to choose a posting order. (ER 49–50; RT 269:18–21, 285:14–25, 1331.) Prior to October 2004, the CAA contained a section, buried within the lengthy document, that read (with minor variations):

> We may pay Items presented against your account in any order we choose, unless a particular order is either legally required or prohibited. In particular, we *may choose* to

> pay Items in the order 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.

(ER 49; PER 464) (emphasis added).) This language was ambiguous and misleading to customers: while the provision stated Wells Fargo "*may* choose to pay Items in the order of highest-to-lowest in dollar amount," it is undisputed that Wells Fargo *was actually* posting debit transactions from high-to-low at the time. (ER 49–50; PER 64.) Notably, the provision was substantially the same before the bank implemented high-to-low re-sequencing in California. (ER 50; PER 488.)

In October 2004, Wells Fargo modified the CAA posting order provision, and the provision remained substantially identical for the balance of the class period:

> The Bank may post Items presented against the Account in any order the Bank chooses, unless the laws governing your Account either requires or prohibits a particular order. For example, the Bank may, if it chooses, post Items in the order of the highest dollar amount to the lowest dollar amount. The Bank may change the order of posting Items to the Account at any time without notice. If more than one Item is presented to the Bank for payment 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.

(ER 50; ER 817.) This iteration was misleading in that it likewise merely informed the reader, as an "*example*," what the bank "*may*" do. The language the bank added only compounded the confusion by reinforcing the perception that Wells Fargo had not actually made the decision to post high to low. (ER 50.) Trial evidence revealed that the only example provided of what the bank "may" do, "if it chooses," did not even accurately describe the bank's actual practice. (RT 287–90, 1142:18–1143:1.)

Wells Fargo's other "disclosures" to customers, including its monthly account statements, did not disclose the bank's high-to-low re-sequencing either, and in fact compounded the confusion about how the bank processed transactions. (ER 53; ER 673 (listing checks and other debits in separate sections of statement); RT 285:9–25, 394:22–395:2, 1359–63.)

Moreover, the evidence showed that Wells Fargo knew perfectly well how to clearly disclose the bank's actual posting practices when it served their purposes. Responding to a select number of customer complaints, Wells Fargo provided a cogent and easily understood explanation of its posting order, including the various posting groups and the sort order within each group. (ER 52; PER 548-52; RT 1313:15–23, 1319:21–1320:17, 1322:15–20.) By contrast, Wells Fargo made the conscious decision to not clearly disclose its true practices to the great bulk of its customers. (*Ibid*; ER 52 (finding "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"); RT 251:7–10, 256:22–258:18, 285:9–25, 286:10–287:24, 290:8–25.)

### 2. Wells Fargo Affirmatively Misled Customers Regarding the Order in Which It Processed Transactions.

Making matters worse, Wells Fargo consistently reinforced customers' natural expectation that their debit card purchases (electronic transactions approved instantaneously) would be deducted in the order in which they occurred—chronological order. (ER 54–56.) A central theme running through Wells Fargo's advertising and educational campaigns was that debit card purchases were deducted from the customer's account "immediately," or "automatically," leading customers to believe incorrectly that their purchases would be deducted chronologically and that transactions would be declined if they had insufficient funds at the time of purchase. (ER 54–55; PER 511, 515, 519, 523, 531, 534, 541, 545, 553, 558, 559-60, 565; RT 386:1–10, 785:3–10.) This language was pervasive, among other places, in the brochures Wells Fargo customarily provided to customers at account opening (PER 519 (TX 84), 534 (TX 89); RT 297, 303, 811–14) and on Wells Fargo's website (PER 553 (TX 129).) The same language also prominently appeared in educational materials, including those Wells Fargo distributed as part of its "Hands on Banking" financial literacy program. (PER 541 (TX 116) (teen checking brochure), 558 (TX 131), 559-60 (TX 142).)

Wells Fargo's witnesses admitted these representations were misleading. (RT 292:13–20 ("We have evolved away from that term, to try to avoid any confusion on the part of the customers about exactly how it works."), 504:4–23, 523:22–524:13, 546:19–547:15, 984:23–985:1 ("I wouldn't use the word 'immediately'"); RT 300:2–8, 308:2–13, 310:3–11.)

Both named plaintiffs saw representations of this nature, and each was misled concerning how debit transactions were processed. On the day she opened her account, Ms. Gutierrez reviewed sections of the "Checking Savings, & More" brochure, including the portion stating debit "purchase amounts are automatically deducted from your primary checking account." This representation reinforced her expectation that debit card purchases would be deducted from her account chronologically. (ER 7, 16; PER 534 (TX 89); RT 372–76, 386:1–10.) Similarly, after opening her account, Ms. Walker read a statement in the "Welcome Jacket" that, for debit cards, "[e]ach purchase is automatically deduced from your primary checking account." This statement reinforced her expectation that her debit purchases would be deducted chronologically. (ER 17; PER 519 (TX 84); RT 756–58, 785:3–10.)

Wells Fargo misled customers in additional ways. For example, its online account information, which customers accessed on Wells Fargo's Internet website, listed "pending" purchases (*i.e.*, post authorization, pre-settlement) in chronological order, reinforcing the expectation that money subtracted from checking accounts when debit transactions were authorized and executed. (ER 55.)

### E. Wells Fargo's Conduct Harmed the Named Plaintiffs and the Class.

#### 1. Harm to the Named Plaintiffs.

Both named plaintiffs were victims of Wells Fargo's misconduct. As noted above, both were misled by Wells Fargo's marketing materials. Moreover, both were assessed additional overdraft charges as a result of Wells Fargo's re-sequencing. For Ms. Gutierrez, Wells Fargo's re-sequencing of her transactions on October 5, 2006 caused her to be charged *four* $22 overdraft fees instead of the *one* fee she would have been charged had the bank posted the transactions chronologically or in low-to-high order. (ER 9–12; PER 12, 16-17; ER 673; RT 1247:15–19.) For Ms. Walker, Wells Fargo's re-sequencing on June 4, 2007 caused her to be charged eight $34 overdraft fees (for a total of $274), whereas fewer overdraft charges would have been assessed had the bank posted the transactions chronologically or low-to-high. (ER 17–20; PER 13; ER 788.)

#### 2. Harm to the Class: Expert Olsen's Restitution Analysis.

Plaintiffs' expert, Arthur Olsen, working with transactional and customer data provided by Wells Fargo, was able to identify each class member who was harmed by Wells Fargo's re-sequencing and to calculate the excess overdraft fees each was charged during the class period. Examining Wells Fargo's own transactional data for all California customers during the class period, and applying a methodology he developed, Expert Olsen automatically re-sequenced customers' daily transactions to re-create alternate posting "scenarios" where the same transactions were posted in a different sequence than the sequence Wells Fargo used. (Docket 338 at 19 (finding the expert "did exactly what he was asked to do, and was clearly qualified to perform those tasks.").)

Mr. Olsen's analysis reliably compared, on an account-by-account basis, the number of overdraft charges Wells Fargo would have assessed under each "scenario" with the charges Wells Fargo actually assessed. The resulting differences, under each scenario, determined the alternate measures of harm to each consumer. (ER 86–89; RT 869–918.) Mr. Olsen calculated the surplus fees using comparisons against chronological posting of debit cards and against Wells Fargo's *ex ante*, low-to-high posting order. (ER 86–89; RT 882–84, 892–96, 906–18.)[10]

The chronological analysis the District Court adopted showed that, when compared to chronological posting, Wells Fargo's re-sequencing caused 1,144,577 California customers to incur surplus overdrafts totaling $202,994,035.46 during

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[10] Mr. Olsen performed calculations under six chronological "scenarios" varying according to: (a) where in the sequence, and in what order, the small number of debit card transactions without authorization time information were posted; and (b) where debit cards were posted in relation to checks and ACH. (RT 891–96, 911–18.)

the class period. (ER 87–89; PER 571-72; RT 911–12.) Mr. Olsen's analysis showed that, when compared to its prior posting practice, Wells Fargo's re-sequencing caused 1,457,281 California customers to incur additional overdrafts totaling $336,080,284.76 during the class period. (ER 86; PER 570, 572; RT 909–911.)

## **SUMMARY OF ARGUMENT**

Federal law does not preempt Plaintiffs' UCL claims: Wells Fargo committed bad faith acts that departed from federal guidelines themselves. The District Court's final judgment is not in tension with federal law and does not significantly interfere with bank operations. Wells Fargo violated the UCL by implementing an unfair and deceptive re-sequencing scheme that caused injury to the class in the form of excess overdraft fees. The District Court's restitution award was well supported by the record and, if anything, was too low. The District Court should have awarded pre-judgment interest.

## **STANDARD OF REVIEW**

A trial court's findings of fact may not be set aside unless they are "clearly erroneous." Fed. R. Civ. P. 52(a). Mixed questions of fact and law that are "primarily factual" are reviewed for clear error. *Sparkman v. C.I.R.*, 509 F.3d 1149, 1157 (9th Cir. 2007). Under the deferential "clear error" standard, affirmance is required unless the record prompts a "'definite and firm conviction that a mistake has been committed.'" *Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1444 (9th Cir. 1991) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

## ARGUMENT

### I. PLAINTIFFS' CLAIMS ARE NOT PREEMPTED.

The District Court properly found that Plaintiffs' claims are not preempted. At multiple stages during the proceedings below, the District Court considered preemption, rejecting Wells Fargo's two requests for summary judgment, and its request for a defense judgment after trial, on preemption grounds. In each ruling, the court held that determining whether "conflict preemption" (the only applicable form of preemption here) applies requires a full consideration of the facts regarding Plaintiffs' claims and Wells Fargo's practices.

Both before and at trial, Wells Fargo failed to meet its burden to prove its preemption defense. *See Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995) (proponent of preemption has the burden to prove it). Here, a finding of preemption under the Bank Act requires a determination of whether the application of state law *to a given set of facts* would frustrate Congressional intent or significantly interfere with banking functions. At trial, Wells Fargo failed to offer any documentary or other credible evidence demonstrating even tension—let alone a true conflict—between state and federal law, or that application of the UCL to the facts here would impair the operation of the Bank Act or its implementing regulations. (ER 43-47, 59, 73-79.)

The District Court's decision on preemption presents a mixed question of law and fact, driven primarily by the factual record concerning preemption presented at trial. This Court, therefore, reviews the District Court's decision for "clear error." The District Court, wholly consistent with the other trial court rulings evaluating overdraft re-sequencing claims, committed no error in finding that Plaintiffs' UCL claims were not preempted.

### A. <u>The District Court's Preemption Ruling Presents a Mixed Question That Is Reviewed for Clear Error.</u>

The District Court's preemption determination is *primarily* factual, and as such is reviewed for clear error. *Sparkman*, 509 F.3d at 1157. The preemption ruling depends on "assessments peculiarly within the province of the trier of fact," *Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 651 F.2d 615, 619 (9th Cir. 1981), subjecting it to clear error review. *See also Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) ("[D]eferential review of mixed questions of law and fact is warranted when it appears that the district court is better positioned than the appellate court to decide the issue in question") (internal quotation marks omitted).

Courts evaluate federal preemption defenses by reference to the underlying facts. *See In re Cellphone Fee Termination Cases*, 193 Cal. App. 4th 298, 2011 WL 743462, at *10 (2011) ("[i]t is clear that the trial court considered the question of federal preemption here as a mixed issue of law and fact. So do we.");

*Hughes v. Blue Cross of N. Cal.*, 215 Cal. App. 3d 832, 859 (1989) (noting that preemption determination "involves complex questions of law and fact").[11]

The District Court properly recognized throughout the litigation that the preemption analysis was dependent on factual considerations.[12] As the post-trial Findings reflect, the District Court relied heavily upon its extensive factual findings following the trial in analyzing preemption. The District Court's ultimate preemption analysis was therefore "primarily" factual, subject to a clear error review. *See Koirala v. Thai Airways Int'l, Ltd.*, 126 F.3d 1205, 1210 (9th Cir. 1997) (applying clear error standard to mixed question of law and fact due to "[d]istrict courts' . . . superior vantage point to the evidence"); *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1132, 1135 (1st Cir. 1995) (affirming under clear error standard "fact-driven" determination that federal law did not preempt state-law contract claim).

The District Court's preemption decision rests on substantial trial evidence rendering a *de novo* review standard—typically applicable to preemption rulings when made "as a matter of law," such as on a motion to dismiss—inapplicable.

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[11] *See also Lincoln-Dodge, Inc. v. Sullivan*, 588 F. Supp. 2d 224, 231 (D.R.I. 2008); *Harvey's Casino v. Isenhour*, 724 N.W.2d 705, 708 (Iowa 2006) (Jones Act preemption claims "must be evaluated with the aid of a factual record" and "involve mixed questions").

[12] *See White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1369 (N.D. Ga. 2008) (finding, in a case alleging similar re-sequencing misconduct, that a preemption determination was premature in the absence of "record evidence").

The District Court's fact-driven preemption ruling is exactly the sort of mixed question of law and fact that must be evaluated under the deferential clear error standard.

### B. No Preemption Exists.

While Wells Fargo nowhere specifies which type of preemption it is asserting, it tacitly concedes that the issue is properly analyzed here under principles of conflict preemption.[13] Under conflict preemption, state law claims against national banks are not preempted unless they "significantly interfere" with banking operations. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007). Thus, to establish conflict preemption, Wells Fargo must show that "it is impossible to comply with both state and federal requirements, or [that] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Serv. Eng'g Co. v. Emery*, 100 F.3d 659, 661 (9th Cir. 1996). Wells Fargo relies on three O.C.C. regulations for its preemption defense, 12 C.F.R. §§ 7.4002, 7.4007, and 7.4009. Plaintiffs' UCL claim is coextensive with each of those regulations, and does not obstruct Wells Fargo from exercising

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[13] There are three types of federal preemption: express, field and conflict. *Service Eng'g Co. v. Emery*, 100 F.3d 659, 661 (9th Cir. 1996). Nothing in the text or legislative history of the Bank Act evidences any express preemption of state law. *First Nat'l Bank v. Commonwealth of Ky.*, 76 U.S. 353, 362 (1869) (national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation"). Likewise, "[t]he [Bank] Act (and OCC regulations thereunder) does not 'preempt the field' of banking." *Martinez*, 598 F.3d at 555.

its banking activities. Therefore, the District Court correctly found that no conflict preemption exists.

**1. <u>Based on the Trial Record, the UCL Requirements, as Applied Here, Are Coextensive, and Indeed Consistent, With Federal Law.</u>**

Under a conflict preemption analysis, a state law may be preempted only where a conflict prevents simultaneous adherence to state and federal law standards—potential conflicts are insufficient. *See Emery*, 100 F.3d at 661; *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1010 (9th Cir. 2007); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *Rice v. Norman Williams Co*., 458 U.S. 654, 659 (1982).

Here, the Bank Act's preemptive scope is strictly limited because state courts "have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years . . ." *Cuomo v. Clearing House Ass'n, L.L.C.*, -- U.S. --, 129 S. Ct. 2710, 2720-21 (2009) (citing cases):

> states retain some power to regulate national banks in areas such as *contracts*, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law. Application of these laws to national banks and their implementation by state authorities typically does *not* affect the content or extent of the *Federally-authorized* business of banking . . . but rather establishes the legal infrastructure that surrounds and supports the ability of national banks . . . to do business.

*Id.* at 2718-19 (emphasis added).[14]

### a. The UCL Claim at Issue Here Is Consistent with the O.C.C. Regulations.

The District Court fully examined the federal regulatory authority of the O.C.C. in light of all the facts and evidence. *See* PER 14, 17-19 (extended analysis of O.C.C. regulations and advisory materials). The UCL claim here does not conflict with any of the three regulations upon which Wells Fargo bases its preemption defense.

As the District Court noted (and as Wells Fargo ignores), by 12 C.F.R. § 7.4007, the O.C.C. exempts from preemption certain state law claims:

> State laws that are *not* preempted. State laws on the following subjects are *not* inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:
>
> (1) *Contracts*;
>
> (2) *Torts*; . . .

[14] "The purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543 (2008) (internal quotation marks, citations, and alteration omitted). In 1994, Congress amended the Bank Act "[i]n view of the Congressional concern regarding preemption of State law regarding . . . consumer protection . . . ." H.R. Rep. No. 103-651, 1994 WL 405911, at *54. The intent behind the new requirements was "to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear." *Id.* at *55. This instruction is consistent with Congress' intention that "[c]ourts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible." *Id.* at *53.

> (8) *Any other law the effect of which the OCC determines to be incidental* to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

12 C.F.R. § 7.4007(c).[15]

The UCL claim here is precisely the type of claim that Section 7.4007(c) expressly exempts from preemption. This Court has stated that "the OCC has specifically cited the UCL in an advisory letter cautioning banks that they may be subject to such laws that prohibit unfair or deceptive acts or practices." *Martinez*, 598 F.3d at 555.[16] The O.C.C. itself has noted that a "number of state laws prohibit unfair or deceptive acts or practices, and such laws may be applicable to

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[15] Thus, under section 7.4007, "state laws that, as a general matter, are not preempted…include state laws concerning contract…." 69 Fed. Reg. 1904-01, at 1912.

[16] "[C]auses of action sounding in contract, consumer protection statutes and tort have repeatedly been found by federal courts not to be preempted" by the Bank Act. *Baldanzi v. WFC Holdings Corp.*, No. 07-cv-9551, 2008 WL 4924987, at *2 (S.D.N.Y. Nov. 14, 2008); *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1022 (S.D. Iowa 2009) (Bank Act did not preempt claims of general application "premised on the theory that Wells Fargo had a legal duty not to employ procedures designed to defraud borrowers by charging unreasonable fees"); *In re Chase Bank USA, N.A. "Check Loan" Contract Litig.*, MDL No. 2032, 2009 WL 4063349, at *9 (N.D. Cal. Nov. 20, 2009) (no Bank Act preemption; court could find "no authority providing that if a national bank enters into a contract and subsequently breaches an implied term of such contract, the customer lacks the ability to seek a remedy under state contract law"); *Levitansky v. FIA Card Servs., N.A.*, 492 F. Supp. 2d 758, 762 (N.D. Ohio 2007); *Mwantembe v. TD Bank, N.A.*, 669 F. Supp. 2d 545, 553 (E.D. Pa. 2009) (no Bank Act preemption of state law that "prohibits fraudulent and deceptive conduct and practices in all consumer transactions."); *Jefferson v. Chase Home Fin.*, No. 06-cv-6510, 2008 WL 1883484, at *10 (N.D. Cal. Apr. 29, 2008) (no Bank Act preemption because state laws in question were "laws of general application" that "merely require all business (including banks) to refrain from misrepresentations and abide by contracts").

insured depository institutions." O.C.C. Interp. Letter AL 2002-3, at 3 n.2 & 1, *available at*: www.occ.treas.gov/ftp/advisory/2002-3.doc. It is indeed "significant that [the] O.C.C. appears to envision that certain state laws against unfair or deceptive practices will remain enforceable against national banks." *Mann v. TD Bank, N.A*, Civil No. 09-1062, 2009 WL 3818128, at *7 (D.N.J. Nov. 12, 2009).

Further, Plaintiffs base their UCL claim on facts implicating the covenant of good faith and fair dealing. *See* ER 62–65. Far from giving Wells Fargo *carte blanche* to reorder transactions, the O.C.C. advises—drawing upon state law—that such reordering is permissible only if a bank "'act[s] in good faith." O.C.C. Interp. Letter No. 916, 2001 WL 1285359 (May 22, 2001) (quoting commentary to California Commercial Code § 4303(b)); *see also* O.C.C. Interp. Letter No. 997, 2002 WL 32639293, at *2 (Apr. 15, 2002) (same treatment of analogous Texas commentary). Thus, the good faith covenant is one of the "other law[s] the effect of which the OCC [has] determine[d] to be incidental" to bank operations. 12 C.F.R. § 7.4007(c)(8). There can be no conflict between federal and state standards when both have the same good-faith requirement.

Likewise, the O.C.C. has stated that a bank acting in good faith "could *not* properly follow an established practice of maximizing the number of returned checks for the sole purpose of increasing the amount of returned check fees charged to the customer." O.C.C. Interp. Letter No. 916, 2001 WL 1285359 (emphasis added); *see also* O.C.C. Interp. Letter No. 997, 2002 WL 32639293 (same); PER 19. The O.C.C. has disapproved of overdraft fee programs that, "in essence, attempt to entice their customers to write NSF checks more frequently and on purpose in order to generate fee income." O.C.C. Interp. Letter No. 914, at 5 (Sept. 2001), *available at*: http://www.occ.gov/static/interpretations-and-precedents/sep01/int914.pdf.

Based on the facts established at trial, the District Court found that Wells Fargo committed exactly such bad-faith violations. ER 35–36 ("this order finds that gouging and profiteering were Wells Fargo's true motivations behind the high-to-low switch"); *see also* PER 16. As the District Court recognized: "Implicit in this analysis was the OCC's effort to reconcile the activity proposed by the bank with the relevant state law. Nowhere in the letter did the OCC state that the California law could be ignored or not complied with because it would be preempted." PER 19.

At complete odds with the O.C.C.'s interpretative letters and other federal authority, Wells Fargo effectively argues that any claim involving checking account practices is *per se* preempted. Wells Fargo asserts that the UCL claim here "indisputably" imposes state-law limitations "concerning . . . checking accounts" under section 7.4007(b), and thus must be preempted. Opening Br. at 33; *see also* Am. Bankers Assoc. Amicus Br. at 14–15. However, to find a claim preempted simply because the underlying facts relate to checking account administration would effectively create a field preemption standard. *Cf. Cuomo*, 129 S. Ct. at 2717-18 ("No one denies that the National Bank Act leaves in place some state substantive laws affecting banks.").[17] Moreover, this assertion would render section 7.4007(c) a nullity; section 7.4007(c), by its express terms, specifically carves out certain state laws from the more general preemption provision of Section 7.4007(b).[18]

Wells Fargo relies on inapposite cases that focus on state laws *targeted specifically at banks*.[19] However, the Bank Act does not ordinarily preempt state laws which are "not aimed at or specific to the banking industry." *Mann*, 2009 WL 3818128, at *5; *Poskin v. TD BankNorth, N.A.*, 687 F. Supp. 2d 530, 556 (W.D. Pa. 2009) (no preemption of a state-law claim "not targeted directly at banking").

[17] Contrary to Wells Fargo's argument (Opening Br. at 34), the same is not true of this Court's interpretation of the separate and distinct real estate lending regulation at issue in *Martinez*, which listed *specific* lending practices that were not subject to state regulation, including the practice that formed the basis of the claims there. *Martinez*, 598 F.3d at 556-57.

[18] If the O.C.C. regulations are truly as broad as Wells Fargo asserts, they would be unenforceable. That is, if section 7.4007(b)(2) truly preempts all claims relating to "checking accounts," despite the enumerated carve-outs of section 7.4007(c), it would "not comport" with the Bank Act. *Cuomo*, 129 S. Ct. at 2717-19 (the Bank Act "does not prevent states from enforcing their law"—including laws that, as applied, affect banking operations no more than incidentally).

[19] *Franklin National Bank v. New York*, 347 U.S. 373 (1954), concerned a statute that prohibited national banks in particular from using the word "savings" or its variants. *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008), analyzed a statute that imposed disclosure requirements specifically on national credit card issuers in California. *Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002), analyzed a municipal ordinance that barred national banks from charging ATM fees to non-depositors in San Francisco.

The UCL requires *all* businesses operating in California to refrain from unlawful, unfair, and fraudulent business practices. *See Davis v. Chase Bank U.S.A., N.A.*, 650 F. Supp. 2d 1073, 1084-86 (C.D. Cal. 2009). The UCL is not directed at banks in particular and, at least as to these facts, the duties it imposes do not conflict with federal banking law.[20]

**b. <u>Wells Fargo's Own Agreement and Conduct Demonstrate the Applicability of State Law.</u>**

Wells Fargo internally acknowledges that its posting-order decisions are "depend[ent] on *state* laws":

> The different "orders of posting" vary by state. The method we chose in each state depends on state laws . . . . That's why we state in our "deposit account agreement" that Wells Fargo determines the order of posting unless otherwise required by law.

PER 648 (TX 55); ER 76. Wells Fargo's own deposit account agreement provides that it is subject to "the laws governing your account"—*not* exclusively federal law. ER 817; *see* PER 18.

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[20] Wells Fargo's reliance on *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) is misplaced. *Monroe* did not address bad-faith practices, let alone the relationship between bank and depositor, but rather the legality of a bank's *ability* to charge a garnishment fee. *See In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1312 (S.D. Fla. 2010) (holding *Monroe* inapplicable to re-sequencing claims against national banks); PER 8 (distinguishing *Monroe*). The District Court also correctly distinguished *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001 (9th Cir. 2008), which addressed a dissimilar regulatory scheme that occupied the *field* of lending regulation of federal savings associations. *Id.* at 1004; PER 20.

Wells Fargo cannot credibly claim that state law has no application to the conduct at issue here when its own documents expressly recognize that state law governs its contracts and posting practices. *See* PER 18 (refusing to let the bank "escape accountability under the veil of preemption when its own contract language states that the very practices will be subject to governing law"); ER 817; *see also In re Chase*, 2009 WL 4063349 at *9 (rejecting a Bank Act preemption defense in light of a similar choice-of-law provision under which "the parties agreed to subject themselves to [the state's] general and undiscriminating . . . implied covenant of good faith and fair dealing"). The District Court was correct in concluding that the "governing law on bank deposits is normally *state* law, such as the Uniform Commercial Code and state contract law." *Id*. (emphasis added).

Notwithstanding its federal preemption defense, Wells Fargo itself relied upon California law in an attempt to defend its practices. *See* ER 76 (Wells Fargo "first raised California Commercial Code Section 4303 in its defense herein—only to learn that the legislative comment thereto barred the very practice at issue").

#### 2. <u>Plaintiffs' UCL Claims Do Not Significantly Interfere With Wells Fargo's Banking Activities.</u>

##### a. <u>Compliance With State Law Does Not Affect Wells Fargo's Banking Activities More Than Incidentally Under Sections 7.4007 and 7.4009.</u>

The District Court properly found that "the trial record is devoid of any credible evidence demonstrating that the state-law claims asserted in this action would impose more than an incidental effect on the exercise of Wells Fargo's deposit taking powers or . . . any other power authorized under the [NBA] or OCC regulations." ER 79; 12 C.F.R. §§ 7.4007(c) & 7.4009(c)(2). Indeed, the trial yielded ample evidence supporting the District Court's factual finding that "posting order variances do *not* more than incidentally affect the bank's ability to engage in the business of banking." ER 59.

For instance, Wells Fargo's use of low-to-high posting for many years prior to its merger with Norwest did not impair the bank's abilities to exercise its deposit-taking powers. ER 59. Moreover, Wells Fargo does not deny that it has the ability to post debit transactions chronologically or that it has done so in California subsequent to the District Court's Findings. *See* PER 48, 51. Evidence at trial also showed that in New Mexico and Washington, the bank for years posted debit transactions in partial chronological order. *See* ER 59; RT 685–86, 1502–05, 1508; PER 616 (TX 51).

Trial evidence further showed that Wells Fargo for years has employed yet another posting order in Nevada, to comply with a state law that affirmatively requires national banks to post checking account transactions in low-to-high or sequential order. *See* ER 59 (citing Nev. Rev. Stat. § 657.120); PER 616, 648, 681 (TX 51, 55, 59). The Nevada law has been on the books since 1989. It has never been held to be preempted. Just as the Nevada law operates alongside federal law, so does the District Court's order have binding effect. *See Cuomo*, 129 S. Ct. at 2718-21 (federal law allows considerable room for the states to protect their consumers through regulation of banks).

The bank's compliance with the law in Nevada, use of varying posting methods in different states, and use of chronological posting in California post-judgment, conclusively establish that the District Court's order prohibiting Wells Fargo from "gouging" its customers through high-to-low re-sequencing does *not* more than incidentally affect the bank's ability to engage in the business of banking. Indeed, given that most banks use a low-to-high posting order for debit transactions, PER 568 (FDIC Study), prohibiting Wells Fargo from re-sequencing high-to-low could not possibly interfere with its deposit-taking powers.

Wells Fargo offers no support for its assertion that evidence of "substantial costs to the bank" (which never materialized at trial) to implement an alternative posting order in California demonstrates a more than incidental affect on its banking activities. Opening Br. at 30-31. However, even if the cost to the bank were relevant, the record demonstrates that a change in posting order is largely a mechanical change which does not affect the bank's ability to exercise its federally-granted powers. PER 608 (TX 48) (e-mail stating that changing the posting order was "systematically not a big project"); RT 1122:8–14; RT 1364:18–

21; *see also* RT 607:19. Thus, it comes as no surprise that, post-trial, Wells Fargo made the posting-order change smoothly and without a hitch. *See* PER 51.

The District Court also properly found that the UCL claim did not interfere with Wells Fargo's asserted "incidental authority" under the Bank Act to make disclosures regarding posting order. Opening Br. at 22-23, 26-27. The analysis remains the same: whether the generally applicable state law claims significantly interfere with the national bank's authority. *Watters*, 550 U.S. at 12. Here, applying a law of general application, the UCL, the District Court held that Wells Fargo's disclosures regarding posting order were false and misleading.[21] ER 48-57, 69-73. At trial, Wells Fargo failed to present credible evidence that making honest disclosures regarding its posting order would interfere with its powers. To the contrary, the District Court found that Wells Fargo was capable of providing, and in fact provided, "clear disclosure regarding posting order to customers if they went to the trouble of complaining." ER 51-52. Such after-the-fact explanations highlight Wells Fargo's "intentional" before-the-fact obfuscations. ER 52. The Bank Act does not preempt generally applicable state law making such fraudulent behavior unlawful.

[21] Wells Fargo cites only inapposite cases where specific and concrete mandates targeting banks were at issue. *See Franklin*, 347 U.S. at 374 (addressing state law prohibiting banks from using the word "saving" or "savings" in advertising); *Rose*, 513 F.3d at 1035 (addressing state law mandating banks' inclusion of specific language on the face of all convenience checks issued to credit card holders). Here, the District Court declined to mandate that Wells Fargo make any specific disclosure, but simply held it liable for making dishonest disclosures.

The District Court, contrary to Wells Fargo's argument, in no way challenged the bank's "authority to post transactions." Opening Br. at 20. The court did not prohibit the bank from charging overdraft fees. Nor did it mandate a particular way of sequencing customers' transactions. In fact, the District Court, while enjoining Wells Fargo from posting "high-to-low," allowed it latitude to choose from the other two possible sequencing orders, or "some combination of the two methods."[22] *See* ER 85; Opening Br. at 5-6.

**b. Wells Fargo Failed to Establish Facts Showing That Section 7.4002 Preempts the UCL Claim.**

Plaintiffs' UCL claim is not preempted by the regulation authorizing national banks to levy "non-interest charges," 12 C.F.R. § 7.4002. Section 7.4002 cannot extinguish the UCL claim based on three independent grounds found by the District Court: (1) re-sequencing of transactions for the sole purpose of multiplying overdraft occurrences cannot constitute price-setting conduct; (2) Wells Fargo never regarded its high-to-low posting as a "pricing decision" subject to section 7.4002; and (3) even if section 7.4002 applies, its application is "consistent" with, not contrary to, the application of state law—as the O.C.C. interpretive letters advise. ER 75–78.

[22] Requiring a bank to end a deceptive, bad-faith practice, while at the same time leaving the bank considerable latitude as how to sequence transactions in good faith, does not raise "profound" ramifications. *See* Am. Bankers Ass'n Amicus Br. at 15–16. Instead, the judgment simply upholds the well-settled concept that banks do not have free rein to violate state law.

Section 7.4002 lists four factors a bank "must" consider in setting non-interest charges and fees pursuant to federal law:

> (i) The cost incurred by the bank in providing the service;
>
> (ii) The deterrence of misuse by customers of banking services;
>
> (iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and
>
> (iv) The maintenance of the safety and soundness of the institution.

12 C.F.R. § 7.4002(b)(2); *White*, 563 F. Supp. 2d at 1369.

At trial, Wells Fargo tried to no avail to show that it gave consideration to the factors. ER 43–47; RT 1433–49 (no documents memorialize consideration of factors), 1508–09, 1526–30 (no documents exist in these areas), 1552–54 (same), 1448:15–1449:1 (no specific recollection about whether bank considered its competitors' posting orders), 1521–23 (no documents reflect that Wells Fargo considered posting-order change a "pricing" decision). Wells Fargo's utter failure to demonstrate that it considered *any* of these factors unequivocally demonstrates that adopting its "high-to-low" posting order could not possibly have been a "pricing" decision governed by section 7.4002.[23]

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[23] Contrary to the amicus brief of the American Bankers Association, the District Court's analysis concerning these four factors did not "rewrite" preemption standards. Am. Bankers Ass'n Amicus Br. at 16–17. The court identified additional grounds that, independent of the factors specified in the regulation,

*Footnote continued on next page*

*First*, Wells Fargo "produced no documentary evidence" that "management considered the impact that these three sequencing orders would have had on the bank's operating costs. Rather, the trial record shows that the bank only considered increased revenue." ER 44. The District Court deemed incredible the contrary testimony of a Wells Fargo executive, finding that it was neither supported by contemporaneous documentary evidence nor "anchored in any genuine recollection of what the bank actually considered when it made this decision." ER 43 (citing RT 1427–40).

*Second*, Wells Fargo failed to produce any credible evidence tending to show that the bank instituted high-to-low re-sequencing of debit-card transactions to deter customers from misusing banking services. *See* ER 44–45. Extensive documentary evidence instead showed that "the bank's intentions behind high-to-low resequencing were to promote—not deter—customer overdrafts." ER 45; PER 603, 652 (TX 38, 57) .

*Third*, "[n]o documentary evidence showed that Wells Fargo considered its competitive position or even knew how its competitors were posting debit-card

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bolstered the conclusion that section 7.4002 does not preempt Plaintiffs' claims. *See* ER 76 (holding that the difference between the bad-faith conduct in this case and the pricing conduct in *Martinez* is "[e]qually fatal" to the preemption defense). Indeed, it was *Wells Fargo* that attempted to make the four factors an issue at trial, as part of its ill-fated attempt to show that it considered high-to-low re-sequencing a "pricing" decision. It is also noteworthy that the court in *White v. Wachovia* viewed the section 7.4002 factors as important to the preemption inquiry. *White*, 563 F. Supp. 2d at 1369.

transactions when it made the decision to post these transactions from high-to-low." ER 46. A bank executive testified regarding only what Wells Fargo "would have" considered, as opposed to what it actually did consider, and then admitted he had "no specific recollection" of whether bank executives considered enhancement of the bank's competitive position when they decided to adopt the challenged practices. *See* ER 45–46; RT 1446–49.

*Fourth*, "no documentary evidence supported Wells Fargo's argument that it changed its posting practices to maintain the safety and soundness of the bank." ER 46.

The striking absence of contemporaneous records showing that Wells Fargo considered any of the four factors during its 9-12 month rollout of the three allied practices led to the District Court's conclusion that the "supposed consideration of these factors . . . was a feigned pretense contrived for trial." ER 77; *see also* ER 46; RT 1433–44, 1508–09, 1526–30.

Further evidence confirmed that the bank did not treat its re-sequencing policy as a "pricing" decision subject to federal control. If Wells Fargo truly regarded its high-to-low ordering as a pricing decision, then it was required to provide notice of that practice to its customers, yet, tellingly, it did not. *See* 12 C.F.R. § 230.3, *et seq*.; ER 47; RT 1530–41. Therefore, the District Court properly found that instead of looking to the federally-recognized principles for safe and sound banking, Wells Fargo implemented its high-to-low ordering based on another, far more troubling consideration: profiteering at consumer expense. *See* ER 43–47; RT 1521–23.

### C. <u>Courts Have Consistently Rejected Preemption of Claims for Unfair Imposition of Overdraft Fees.</u>

Not only was the District Court's rejection of preemption well-founded upon the trial record, it is directly in line with the other decisions rejecting preemption of claims challenging bank's debit card re-sequencing practices. Every federal court faced with the question of whether the Bank Act preempts claims challenging the practice at issue here has held that preemption does *not* apply because state-law claims challenging high-to-low re-sequencing neither conflict with federal law nor unduly burden bank operations.

In a pending multidistrict litigation involving several national banks, including Wells Fargo, the trial court held that "banks are not federally authorized to manipulate the transactions as alleged and therefore their claims are not preempted by federal law." *Checking Account Overdraft*, 694 F. Supp. 2d at 1311. The court explained that federal law "gives Defendant banks the right to charge overdraft fees, but it does not authorize banks to ignore general contract or tort law." *Id*. at 1313. The court rejected the banks' conclusory assertion that the state-law claims impinged on their federally-granted powers:

> A bank could follow both the requirements of sound banking judgment outlined in Section 7.4007 and good

> faith; these principals are not in irreconcilable conflict. . . . [T]hese are state laws of general application that do not vitiate the purposes of the NBA, and banks could comply with both the NBA, OCC regulations and state laws if they refrained from engaging in the criticized posting procedures.

*Id*.

In *White v. Wachovia*, the court reached the same conclusion because "compliance with state regulation is required when state and federal law do not conflict." 563 F. Supp. 2d at 1369 The court's analysis of similar allegations as exist here—that a national bank "delays, reorders, or otherwise manipulates posting transactions to an account"—led to the conclusion that "state law claims of improper overdraft fees and an improperly implemented posting policy present no conflict" with federal law.[24] *Id*. at 1361, 1367.

In *Martinez*, this Court favorably cited *White* as an example of a case where a court properly held that banks are subject to state laws of general application "that prohibit unfair or deceptive acts or practices." 598 F.3d at 555-56. Unlike in *White*, the *Martinez* plaintiffs challenged the *amount* of real estate closing fees, and not, as is at issue here, bookkeeping practices which resulted in the artificial proliferation of fees. *See id.* at 556 ("In essence, the Martinezes argue that these

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[24] Like the District Court here, the *White* court properly treated the preemption inquiry as fact-intensive. *See id.* at 1369 ("[T]he OCC Letter emphasizes that to comply with § 7.4002, a bank must justify its check-posting policy by considering the listed factors. The court is not inclined to dismiss Plaintiffs' claims as preempted before the parties have developed record evidence on this point.").

fees are too high, and ask the court to decide how much an appropriate fee would be."). Given the factual allegations in *Martinez*, this Court held the *amount* of such fees are within the province of federal law. *Martinez* demonstrates that federal law does not extend to, supersede, or preempt claims involving unfair and deceptive overdraft-fee practices like those at issue in this case.

Here, the UCL claim challenges Wells Fargo's manipulation of transactions for the purpose of multiplying the instances of overdrafts for which it assesses fees, and not the amount of the fee charged for the overdrafts. This claim is akin to those this Court, in *Martinez*, recognized are not preempted, *i.e.*, where "a bank engaged in unfair or deceptive business practices by manipulating the posting of transactions to an account in order to impose overdraft fees." *Id.* at 555-56.

Therefore, the District Court correctly ruled that the conclusion of preemption in *Martinez* was inapplicable here:

> Unlike in *Martinez*, plaintiffs in the instant litigation neither challenge whether a particular overdraft fee charged by the bank is "too high," nor do they ask the Court to decide how much an appropriate fee would be. Rather, the "unfair" claim in this litigation targets whether Wells Fargo's manipulation of customer transactions "behind the scenes" to maximize the *occurrence* of overdraft fees during the posting process was a breach of the bank's duty to act in good faith. In other words, it is the bank's allegedly "unfair" practice of assessing and imposing as many overdraft penalties as mathematically possible that is at issue in this action.

PER 8.

## II. THE DISTRICT COURT PROPERLY FOUND WELLS FARGO VIOLATED THE UCL.

The District Court acted well within its discretion in finding Wells Fargo violated the UCL. The UCL is aimed at "protecting the general public against unscrupulous business practices" such as the bank practices shown at trial. *Nelson v. Pearson Ford Co.*, 186 Cal. App. 4th 983, 1015 (2010) (citation omitted). The statute's coverage is "sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). The UCL "was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." *Id.* at 181.

Liability under the UCL depends on a showing that the defendant's acts or omissions were unlawful, unfair, or fraudulent.[25] *See* Cal. Bus. & Prof. Code § 17200. Whether a business practice is unfair or fraudulent is a question "of *fact* which requires a review of the evidence from both parties." *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2006) (emphasis added). Here, the District Court based its UCL liability determination on extensive evidence from the

[25] The District Court's judgment rests on its findings that Wells Fargo's conduct violated both the unfair and fraudulent prongs of the UCL. Each prong supplied an independent basis for liability. *See* ER 60 (citing *Cel-Tech*, 20 Cal. 4th at 180). Therefore, this Court need not reach both statutory prongs, but can affirm the judgment on the basis of either.

trial. First, the court properly found that Wells Fargo violated the UCL's unfair prong through its clandestine re-sequencing of transactions to maximize bank profits from overdraft fees. Second, the court properly found that Wells Fargo's representations to its customers contained affirmative misstatements and omissions that violated the UCL's fraudulent prong.

### A. <u>Wells Fargo's Unfair Conduct Violates the UCL.</u>

The District Court based its conclusion that Wells Fargo violated the UCL upon the most stringent standard for finding "unfair" conduct. It required that the offending conduct "be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Cel-Tech*, 20 Cal. 4th at 186-87. This requirement was expressly "limited" to competitor cases. *Id*. at 187 n.12 ("Nothing we say relates to actions by consumers . . . ."). Even so, the District Court found that the proof at trial satisfied this most stringent standard.[26]

The District Court tethered its unfair practices finding to the legislatively declared policy embodied in the California Commercial Code section 4303(b).

[26] Plaintiffs therefore easily satisfy the less stringent standards for "unfairness" applied by some California appellate courts. In consumer cases like this one, a UCL finding of unfairness may be grounded in a determination that the challenged practice violates established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious and causes injury to consumers outweighing its benefits. *See McKell*, 142 Cal. App. 4th at 1473; *Progressive West Ins. Co. v. Yolo County Super. Ct.*, 135 Cal. App. 4th 263, 286 (2005) (under *Cel-Tech*, "section 17200's 'unfair' prong should be read more broadly in consumer cases because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices").

The Commercial Code imposes a "restraint" on the bank's posting discretion by requiring it to "act in good faith. For example, the bank could not properly follow an established practice of maximizing the number of returned checks for the sole purpose of increasing the amount of returned check fees charged to the customer."[27] Cal. Com. Code § 4303(b), Calif. cmt. 7. The court also discussed the established California public policy—reaffirmed in *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 923 (1985), *appeal dismissed*, 475 U.S. 1001 (1986)—that "where a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise the discretion in good faith and in accordance with fair dealing."[28] *Id*. at 923.

**1. <u>Wells Fargo's Re-Sequencing Was Imposed in Bad Faith.</u>**

Wells Fargo adopted practices specifically designed to pile on overdraft fees charged to customers. Though it approved debit card transactions in real time, Wells Fargo re-sequenced the transactions, posting them "high-to-low" so as to

[27] Wells Fargo's suggestion that the advent of debit card transactions rendered this Legislative Comment irrelevant is belied by the absence of any such statement from the Legislature and by the bank's own reliance on the section in attempting to defend its conduct. *Compare* Opening Br. at 40, *with* ER 62.

[28] A defendant may violate the UCL's unfair prong by breaching the covenant of good faith and fair dealing. *See, e.g.*, *Gabana Gulf Distrib., Ltd. v. GAP Int'l Sales, Inc.*, No. 06-cv-02584, 2008 WL 111223, at *10 (N.D. Cal. Jan. 9, 2008) (plaintiff "may use the covenant claim as a predicate for § 17200 liability."); *In re HP Inkjet Printer Litig*., No. 05-cv-3580, 2006 WL 563048, at *7 (N.D. Cal. Mar. 7, 2006) (same). Good faith here means "consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Restatement (Second) of Contracts § 205, cmt. a (1981). Fair dealing "may require more than honesty." *Id*., cmt. d.

deplete balances as rapidly as is possible and thereby maximize the number of overdraft occurrences. The trial record confirms the District Court's finding that "Wells Fargo's decision to post debit-card transactions in high-to-low order was made for the sole purpose of maximizing the number of overdrafts assessed on its customers, *exactly what Section 4303 and Perdue bar*." ER 66 (emphasis added). Numerous internal Wells Fargo memos admitted at trial revealed that the re-sequencing was purposefully engineered to increase overdraft fees and that, as expected, it had a "colossal impact on depositors," who paid nearly $2 billion in overdraft fees during the class period. ER 35; ER 25–36 (factual findings regarding documents showing bad faith); Facts Sections A–B, *supra*. Testimonial evidence confirmed Wells Fargo's bad faith motive as well. The bank's own expert testified that high-to-low posting would "mechanically . . . lead to more overdrafts" than any other posting order, and a bank executive conceded that he recommended against adopting high-to-low posting because it would adversely affect the bank's customers. *Id.*; ER 27–28.

Wells Fargo then implemented a "Balance Engineering Plan," which, by design, greatly exacerbated the impact of high-to-low re-sequencing. First, Wells Fargo began "commingling," for posting purposes, debit card transactions together with other prevalent debits (like checks and ACH) and then sorted these transactions high-to-low. Commingling these different transaction types together increases the effect of posting "high-to-low." Wells Fargo's documents "show that overdraft revenue was the sole motivating factor" for this policy change, "predicting a 'lift' in overdraft revenues by $40 million." ER 67; *see also id.* 25–36; Facts Section A.3, *supra*.

Next, Wells Fargo implemented a policy change to secretly authorize debit card transactions even when accounts lacked sufficient funds. Internally referred to as the "Shadow Line," this surreptitious extension of credit—completely hidden from customers—greatly exacerbated the impact of high-to-low posting. Wells Fargo documents referred to the Shadow Line as "overdraft via POS," revealing the initiative's true purpose of gouging customers to drive up profits. ER 31–33; Facts Section A.3, *supra*. "No credible or written evidence showed that this initiative was implemented for any other reasons," the District Court found. ER 68.

Wells Fargo's re-sequencing practices were designed "exclusively to generate more overdraft fees and fee revenue at the expense of depositors" in violation of public policy. ER 35–36; *Perdue*, 38 Cal. 3d at 923; Cal. Com. Code § 4303(b), Calif. cmt. 7. They "set the stage for the profiteering that ran rampant during the class period." ER 35–36. Such abusive conduct violates the UCL.

**2. The Checking Account Agreement Does Not Immunize Wells Fargo's Bad Faith Conduct.**

Wells Fargo's customer agreement purports to confer discretion on Wells Fargo regarding posting order, stating that the bank, "may, if it chooses, post items in the order of the highest dollar amount to the lowest dollar amount." ER 817. In fact, the bank *was already* posting debit items from high to low to maximize fees throughout the class period, and its equivocal disclosure does not somehow make that practice fair. The District Court correctly rejected the contractual language as insufficient to justify the bank's bad faith.

Established California law provides that contracting parties must exercise contractual discretion in good faith. The California Supreme Court has specifically held that a contract authorizing a bank to assess insufficient-funds charges remains "subject to the bank's duty of good faith and fair dealing in setting or varying such charges." *Perdue*, 38 Cal. 3d at 923-24 (citing *California Lettuce Growers v. Union Sugar Co.*, 45 Cal. 2d 474 (1955) and other cases); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 795 (1998) (noting that "one having the discretionary power to affect the rights of the other party" has a duty "to exercise that power in a manner consistent with the covenant of good faith and fair dealing" and "in accordance with the parties' legitimate expectations.").[29]

[29] *Accord*, *Okmyansky v. Herbalife Int'l of Am., Inc.*, 415 F.3d 154, 157 n.3 (1st Cir. 2005) ("Ceding discretion in a contract is not tantamount to subjecting oneself

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Like the District Court here, other federal courts supervising cases involving similar bank practices have rejected defenses based on discretionary contract language. *See Checking Account Overdraft*, 694 F. Supp. 2d at 1315 (dismissing argument that national banks' deposit account agreements, including Wells Fargo's, can immunize bad faith high-to-low posting of debits under state law; finding that plaintiffs did "not seek to vary the language of the contract, but rather to have the express contractual terms carried out in good faith."); *White*, 563 F. Supp. 2d at 1364 (refusing to accept "that the Deposit Agreement's statement that Wachovia 'may' post items 'in any order' . . . expressly gives Wachovia the right to manipulate transactions, delay posting indefinitely, and maximize overdraft fees").[30]

Wells Fargo, having delegated itself discretion, grossly abused that discretion. There is no merit to its assertion that the District Court "impose[d]

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to legalized tyranny."); *Amoco Prod. Co. v. Heimann*, 904 F.2d 1405, 1412 (10th Cir.), *cert. denied*, 498 U.S. 942 (1990) ("Where discretion is lodged in one of two parties to a contract or a transaction, such discretion must, of course, be exercised in good faith. That simply means that what is done must be done honestly to effectuate the object and purpose the parties had in mind in providing for the exercise of such power. All the authorities are to this effect.") (citation omitted).

[30] *Hassler v. Sovereign Bank*, 374 Fed. Appx. 341 (3d Cir. 2010), is unpublished and inapposite. The plaintiff there did not allege violations of California law, and the record did not contain internal bank documents evidencing bad faith. Indeed, the plaintiff did not even "allege any bad motive on the part of Sovereign." *Id*. at 345. In addition, Sovereign's checking account agreement, unlike Wells Fargo's agreements, stated outright: "Generally, we post your payment transactions each business day in descending order, starting with the largest payment order that is presented for payment." *Id.* at 342.

obligations contrary to the terms of the agreement," because under California law, every contract requires the parties to carry out their obligations in good faith. *See Hailey v. California Physicians' Serv.*, 158 Cal. App. 4th 452, 472 (2007); (Restatement (Second) of Contracts § 205 (1981)). The District Court simply held Wells Fargo to that standard.

Wells Fargo misstates the holding and relevant facts of *Carma Developers v. Marathon Development California, Inc*., 2 Cal. 4th 342 (1992). The contract at issue in *Marathon* was a commercial lease— negotiated by "sophisticated commercial entities operating at arm's length and assisted by competent counsel"—and at issue was the validity of a provision that gave the landlord the absolute right to terminate when the commercial tenant gave notice of an intent to sublet. *Id*. at 350-54. Wells Fargo cites different language in the *Marathon* agreement containing the word "may" that permitted the landlord, after termination, to sign a lease with a new tenant. Opening Br. at 45-46; *Marathon*, 2 Cal. 4th at 351-52. But the holding there related to the provision that the landlord "*shall* have the right by written notice to Tenant to terminate," not on any analysis of the "may" language. *Id.* at 351-52 (emphasis added). Moreover, the court made clear that the covenant of good faith and fair dealing *did* apply to the lease. The court's lengthy analysis quoted the Restatement and concluded that liability for bad-faith performance turns on whether the performance is "contrary to the contract's purposes and the parties' legitimate expectations." *Id*. at 372-74. The outcome in *Marathon* was based on the finding that the termination was not in bad faith because it "was certainly within the reasonable expectations of the parties that Marathon might terminate the lease." *Id*. at 374.

In contrast, Wells Fargo violated consumers' reasonable expectations as found by the District Court. Wells Fargo purposely reinforced the natural expectation that funds are debited from accounts in the order in which transactions occur. ER 54–55. Yet it re-sequenced those transactions when it came time to post them.[31] In addition, Wells Fargo breached reasonable expectations by exercising its contractual discretion in bad faith. ER 60–69. No Wells Fargo customer reasonably expected the bank to intentionally manipulate transactions to artificially increase the number of overdrafts. *See Djowharzadeh v. City Nat'l Bank & Trust Co*., 646 P.2d 616, 619 (Okla. Ct. App. 1982) (banks "are invested with enormous public trust").

[31] Wells Fargo cites three decisions—*Hill v. St. Paul Fed. Bank for Sav*., 768 N.E.2d 322 (Ill. App. Ct. 2002); *Daniels v. PNC Bank, N.A*., 738 N.E.2d 447 (Ohio Ct. App. 2000); and *Fetter v. Wells Fargo Bank Texas, N.A*., 110 S.W.3d 683 (Tex. App. 2003)—that address the posting of paper checks, a separate factual context that does not involve instantaneous approval. Further, one justification Wells Fargo and other banks have offered for processing checks in high-to-low order is that consumers purportedly prefer their bank to process large-ticket items (such as rent checks and car payments) ahead of other transactions. This purported justification, which as set forth above is wholly unsupported by the record here, vanishes completely in the debit-card setting, since all posted debit card transactions have been approved prior to posting/re-sequencing. ER 36–37; Facts Section B, *supra*.

The form contract did nothing to change these expectations. Wells Fargo's own expert conceded that even consumers who took the time to read the small-print section regarding posting order could not have been expected to understand how posting order could increase overdraft fees. *See* ER 53, 63–64; RT 977–82 (it is "completely unrealistic to assume . . . many consumers would actually read those lengthy documents"). The contract itself provided that the bank's discretion was limited by "laws governing your Account [that] either requires or prohibits [sic] a particular order," *e.g.*, the Legislative Comment requiring good-faith posting.[32] *Id*.

The honest belief of consumers that Wells Fargo would not surreptitiously gouge them was entirely reasonable. Wells Fargo offered no credible evidence that its contractual terms were sufficient to put customers on notice of its bad faith practices. ER 49-53, 63-64, 70-71. Wells Fargo's attempt to rely on a self-serving interpretation of its contract terms ignores established legal principles:

[32] By contrast, the real-estate purchase agreement, negotiated with the assistance of counsel, in *Gaggero v. Yura*, No. B203780, 2009 WL 2916759, at *15 (Cal. Ct. App. Sept. 14, 2009) (unpublished), did "not state or imply that the parties were under a mutual and mandatory duty to negotiate" real-property conditions, covenants and restrictions ("CC & R's"). The seller instead "bargained for the express and exclusive right to dictate the CC & R's," and the "plaintiff willingly bargained away any right or ability to insist on certain CC & R's or reject others." *Id*. at *14-15. It was therefore unreasonable for the plaintiff to have expected to negotiate CC & R's. Likewise, in *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1122 (2008), there was "unfettered discretion expressly bargained for in the agreement." Here, not only were the class members not allowed to bargain for anything, but the adhesion contract explicitly limited Wells Fargo's discretion, requiring it to comply with state law.

> An examination of express contract terms alone is *insufficient* to determine whether there has been a breach of the implied covenant of good faith and fair dealing. To comply with his obligation to perform a contract in good faith, a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party. The purpose, intentions, and expectations of the parties should be determined by considering the contract language *and* the course of dealings between *and* conduct of the parties.

*Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist.*, 226 F.3d 1170, 1176 (10th Cir. 2000) (emphasis added); *see also Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 818 (1979) (the "precise nature and extent of the duty" of good faith and fair dealing "will depend on the contractual purposes").[33]

Wells Fargo seeks to avoid its duty to act in good faith by citing (without indication) a dissent in *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1060 (9th Cir. 2010), interpreting the word "may" in a statute relating to Indian tribes. The dissent neither addressed

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[33] The good-faith performance doctrine allows "the exercise of discretion for any purpose . . . reasonably within the contemplation of the parties. A contract thus would be breached by a failure to perform in good faith if a party uses its discretion for a reason outside the contemplated range—a reason beyond the risks assumed by the party claiming a breach." *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 30 (Ariz. 2002) (citation omitted). Stated differently, the covenant of good faith and fair dealing requires contracting parties to act "with honesty of purpose, freedom from fraudulent intent and faithfulness to duty or obligation." *Raab v. Casper*, 51 Cal. App. 3d 866, 872 (1975). Wells Fargo departed from this standard.

contract language nor suggested that inserting the word "may" into a form contract relieves a contracting party of its duty to exercise discretion in good faith.[34]

### 3. The Bank's Attempt to Justify Its Bad Faith Fails.

Wells Fargo contends that the Commercial Code's prohibition of bad-faith posting does not apply because it "did not adopt *ad hoc* posting rules for different customers." Opening Br. at 47. However, the Code actually provides that, "for example," "the bank could not properly follow an *established* practice of maximizing the number of returned checks . . . ." Cal. Com. Code § 4303(b), Calif. cmt. 7 (emphasis added). It was the *systematic* re-sequencing, made possible by Wells Fargo's computer software, that produced the massive gain in profits from overdraft fees here.

Wells Fargo also asserts that the Commercial Code does not apply because "its posting procedures did not maximize overdraft fees." Opening Br. at 47. To support this argument Wells Fargo cites a smattering of practices unrelated to posting which the District Court properly rejected as not bearing on the overdraft fee-maximizing effect of "high-to-low" posting. As the District Court found:

> That Wells Fargo could have gouged even worse than it has hardly alters the fact that it has gouged badly. Plaintiffs do not need to prove that the bank mistreated

[34] *Amici* American Bankers Association incorrectly argues that "[p]rohibiting the terms 'may' in bank deposit agreements and other disclosures . . . would serve no purpose . . . ." Am. Bankers Amicus Br. at 23–24. It is Wells Fargo's bad faith conduct, not its mere use of the word "may," that justifies the District Court's finding of liability.

> depositors in every way possible in order to show that they were mistreated. The presence of an extraordinarily high ten-item cap on daily overdraft fees, as well as a minuscule one-dollar courtesy threshold, do not change the fact that Wells Fargo deployed the challenged practices for the sole purpose of multiplying overdrafts to increase fee revenue.

ER 68. The District Court properly ruled that Wells Fargo's practices "were adopted solely to maximize the number of overdraft items assessed on customers." *Id*. Wells Fargo's assertion that it considered factors other than maximizing fees was unsupported by the trial evidence. In any event, the Code proscribes all bad faith conduct, and is not limited to instances where there is one sole motive. Cal. Com. Code § 4303(b), Calif. cmt. 7 ("For example . . .").

### B. <u>Wells Fargo's Fraudulent Conduct Violates the UCL.</u>

Wells Fargo's facade of phony disclosure establishes an independent basis for liability under the UCL, which safeguards "the right of the public to protection from fraud and deceit." *People ex rel. Bill Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 514-15 (2002) (citations omitted). Significantly:

> the fraud prong of section 17200 bears little resemblance to common law fraud or deception. Under section 17200, the test is whether the public is likely to be deceived. This means that a section 17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage.

*Id*. at 516-17. The District Court identified a series of material misrepresentations and omissions that were likely to—and did—deceive the named plaintiffs and the class. ER 48–57, 69–73, 79–80; Facts Section D, *supra*. The bank's fraud cloaked the unfair practices in secrecy, contributing to the class members' injuries. Had the bank truthfully disclosed its overdraft-fee practices, the class could and would have avoided harm from wrongful fees.

### 1. <u>The Named Plaintiffs Have Standing to Sue.</u>

Wells Fargo argues incorrectly that Proposition 64 deprives the named plaintiffs of standing under the UCL's fraud prong. While "actual reliance" is now required for a named plaintiff to have standing to sue on behalf of a class using this prong, such a plaintiff need only allege that the misrepresentation was one cause, not the only cause, of the harm. *See In re Tobacco II Cases*, 46 Cal. 4th 298, 326-28 (2009). Contrary to Wells Fargo's argument, a plaintiff alleging fraudulent conduct under the UCL need not allege that the challenged misrepresentations or omissions were "the sole or even the predominant or decisive factor influencing his conduct." *Id.* Rather, a named plaintiff has standing to sue if, but for the defendant's misrepresentations and omissions, she "in all reasonable probability would not have engaged in the injury-producing conduct." *Id.*

Furthermore, where, as here, "a fraud claim is based upon *numerous* misrepresentations . . . plaintiffs need not allege the specific advertisements the individual plaintiffs relied upon," but need only "provide a representative selection of the advertisements or other statements . . . ." *Morgan v. AT & T Wireless Servs.*, *Inc*., 177 Cal. App. 4th 1235, 1262 (2009) (emphasis added). And where—as here—the similar "misrepresentations and false statements were part of an extensive and long-term advertising campaign," a plaintiff "is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements." *Tobacco II*, 46 Cal.4th at 328.

The District Court found "it is clear that both Ms. Gutierrez—the class representative—and Ms. Walker have alleged and proven that they were harmed as a result of misrepresentations and omissions by Wells Fargo." ER 80. The trial record confirms this finding. With regard to Wells Fargo's brochure misrepresenting that money would be deducted from her account "automatically," Plaintiff Gutierrez testified: "I have read this document. Whether it was in the bank, after the bank, at home, I have referred to it."[35] RT 463; *see also* RT 372–76, 464, 469. In her understanding, "'automatic' is like an automatic window. You push the button, it goes up immediately. . . . So when they swipe the card, I assumed once they swipe that card, it was automatically deducted from my account."[36] RT 386. She further testified that had she been informed of Wells

[35] Wells Fargo's standing argument depends on mischaracterizations of Ms. Gutierrez's testimony. At deposition, she was asked whether she had read the deceptive brochure "when you opened your account," not at any time. *Compare* Opening Br. at 51–52, *with* RT 461–64. Wells Fargo may not have given her the brochure she read featuring "automatically" at account opening, but she testified that the bank sent it to her. *Compare* Opening Br. at 51, *with* RT 469.

[36] Ms. Gutierrez's testimony demonstrates the falsity of Wells Fargo's assertions that "Plaintiffs presented no evidence that reasonable consumers were misled by

*Footnote continued on next page*

Fargo's actual posting practices when she incurred the overdraft charges in question, she would have avoided the charges. *See* RT 399, 403–04, 405. Thus, but for the bank's omissions and misrepresentations, Ms. Gutierrez would *not* have "engaged in the injury-producing conduct." *Tobacco II*, 46 Cal. 4th at 326.

Plaintiff Walker also was exposed to, and relied to her detriment on, Wells Fargo's misrepresentations and omissions. *See* RT 758 ("Q: So you read this section that said: 'Each purchase is automatically deducted from your primary checking account'? A: Yes, I did."). Ms. Walker testified that, based on her review of this brochure section, she thought her money came out of her account right away when she used her debit card to buy something. *See* RT 785 ("I just thought it would be immediate. . . . I read it on my welcome jacket."). Like Ms. Gutierrez, Ms. Walker testified that she would have avoided harm had she known the truth about Wells Fargo's conduct. *See* RT 775.

Wells Fargo ignores or mischaracterizes this testimony, found to be credible. *See* ER 16, 23. The bank contends that the plaintiffs' lack of oversight is to blame for their overdraft fees. Opening Br. at 50. But the bank cannot deny (1) that its *re-sequencing* resulted in *additional* fees beyond what it otherwise would have imposed and what customers could have expected, or (2) that those additional fees are the only ones included in the court's restitution award. In reality, the named

*Footnote continued from previous page*
the term 'automatically' . . . no evidence that *any* customer was deceived . . . ." Opening Br. at 57 (emphasis in original). Ms. Gutierrez was deceived.

plaintiffs "could not have predicted that what appeared to be a single overdraft would be converted to ten by the artifice of high-to-low resequencing." ER 69. The fact they did not fully understand the bank's practices does not contradict the finding that full disclosure would have enabled them to avoid being injured.

"Proposition 64 should be read in light of its apparent purposes, *i.e.*, to eliminate standing for those who have not engaged in any business dealings with would-be defendants and thereby strip such unaffected parties of the ability to file 'shakedown lawsuits,' while preserving for actual victims of deception . . . the ability to sue and enjoin such practices." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 317 (2011). The electorate "plainly preserved standing for those who had had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices." *Id.* at 321; *Lozano v. AT & T Wireless Services, Inc.*, 504 F.3d 718, 734 (9th Cir. 2007).[37] Here, the named plaintiffs have standing because they relied on Wells Fargo's material misstatements, and additionally because they dealt directly with the bank and lost money as a result of its unfair practices.

[37] *See also Coupons, Inc. v. Stottlemire*, 588 F. Supp. 2d 1069, 1075 (N.D. Cal. 2008); *Brewer v. Indymac Bank*, 609 F. Supp. 2d 1104, 1123 (E.D. Cal. 2009); *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 715-16 (2007).

### 2. **The Bank's Misrepresentations and Omissions Were Material and Actionable.**

If alleged misrepresentations or omissions are likely to deceive the public, UCL class relief is available "without individualized proof of deception, reliance and injury." *Tobacco II*, 46 Cal. 4th at 320; *Morgan*, 177 Cal. App. 4th at 1255 ("A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under the UCL.") (internal quotation marks and citation omitted). Reliance is presumed upon a showing that a misrepresentation or omission was material. *See Tobacco II*, 46 Cal. 4th at 327. A misrepresentation or omission is "material if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question, and as such materiality is generally a *question of fact* . . . ." *Id*. (internal quotation marks and citations omitted) (emphasis added); *see also Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 508 (2003) ("whether an advertisement or business practice violates the UCL is not measured by the perception of the most sophisticated, wary, or expert consumer, but by the likely effect on the normally credulous consumer").

The District Court found that Wells Fargo committed a series of omissions and affirmative misrepresentations. ER 70–73; *see also* Fact Section D, *supra*. These omissions and misrepresentations were designed to conceal the bank's profitable re-sequencing scheme and, in fact, deceived customers regarding the manner in which Wells Fargo processed transactions.

### C. **The District Court Properly Certified the Class in Light of the Common Harm Incurred.**

The District Court properly recognized the class members are similarly situated as to the readily determined excess fees they incurred as a result of a standardized process. The class is united by both common questions and a common interest. *See* PER 24-25. Wells Fargo attempts to manufacture individualized issues by shifting the focus to the absent class members. The attempt lacks merit.

First, Wells Fargo relies on the Eighth Circuit's opinion of California law to assert that a trial court must determine "if the entire class," not simply the named plaintiff, has standing. Opening Br. at 53 (citing *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010)). This is incorrect. "Proposition 64 was not intended to, and does not, impose section 17204's standing requirements on absent class members in a UCL class action where class requirements have otherwise been found to exist." *Tobacco II*, 46 Cal. 4th at 324. The District Court applied Federal Rule of Civil Procedure 23, not any state procedural rule, in certifying the class. *See* PER 24-25. *Avritt* offers only speculative dicta that class members "may not have had a cause of action themselves . . . ." 615 F.3d at 1034. Here, however, the District Court ascertained the class, all of whose members were shown to have suffered common harm in the form of excess overdraft fees, and thus all of whom had a cause of action.

Second, Wells Fargo makes the unsupported and erroneous claim that "plaintiffs were required to prove that each class member relied on the alleged misrepresentations." Opening Br. at 55. The District Court properly found that the named class representatives were actually deceived, but there is no requirement to show that each of the absent class members was deceived. Actual reliance is *not* a required element of a UCL fraud violation. *See Tobacco II*, 46 Cal. 4th at 320 (relief is available without proof of individualized reliance). Liability turns on whether "members of the public are likely to be deceived." *Id*. at 312 (internal quotation marks and citation omitted).

Wells Fargo's misrepresentations and omissions commonly, and adversely, affected the entire class. *See* Advisory Committee Notes to Rule 23(b)(3) (1966 Amendments) ("[F]raud perpetrated on numerous persons by the use of similar misrepresentations" may be "an appealing situation for a class action"); *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975) (if they were "allegedly defrauded over a period of time by similar misrepresentations," class members are "united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions").

## III. <u>THE DISTRICT COURT'S RESTITUTION AWARD IS SUPPORTED BY THE RECORD AT TRIAL.</u>

The District Court had broad discretion in awarding restitution. *See Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 176-801 (2000) (UCL "authorizes the court to fashion remedies to prevent, deter, and compensate for unfair business practices."). Its award, which followed a bench trial, is reviewed under the "clear error" standard. *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 843 (9th Cir. 2004). Having found that Wells Fargo violated the UCL, the District Court's task was to determine the harm caused by Wells Fargo's misconduct—*i.e.*, its re-sequencing of debit card transactions—and "restore the *status quo ante* as nearly as possible." *Tomlinson v. Indymac Bank, F.S.B.*, 359 F. Supp. 2d 891, 893-94 (C.D. Cal. 2001) (citing *Cortez*, 23 Cal. 4th at 177). The District Court's award after trial was well supported by the evidentiary record, including evidence of Wells Fargo's practices, consumers' reasonable expectations, and Plaintiffs' expert's analysis, which drew upon Wells Fargo's transactional data to reliably measure, on an account-by-account basis, each customer's harm resulting from the re-sequencing. ER 86–89; RT 869–918.[38]

Plaintiffs' expert, Arthur Olsen, used archived transactional data for all California customers during the class period. In general, the expert analysis took

[38] As the District Court's award was based on "substantial evidence," it is plainly distinguishable from the award vacated in *Colgan v. Leatherman Tool Grp.*, which was based on "no evidence concerning the amount of restitution necessary to restore purchasers to the status quo ante." 135 Cal. App. 4th 663, 700 (2006).

the debit card transactions sequenced high-to-low by Wells Fargo, and reordered them either chronologically or low-to-high. The expert analysis provided the District Court with multiple options, or "scenarios," for measuring the harm. For each scenario, Mr. Olsen did not simply approximate aggregate harm to the class, but rather, identified each *specific customer* harmed by Wells Fargo's re-sequencing and the amount of his or her individual harm (*i.e.* the excess overdraft charges each incurred). ER 87–88; RT 888:3–6.

Plaintiffs advocated for one of two of the alternative posting scenarios. The District Court adopted one of them, the so-called "scenario 2A," which measured the impact of Wells Fargo's actual posting sequence in comparison to a chronological sequencing. Specifically, scenario 2A assessed an alternative posting sequence where: (a) debit card transactions were removed from the batch and sorted in the best approximation of chronological order possible (rather than in high-to-low order, as Wells Fargo posted them); and (b) the rest of the transaction types were sorted as Wells Fargo sorted them throughout the class period. ER 86–88; PER 63, 571. This method therefore isolated the effect of high-to-low re-sequencing of debit card transactions as compared with chronological posting.

Wells Fargo's only criticism regarding the use of scenario 2A is that it placed chronological debit card transactions prior to, instead of after, checks and ACH in the posting order. It is disingenuous for Wells Fargo to urge a "checks first" measure, now, when the head of Wells Fargo's Consumer Deposit Group testified at trial that "checks first" is not a "viable posting order" and, if adopted, would "undermine the safety-and-soundness" of the bank. RT 1471–73.

Indeed, not only has Wells Fargo never posted checks and ACH before debit cards—including now, *see id.*; ER 87; PER 48, 51, 63—but when asked on direct examination why Wells Fargo would never do so, Wells Fargo's Kenneth Zimmerman explained:

> The transactions there at the end would be must-pay transactions. And so, they would risk going beyond the overdraft tolerance on the account.
>
> So it would really -- it would undermine the safety-and-soundness mandate that we've got about controlling our overdraft exposure, because in that example, we would be using up the overdraft tolerance potentially in total on checks and ACH before we processed a single debit card.

RT 1472:21–1473:8. Wells Fargo fails to explain why "checks first"—which its executive testified is *not* a "viable posting order"—could somehow be a proper "but for" world for purposes of measuring harm to the class. The only possible explanation is that "Wells Fargo now suggests radical rearrangements of credits, checks, and ACH transactions to artificially *minimize* the restitution awarded to the class." ER 87.

Mr. Olsen's analysis only measures the impact of re-sequencing debit card transactions. That debit card re-sequencing will affect the order of all other transactions, including checks and ACH, does not undermine the District Court's restitution award in any way. Rather, if Wells Fargo's re-sequencing caused some customers to be charged overdraft fees on checks and ACH transactions, there is no reason that harm—a consequence of the bank's misconduct regarding the re-sequencing of debit card transactions—should go uncompensated.

Moreover, contrary to Wells Fargo's argument, placing debit cards ahead of checks and ACH most closely approximates real-time chronological posting (and consumers' actual expectations). Debit card transactions are always *authorized* prior to posting, whether they post the day of transaction or several days after the transaction. In contrast, all checks and ACH transactions are authorized only at the time of posting when they are "presented" for payment. Hence, the authorization (or "honoring") of checks and ACH transactions necessarily occurs, chronologically speaking, after the authorization of all debit card transactions that post the same day. *See* RT 608–09, 1022–23, 1056:22–1057:10, 1106, 1112–13, 1121; PER 742.[39]

Accordingly, the District Court selected the chronological analysis that best fit the facts of the case in terms of measuring the harm to class members by

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[39] Plaintiff Gutierrez's $65 check, cited by Wells Fargo, underscores the fallacy of Wells Fargo's argument. Wells Fargo authorized her check *after* authorizing the debit card transactions that posted the same day, and Ms. Gutierrez did not expect the check to be approved and processed until sometime after she wrote it. *See* ER 673 (TX 1); RT 393:2–7, 409:15–22, 438:16–25, 442–47; ER 10.

comparison to a viable alternative that properly posted debit cards chronologically and otherwise left Wells Fargo's posting order as it was. *See* ER 87–89. The award is well supported by the record.

In fact, if anything, the District Court's award significantly *understates* the restitution owed to the class. Another perfectly proper way to measure the harm caused by Wells Fargo's re-sequencing is to compare the overdrafts Wells Fargo imposed with what it would have charged under its prior California posting practice—*i.e.*, before Wells Fargo began violating the UCL—which Mr. Olsen calculated as $336,080,284.76. *See* RT 901–10; PER 570(TX 212F).[40] While the District Court did not adopt this approach (ER 86), an award based on this measure would best restore the *status quo ante* by placing class members in the position they would have been in had Wells Fargo had not implemented its unlawful re-sequencing practice. *Tomlinson*, 359 F. Supp. at 893-94; *Cortez*, 23 Cal. 4th at 177; *Miletak v. Allstate Ins. Co.*, No. C 06-03778, 2010 WL 809579, at *7 (N.D.

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[40] Expert Olsen calculated this amount by comparing the overdraft charges Wells Fargo assessed with what it would have assessed had the same transactions been posted under the order Wells Fargo used in California before it implemented high-to-low re-sequencing; the bank detailed the prior practice in a filing. *See* RT 901–10; Docket 334-1. After Expert Olsen completed his analysis, Wells Fargo submitted a "Notice of Correction," indicating that its earlier description of one aspect of its prior posting order—how checks were posted—may have been wrong. *See* Docket 383. None of Wells Fargo's witnesses at trial could say how checks were posted before high-to-low re-sequencing was implemented (*see* RT 72:10–21, 110:21–113:08, 1308:25–1309:3, 1409:22–1410:1), and the bank ultimately stipulated that checks were posted either high-to-low or sequentially during that time period. *See* PER 63(Docket 448).

Cal. Mar. 5, 2010) ("'[A] court of equity may exercise the full range of its inherent powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved.'") (quoting *People v. Superior Court*, 9 Cal. 3d 283, 286 (1973)).

**A. <u>The District Court Incorrectly Denied Pre-Judgment Interest.</u>**

Under California Civil Code section 3287(a), the class is entitled to pre-judgment interest on the restitution awarded. *Ballard v. Equifax Check Servs*., 158 F. Supp. 2d 1163, 1176-77 (E.D. Cal. 2001) (holding section 3287 applies to UCL restitution). "It has long been settled that section 3287 should be broadly interpreted to provide just compensation to the injured party for loss of use of money during the prejudgment period." *Gourley v. State Farm Mut. Auto. Ins. Co.*, 53 Cal. 3d 121, 132 (1991).

Here, Wells Fargo denied class members their use of their funds for up to six years. The District Court found the restitution was not "certain or capable of being made certain by calculation" under section 3287(a). PER 2-3. The restitution awarded, however, was directly tied to specific overdraft charges, the individual dollar amounts of which were certain and undisputed. *See* ER 86–88; Olsen at RT 869–918. Prejudgment interest can be calculated reliably. *See Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 232 (5th Cir. 1972) (awarding interest under section 3287(a) where “[t]he jury was not called upon to calculate a disputed wage rate but to decide how many payments at the predetermined rate were not made.”).

Additionally, the District Court should have awarded discretionary pre-judgment interest under California Civil Code section 3288, since justice requires that class members be compensated for being denied, for many years, funds Wells Fargo wrongfully took from them. *In re Pago Pago Aircrash of January 30, 1974*, 525 F. Supp. 1007, 1015-18 (C.D. Cal. 1981).

### B. <u>The District Court Incorrectly Declined to Consider Punitive Damages</u>

The District Court ruled that it did not need to address Plaintiffs’ claim for punitive damages, based on its finding that Plaintiffs sought only injunctive relief for their common law fraud claim. PER 3–4; ER 73. That finding, however, was based on a statement the District Court took out of context, made a time when the status of Plaintiffs’ class fraud claim was unclear to the parties. PER 3–4. Subsequent to the statement at issue, in a pre-trial ruling, the District Court clarified that Plaintiffs did have a live, triable class fraud claim. ER 133–34. Plaintiffs therefore pursued their fraud claim at trial on a class-wide basis, and pursued punitive damages. ER 99–103, 109–10; PER 55–59; *see also* ER 946–49. The District Court therefore incorrectly denied Plaintiffs’ request for further proceedings regarding punitive damages.

**CONCLUSION**

For the foregoing reasons, the judgment should be affirmed and Plaintiffs' cross-appeal granted.

Respectfully submitted,

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April 20, 2011

## CERTIFICATE OF COMPLIANCE

This brief contains 19,840 words, as determined by Microsoft Word 2007, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. Together with this brief, pursuant to Circuit Rule 32-2, Plaintiffs-Appellees-Cross-Appellants are filing a Motion to Exceed Type-Volume Limitation set forth in Rule 28.1(e)(2)(B) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman and 14 point font.

/s/ Richard M. Heimann
Richard M. Heimann

April 20, 2011

# STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellees-Cross-Appellants Veronica Gutierrez, *et al*. state that they are not aware of any related cases.

/s/ Richard M. Heimann
Richard M. Heimann

April 20, 2011

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system of on April 20, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by appellate CM/ECF system.

__/s/ Roger Heller
Roger Heller

April 20, 2011

# ADDENDUM: RELEVANT STATUTES AND REGULATIONS

## 12 U.S.C. § 24 (Seventh)

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power--

* * *

**Seventh.** To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. . . .

## 12 C.F.R. § 7.4002

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

**(b) Considerations.**

(1) All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

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

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

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

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

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

**(c) Interest.** Charges and fees that are "interest" within the meaning of 12 U.S.C. 85 are governed by § 7.4001 and not by this section.

**(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.

**(e) National bank as fiduciary.** This section does not apply to charges imposed by a national bank in its capacity as a fiduciary, which are governed by 12 C.F.R. part 9.

**12 C.F.R. § 7.4007**

**(a) Authority of national banks.** A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

**(b) Applicability of state law.**

(1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.

(2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:

(i) Abandoned and dormant accounts;

(ii) Checking accounts;

(iii) Disclosure requirements;

(iv) Funds availability;

(v) Savings account orders of withdrawal;

(vi) State licensing or registration requirements (except for purposes of service of process); and

(vii) Special purpose savings services;

**(c) State laws that are not preempted.** State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

## 12 C.F.R. § 7.4009

**(a) Authority of national banks.** A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

**(b) Applicability of state law.** Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

**(c) Applicability of state law to particular national bank activities.**

(1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

(i) Contracts;

(ii) Torts;

(iii) Criminal law

(iv) Rights to collect debts;

(v) Acquisition and transfer of property;

(vi) Taxation;

(vii) Zoning; and

(viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

## California Business & Professions Code § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

## California Business & Professions Code § 17203

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

## California Civil Code § 3287

(a) Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

(b) Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed.

## California Civil Code § 3288

In actions other than contract. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.

## California Commercial Code § 4303

(a) Any knowledge, notice, or stop-payment order received by, legal process served upon, or setoff exercised by a payor bank comes too late to terminate, suspend, or modify the bank's right or duty to pay an item or to charge its customer's account for the item if the knowledge, notice, stop-payment order, or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the earliest of the following:

(1) The bank accepts or certifies the item.

(2) The bank pays the item in cash.

(3) The bank settles for the item without having a right to revoke the settlement under statute, clearing house rule, or agreement.

(4) The bank becomes accountable for the amount of the item under Section 4302 dealing with the payor bank's responsibility for late return of items.

(5) With respect to checks, a cutoff hour no earlier than one hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

(b) Subject to subdivision (a), items may be accepted, paid, certified, or charged to the indicated account of its customer in any order.

**Comment 7**

Subsection (b) provides that a payor bank may accept or pay items in any order. For example, three checks drawn on a customer's account are presented for payment to the payor bank as follows: an $850 check to the Internal Revenue Service, a $300 check to a department store and a $200 check to John Doe. The balance of available funds in the customer's account is $900. Since the three checks overdraw the customer's account by $450 the payor bank has no duty to the customer to pay all three checks. Under subsection (b) if the bank chooses not to pay all of the checks, it may either pay the $850 check to the IRS and return the other two smaller checks or pay the two smaller checks and return the $850 check. In this example, it may well be that the customer would prefer that the check to the IRS be paid because nonpayment may have more serious consequences than nonpayment of the other two checks, 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. The bank has no way of knowing the wishes of the customer, but it may be able to identify a check that appears to be particularly important. It is necessary to give discretion to the payor bank because it is impossible to state a rule that will be fair to the 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. Further, the drawer has drawn all the checks, the drawer should have funds available to meet all of them and has no basis for urging one should be paid before another; and the holders have no direct right against the payor bank in any event, unless of course, the bank has accepted, certified or finally paid a particular item, or has become liable for it under Section 4-302.

The only restraint on the discretion given to the payor bank under subsection (b) is that the bank act in good faith. For example, the bank could not properly follow an established practice of maximizing the number of returned checks for the sole purpose of increasing the amount of returned check fees charged to the customer. On the other hand, the bank has the right to pay items for which it is itself liable ahead of those for which it is not. (1992 Senate Daily Journal 7350)

**Nevada Revised Statute § 657.120**

1. A financial institution may impose and collect a fee or charge, not to exceed an amount specified in or limited by specific statute, for any service it provides to a customer, if the fee or charge is clearly and conspicuously disclosed in writing to the customer before the customer receives the service. A financial institution must provide a customer with written notice of any increase in the fee or charge at least 10 days before the increase becomes effective.

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

(a) In the order the checks were written;

(b) From the lowest check number to the highest check number; or

(c) In order of ascending amounts, the check for the smallest sum being presented first.

3. As used in this section, “financial institution” means an institution licensed pursuant to the provisions of this title or title 56 or chapter 645B, 645E or 649 of NRS, or a similar institution chartered or licensed pursuant to federal law.