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6 Attorneys for Plaintiffs WILLYUM WATERS and
FRANK SMITH, on behalf of themselves and all
7 others similarly situated.

8
9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11

12 WILLYUM WATERS, FRANK SMITH, as)
individuals and on behalf of all others similarly)
13 situated,)

14 Plaintiffs,)

15 v.)

16 U.S. BANCORP, U.S. BANK, N.A., and DOES 1)
17 through 125,)

18 Defendants.)
19)
20)
21)
22)
23)
24)
25)

CASE NO.: CV 09 2071 EMC

**FIRST AMENDED CLASS ACTION
COMPLAINT**

1. VIOLATION OF UNFAIR BUSINESS PRACTICES ACT [BUSINESS & PROFESSIONS CODE SECTION 17200, ET SEQ.]
2. VIOLATION OF UNFAIR BUSINESS PRACTICES ACT [BUSINESS & PROFESSIONS CODE SECTION 17500, ET SEQ.]
3. FRAUD
4. NEGLIGENT MISREPRESENTATION
5. BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

DEMAND FOR JURY TRIAL

26 Plaintiffs FRANK SMITH and WILLYUM WATERS (“Plaintiffs”), on behalf of themselves and
27 all others similarly situated (i.e., the members of the various Plaintiff Class described and defined, infra),
28 herein allege as follows:

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I

JURISDICTION AND VENUE

1. This Court has original jurisdiction of this action under the Class Action Fairness Act of 2005. The amount-in-controversy exceeds the sum or value of \$5,000,000 exclusive of interest and costs, and there is minimal diversity because certain members of the class are citizens of a different state than any defendant as required by 28 U.S.C., section 1332(d)(2).

2. Venue as to Defendant is proper in this judicial district because Defendant U.S. Bank, N.A.'s northern California headquarters is in the City and County of San Francisco. Furthermore, Defendants U.S. Bank, N.A. and U.S. Bancorp do substantial business in this judicial district and some of the acts complained of occurred in this judicial district.

II

GENERAL ALLEGATIONS

3. This is a civil action primarily seeking from Defendants U.S. Bank, N.A. and U.S. Bancorp (together referred hereinafter as "U.S. Bank," "Defendants" or "Defendant U.S. Bank") restitution and disgorgement of all profits gained as a result of wrongfully taking overdraft fees from U.S. Bank customers' checking accounts after debit card transactions and ATM withdrawals when customers had sufficient funds in their checking accounts to cover these transactions at the time they were made. Plaintiffs also seek remedies for Defendants' failure to adequately notify customers of this practice. Finally, Plaintiffs seek to enjoin Defendants from continuing to conduct such improper activities. Plaintiffs, for themselves and all others similarly situated, brings this action pursuant to the Consumer Legal Remedies Act, Civil Code section 1750, *et seq.*; the Unfair Business Practices Act, Business & Professions Code section 17200, *et seq.*; and False Advertising, Business & Professions Code section 17500, *et seq.*; as well as California common law fraud, negligent misrepresentation, and breach of the implied covenant of good faith and fair dealing.

4. Plaintiffs FRANK SMITH and WILLYUM WATERS are residents of the County of Sacramento, California. They entered into their contractual relationship with U.S. Bank in the County of Sacramento, California, and their account is currently maintained at a Sacramento County U.S. Bank office.

1 5. Defendant U.S. Bancorp is the parent of all U.S. Bank entities. U.S. Bancorp is a
2 diversified financial services company providing banking, insurance, investments, mortgage banking
3 and consumer finance to individuals, businesses and institutions in all 50 states and internationally. U.S.
4 Bank Inc. is headquartered in Minnesota.

5 6. Defendant U.S. Bank, N.A. is a subsidiary of U.S. Bancorp and conducts substantial
6 business in all Counties within the State of California as well as in most other States. U.S. Bank, N.A.'s
7 northern California headquarters, which, upon information and belief, is responsible for bank accounts
8 held by customers all over northern California, including in Sacramento county, is based in San
9 Francisco.

10 7. U.S. Bank maintains branch offices throughout the State of California and in most other
11 states. Individual customer accounts are maintained at these branch offices.

12 8. Based on information and belief, some of the decisions relating to developing, marketing
13 and implementing the actions complained herein originated from U.S. Bank, N.A.'s northern California
14 headquarters in San Francisco, California.

15 9. The true names and capacities of Defendants sued herein as DOES 1 through 125,
16 inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by such fictitious
17 names. Each of the Defendants designated herein as a DOE is legally responsible in some manner for
18 the unlawful acts referred to herein. Plaintiff will seek leave of Court to amend this Complaint to reflect
19 the true names and capacities of the Defendants designated herein as DOES when such identities
20 become known.

21 10. Based upon information and belief, Plaintiffs allege that at all times mentioned herein,
22 each and every Defendant was acting as an agent and/or employee of each of the other Defendants, and
23 at all times mentioned was acting within the course and scope of said agency and/or employment with
24 the full knowledge, permission and consent of each of the other Defendants. In addition, each of the acts
25 and/or omissions of each Defendant alleged herein were made known to, and ratified by, each of the
26 other Defendants.

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III

FACTUAL ALLEGATIONS

11. U.S. Bank is one of this country’s largest consumer banking companies servicing millions of individual and business customers nationwide. One of the services provided by U.S. Bank for customers who open a checking account is a check/debit/ATM card. This card allows customers to access their checking account funds by using the card to conduct transactions. Whether it is transactions with vendors or using the card to withdraw cash from an ATM machine, the card is processed electronically so that U.S. Bank is aware of the use of the card and has the option to accept or decline transactions at the point of sale.

12. In September 26, 2008, Plaintiffs, as joint holders of their account, used their debit card to make multiple transactions, including purchases of \$8.61, \$10.31, and \$12.15, and they also made an electronic withdrawal of \$90.00. Based on information and belief, U.S. Bank expressly electronically approved these transactions before the transactions were completed. Based on information and belief, at the time of all of these transactions, except for the electronic withdrawal, Plaintiffs had a positive balance in his account. However, instead of being assessed the one overdraft fee for the electronic withdrawal, Plaintiffs were assessed four overdraft fees on September 27, 2009. On October 2, 2008, Smith made an electronic withdrawal of \$134.33. Again, Plaintiffs were charged with three more overdraft fees, even though the remaining transactions included as overdraft transactions were not overdraft transactions when they took place. In fact, on October 2, 2008, Plaintiffs made an ATM deposit of \$550.00 which made the amount of funds in his account to sufficiently cover these “overdraft” transactions.

13. As a result, U.S. Bank assessed at least four overdraft fees of \$37.50 each, which were more than he should have been assessed based on the fact that he had sufficient funds in his account at the time he made most of these transactions, and as a result of U.S. Bank’s practice of approving debit card transactions that result in overdrafting from the account and then assessing multiple overdraft fees, and artificially manipulating and re-ordering transactions from the order they occurred to highest transactions to lowest for the purpose of assessing additional overdraft fees.

1 19. **Numerosity of the Class** – The members of the Class are so numerous that their
2 individual joinder is impracticable. Plaintiffs are informed and believes that there are at least hundreds
3 of thousands of customers in the class. Since the class members may be identified through business
4 records regularly maintained by Defendants and their employees and agents, and through the media, the
5 number and identities of class members can be ascertained. Members of the Class can be notified of the
6 pending action by e-mail, mail and supplemented by published notice, if necessary;

7 20. **Existence and Predominance of Common Question of Fact and Law** – There are
8 questions of law and fact common to the Class. These questions predominate over any questions
9 affecting only individual class members. These common legal and factual issues include, but are not
10 limited to:

- 11 a. Whether Defendant U.S. Bank assessed insufficient overdraft fees for transactions it
12 approved and for which there were sufficient funds in the account at the time of the
13 transaction to cover the cost of the transaction.
 - 14 b. Whether Defendant U.S. Bank posted account balances that do not reflect their actual
15 balance, thereby inducing the customers who rely on the inaccurate statement of
16 account balance into overdrafting from their account and resulting in being assessed
17 overdraft fees.
 - 18 c. Whether Defendant U.S. Bank delayed the posting of transactions made by customers
19 using U.S. Bank’s debit card, check card or ATM card so that customers are charged
20 overdraft fees on transactions where there was sufficient funds in the account when
21 the transactions were entered into.
 - 22 d. Whether Defendant U.S. Bank re-ordered daily the posting of transactions from
23 largest transactions to smallest, thereby increasing the number of overdraft fees
24 customers are assessed.
 - 25 e. Whether Defendant U.S. Bank had a policy of approving transactions when it knew
26 that they would result in overdrafting from the customers’ account, in order to assess
27 multiple overdraft fees.
- 28

- 1 f. Whether Defendant U.S. Bank enrolled its customers in an automated overdraft
2 program in order to increase the amount of overdraft fees assessed.
- 3 g. Whether Defendant U.S. Bank charged an exorbitant overdraft fee amount that bears
4 no relationship to the actual cost and risk to U.S. Bank of paying an NSF item that it
5 had already approved.
- 6 h. Whether Defendant U.S. Bank failed to disclose to customers each of the above
7 practices.
- 8 i. Whether Defendant U.S. Bank misled customers regarding that it assessed
9 insufficient overdraft fees for transactions it approved, and for which there were
10 sufficient funds in the account at the time of the transaction to cover the cost of the
11 transaction.
- 12 j. Whether Defendant U.S. Bank engaged in deceptive advertising campaigns which
13 create consumer expectations that are inconsistent with each of the above practices.
- 14 k. Whether Defendant U.S. Bank breached the implied covenant of good faith and fair
15 dealing with regards to these practices.
- 16 l. Whether Defendant U.S. Bank's conduct as described above constitute violations of
17 the causes of action set forth below.

18 21. **Typicality** – The claims of the representative Plaintiffs are typical of the claims of the
19 members of the Class. Plaintiffs, like all other members of the Class, has sustained damages arising
20 from Defendant's violations of the laws, as alleged herein. The representative Plaintiffs and the
21 members of the Class were and are similarly or identically harmed by the same unlawful, deceptive,
22 unfair, systematic and pervasive pattern of misconduct engaged in by Defendant.

23 22. **Adequacy** – The representative Plaintiffs will fairly and adequately represent and protect
24 the interests of the Class members and has retained counsel who are experienced and competent trial
25 lawyers in complex litigation and class action litigation. There are no material conflicts between the
26 claims of the representative Plaintiffs and the members of the Class that would make class certification
27 inappropriate. Counsel for the Class will vigorously assert the claims of all Class members.

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1 23. **Predominance and Superiority** – This suit may be maintained as a class action under
2 Federal Rules of Civil Procedure 23(b)(3) because questions of law and fact common to the Class
3 predominate over the questions affecting only individual members of the Class and a class action is
4 superior to other available means for the fair and efficient adjudication of this dispute. The damages
5 suffered by individual class members are small compared to the burden and expense of individual
6 prosecution of the complex and extensive litigation needed to address Defendants’ conduct. Further, it
7 would be virtually impossible for the members of the Class to individually redress effectively the
8 wrongs done to them. Even if class members themselves could afford such individual litigation, the
9 court system could not. In addition, individualized litigation increases the delay and expense to all
10 parties and to the court system resulting from complex legal and factual issues of the case.
11 Individualized litigation also presents a potential for inconsistent or contradictory judgments. By
12 contrast, the class action device presents far fewer management difficulties; allows the hearing of claims
13 which might otherwise go unaddressed because of the relative expense of bringing individual lawsuits;
14 and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by
15 a single court.

16 24. The Class Plaintiffs contemplate the eventual issuance of notice to the proposed Class
17 members setting forth the subject and nature of the instant action. Upon information and belief,
18 Defendants’ own business records and electronic media can be utilized for the contemplated notices. To
19 the extent that any further notices may be required, the Class Plaintiff would contemplate the use of
20 additional media and/or mailings.

21 25. In addition to meeting the statutory prerequisites to a Class Action, this action is properly
22 maintained as a Class Action pursuant to Rule 23(b) of the Federal Rules of Civil Procedure, in that:

23 a. Without class certification and determination of declaratory, injunctive, statutory
24 and other legal questions within the class format, prosecution of separate actions by individual members
25 of the Class will create the risk of:

26 i. Inconsistent or varying adjudications with respect to individual members
27 of the Class which would establish incompatible standards of conduct for the parties opposing the Class;
28 or

1 injurious to Plaintiffs and members of the Class, and/or (4) the uniform conduct of Defendants has a
2 tendency to deceive Plaintiffs and the members of the Class.

3 28. Defendants' unlawful, unfair and fraudulent business acts and practices are described
4 throughout this Complaint and include, but are not limited to, wrongfully directly taking insufficient
5 overdraft fees from customers' checking accounts for transactions where there was sufficient funds in
6 the account at the time of the transaction to cover the transaction; improperly re-ordering the posting of
7 transactions to highest transactions to lowest in order to generate more overdraft fees; and
8 misrepresenting and falsely advertising the accuracy and reliability of the available balance or account
9 balance in publications of customers' checking account information.

10 29. In addition to the above, the conduct as alleged throughout the complaint constitutes
11 breach of contract, negligent misrepresentation, fraud, and breach of the implied covenant of good faith
12 and fair dealing that not only result in liability as individual causes of action, they also provide the basis
13 for a finding of liability under Business and Professions Code Section 17200 *et seq.*

14 30. Plaintiffs and the Class members, and each of them, have been damaged by said
15 practices.

16 31. The conduct of Defendants as described herein violates Business and Professions Code
17 section 17200 *et seq.*, and other similar state unfair competition and unlawful business practices statutes.

18 32. Pursuant to Business and Professions Code sections 17200 and 17203, Plaintiffs, on
19 behalf of himself and all others similarly situated, seeks relief as prayed for below.

20 **SECOND CAUSE OF ACTION**

21 **Violation of Business and Professions Code Section 17500 *et seq.* – False Advertising**

22 **(Against all Defendants)**

23 33. Plaintiffs incorporate by reference and re-allege all paragraphs previously alleged herein.

24 34. The standardized practice and advertisements regarding the practice were uniformly
25 applied to Plaintiffs and the Class members.

26 35. As a result, Plaintiffs relied on the advertisements and were damaged as a result by
27 incurring overdraft charges they otherwise would not have incurred.

28 36. Plaintiffs, on behalf of himself and the Class, seek relief as prayed for below.

1 **THIRD CAUSE OF ACTION**

2 **Fraud**

3 **(Against all Defendants)**

4 37. Plaintiffs incorporate by reference and re-allege all paragraphs previously alleged herein.

5 38. The misrepresentations, nondisclosure and/or concealment of material facts made by
6 Defendants to Plaintiffs and the members of the Class, as set forth above, were known by Defendants to
7 be false and material and were intended by the Defendants to mislead Plaintiffs and the members of the
8 Class.

9 39. That the Plaintiffs and the Class were actually misled and deceived and were induced by
10 U.S. Bank to incur overdraft charges they otherwise would not have incurred.

11 40. As a result of the conduct of Defendants, Plaintiffs and the Class members have been
12 damaged by having incurred unwarranted overdraft fees assessed and taken from their checking account.
13 In addition to such damages, Plaintiffs seek punitive or exemplary damages pursuant to Civil Code
14 section 3294 in that Defendants engaged in “an intentional misrepresentation, deceit, or concealment of
15 a material fact known to the defendant[s] with the intention on the part of the defendant[s] of thereby
16 depriving a person of property or legal rights or otherwise causing injury.”

17 **FOURTH CAUSE OF ACTION**

18 **Negligent Misrepresentation**

19 **(Against all Defendants)**

20 41. Plaintiffs incorporate by reference and re-allege all paragraphs previously alleged herein.

21 42. That Defendants had a duty to provide honest and accurate information to its customers
22 to avoid those customers from incurring expensive and unnecessary overdraft charges.

23 43. Defendants specifically and expressly indicated to class members that U.S. Bank
24 customers’ checking account balance information that are published online, by phone, by ATM
25 machines, and in-store inquiries are accurate and reliable, when in fact they are inaccurate and
26 unreliable.

27 44. Such misrepresentations were and are made by U.S. Bank through the use of the
28 identifying term “account balance” in the various methods in which customers may access their

1 checking account information, when in fact such information is not what it purport to be, and through
2 the various marketing materials and the customer agreement contracts.

3 45. Defendants knew or in the exercise of reasonable diligence should have known, that the
4 ordinary consumer and customer of Defendants' products would understand Defendants' representations
5 concerning the term "account balance" as being what they purport to be – the actual available balance at
6 the time of the inquiry. Defendants also knew or in the exercise of reasonable diligence should have
7 known, that the ordinary consumer and customer of Defendants' products would understand the
8 marketing materials and the terms of the customers agreement contracts set forth in this Complaint as
9 indicating that the published "account balance" is accurate and reliable. Any other understanding on the
10 part of consumers would not be reasonable given Defendants' representations.

11 46. Plaintiffs and the Class members justifiably relied on Defendants' misrepresentation as to
12 their available balance and engaged in debit transactions or ATM withdrawals which were within the
13 limits of their published "balance," yet were assessed overdraft fees.

14 47. As a result of the conduct of Defendants, Plaintiffs and the Class Members have been
15 damaged by having relied on Defendants' misrepresentations as to their available balance and have
16 incurred unwarranted overdraft fees.

17 48. In addition, by representing and posting pending charges to online accounts in real time,
18 and then including those charges to provide available balance, U.S. Bank represented to Class Members
19 that overdraft fees would not be charged for transactions that were less than the balance in the account at
20 the time the transaction took place.

21 49. Those representations were false as Defendants did assess and automatically deduct
22 overdraft fees from customers account even though there were funds available to cover the transaction at
23 the time of the transaction.

24 50. Defendants knew or in the exercise of reasonable diligence should have known, that
25 Plaintiff and ordinary customers would rely on those representations.

26 51. That Plaintiffs and the Class members did reasonably rely on those representations.

27 52. As a result, Plaintiffs and the Class members have been damaged by being assessed
28 expensive and unnecessary overdraft fees.

1 **FIFTH CAUSE OF ACTION**

2 **Breach of Implied Covenant of Good Faith and Fair Dealing**

3 **(Against all Defendants)**

4 53. Plaintiffs incorporate by reference and re-allege all paragraphs previously alleged herein.

5 54. California law implies a covenant of good faith and fair dealing in all contracts between
6 parties.

7 55. As a result of the actions of Defendants, set forth hereinabove, Defendants have violated
8 the implied covenant of good faith and fair dealing contained in the agreements which purport to govern
9 Plaintiffs' and the Class members' checking accounts, and as a result thereof, Plaintiffs and the Class
10 members are entitled to damages as prayed.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs, on their own behalf and on behalf of the Class, pray for relief as
13 follows:

14 A. For an order certifying the National Class, and appointing Plaintiffs and their counsel to
15 represent the Class;

16 B. Alternatively, if the Court does not grant certification of the National Class, Plaintiffs pray
17 for an order certifying a California Class, and appointing Plaintiffs and their counsel to represent the
18 class;

19 C. For an order awarding Plaintiffs and the Class restitution and/or disgorgement and other
20 equitable relief as the Court deems proper;

21 D. For an order awarding Plaintiffs and the Class punitive damages as to the appropriate cause
22 of action;

23 E. For an order enjoining Defendants:

24 1. under Business and Professions Code section 17203 from continuing to engage in
25 business acts and practices, or any of them, which are unlawful, unfair, or fraudulent,
26 as alleged herein; and

27 2. under Business and Professions Code section 17535 from continuing to engage in the
28 dissemination of advertisements which are untrue or misleading, alleged herein;

1 F. For an order mandating that Defendants engage in a corrective advertising campaign to
2 correct the misperceptions Defendants' conduct created;

3 G. For an order awarding Plaintiffs and the Class pre-judgment and post-judgment interest, as
4 well as reasonable attorneys' and expert-witness fees and other costs pursuant to Code of Civil
5 Procedure section 1021.5, and other statutes as may be applicable; and

6 H. For an order awarding such other and further relief as this Court may deem just and proper.

7 DATED: June 22, 2009.

MCCUNEWRIGHT, LLP

8
9 BY: /s/ Richard D. McCune

Richard D. McCune

Attorney for Plaintiffs

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11 **DEMAND FOR JURY TRIAL**

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13 Plaintiff, and all others similarly situated, hereby demands a trial by jury herein.

14 DATED: June 22, 2009.

MCCUNEWRIGHT, LLP

15
16 BY: /s/ Richard D. McCune

Richard D. McCune

Attorney for Plaintiffs