

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE No. 1:09-MD-02036-JLK**

**IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION**

**MDL No. 2036**

**THIS DOCUMENT RELATES TO:  
FOURTH TRANCHE ACTION**

*Shane Swift v. BancorpSouth, Inc.*  
N.D. Fla. Case No. 1:10-cv-00090-SPM  
S.D. Fla. Case No. 1:10-cv-23872-JLK

**APPENDIX IV TO PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION AND INCORPORATED MEMORANDUM OF LAW**

Dated: December 20, 2011.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE No. 09-MD-02036-JLK**

**IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION**

**MDL No. 2036**

**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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# **EXHIBIT A**

# Exhibit A – Arthur Olsen Consultant Profile

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## IT CONSULTANT PROFILE: ARTHUR OLSEN

### BACKGROUND

Specializing in the areas of database development, administration, and support, Mr. Olsen has over 15 years of professional IT experience. He has a strong background in both Oracle and Microsoft database technologies, with a focus in developing web-based applications. Additionally, he has had valuable experience in analyzing and processing large amounts of data for use in litigation support.

### SKILLS

- ◆ Extensive training and experience creating functional designs and logical data models.
- ◆ Proficient in the wide range of database development and administration technologies including: Windows 2000, 2003, and 2008 administration; Microsoft SQL Server 2000, 2005 & 2008; Microsoft TSQL; Oracle RDBMS 9.x, 10.x, and 11.x; Oracle PL/SQL; and Microsoft clustering software for Windows.
- ◆ Relevant experience designing, implementing and maintaining large scale database solutions on Oracle and SQL Server, including both online transaction based systems and data warehouses.
- ◆ Reporting specialist with experience developing custom reporting solutions based on financial systems such as Microsoft Great Plains / Dynamics and Oracle Financials, as well as custom applications.
- ◆ Considerable experience compiling, analyzing and processing data in support of corporate litigation.

### AWARDS

- ◆ Award for Operation Excellence | Microsoft  
Recognized for outstanding contribution to the design and implementation of the data warehousing solution for the Microsoft Licensing division.

### CERTIFICATIONS

- ◆ Oracle Certified Professional
- ◆ Certified Oracle Database Administrator

## EXPERIENCE

### Database Engineer: Reporting Specialist | under contract at various clients

- ◆ Processed and analyzed data in support of class action litigation, (*Veronica Gutierrez et. al. v. Wells Fargo Bank, N.A.*, N.D. Cal. Case No. 07-05923 WHA), that resulted in \$203 million class restitution award.
- ◆ Developed a custom Chart of Accounts management solution that integrates with Microsoft Great Plains for small to mid-size companies.
- ◆ Designed and implemented several custom financial reporting solutions, including one for a Fortune 500 company, based on Microsoft Business Intelligence, MOSS, and Excel Services.
- ◆ Architected a solution for a large corporation that integrated with Oracle Financials and automated the process of calculating inventory reserves.

### Database Administrator, Developer & Litigation Support Specialist | under contract at Hewlett Packard, Cupertino, CA

- ◆ Primary Database Administrator responsible for both Oracle and SQL Server support for three divisions, including 20+ applications spread out over a total of 30+ development, test and production servers.
- ◆ Lead analyst responsible for compiling, analyzing and processing data from various systems throughout HP for use in litigation support.
- ◆ Participated as the principal authority in the composition and implementation of SQL Server database standards across the three divisions, including security models, backup and recovery plans, DTS programming standards, and general database naming conventions.
- ◆ Performed extensive SQL development on various systems, consisting primarily of stored procedures and DTS packages.
- ◆ Created data models for several key internal systems and their related data repositories.
- ◆ Implemented an Oracle replication model consisting of a source system in California and several remote manufacturing sites located all over the world.

### Database Engineer | Microsoft Licensing, Inc., Reno, NV

- ◆ Participated in the design, implementation and support of an extensive data warehousing solution for Microsoft's licensing division. System included nearly twenty data sources and several thousand end users, including select customers who accessed the system remotely via the Internet.
- ◆ Developed numerous DTS packages to pull delta information from various source systems, process and denormalize data and push it to one of several data repositories.
- ◆ Created and documented plans for database maintenance, backup and recovery, and high availability.

**Database Engineer** | under contract at Microsoft Corporation, Redmond, WA

- ◆ Lone Oracle database administrator and general Oracle resource for all teams associated with an enterprise level online end user billing system, including: Management, Development, Testing, Production Support and Infrastructure.
- ◆ Primary owner of a 24 x 7 production database that resided on a DEC Alpha failover cluster with over 800 Gigabytes of raw storage.
- ◆ Monitored and analyzed all Oracle databases for tuning and troubleshooting purposes using Oracle Enterprise Manager, Oracle Intelligent Agent and custom monitoring applications.
- ◆ Coordinated and implemented backup and recovery strategies for databases, including both offline and online backups, database exports and database replication.
- ◆ Created custom scripts that were used by the cluster during failover scenarios.
- ◆ Designed replication model using Oracle replication to satisfy extensive reporting requirements.
- ◆ Ensured system security through the use of NT authentication, roles and privileges, and user activity audit.
- ◆ Tuned SQL statements as written by members of the development team. Developed PL/SQL triggers, stored procedures, SQL scripts and NT scripts as needed to enhance applications and to correct problems as discovered.
- ◆ Acted as liaison between Microsoft and Oracle for all technical issues related to the databases, and between Microsoft and Digital for all technical issues related specifically to the Alpha cluster.

**EDUCATION**

- ◆ Microsoft Internal Training – Redmond, WA | March 2000  
Instructor led SQL Server training, including courses on Database Architecture and Administration, Database Tuning, and Microsoft's TSQL
- ◆ ARIS Education Center – Bellevue, WA | June 1996  
Oracle DBA Program, including courses on Relational Database Design, Database Architecture and Administration, SQL and PL/SQL, Application Tuning, Database Tuning, and Advanced Database Concepts
- ◆ University of Washington – Seattle, WA | June 1989  
BA in Business Administration with a concentration in Finance.

# **EXHIBIT B**

Volume 5

Pages 835 - 1036

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

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

Plaintiffs, )

vs. )

NO. C 07-05923-WHA

WELLS FARGO & COMPANY; WELLS )  
FARGO BANK, N.A.; and DOES 1 )  
through 125, )

Defendants. )

San Francisco, California

Friday

April 30, 2010

7:35 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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BY: RICHARD M. HEIMANN  
ROGER HELLER  
BARRY R. HIMMELSTEIN  
MICHAEL W. SOBOL

(Appearances continued on next page)

Reported by Lydia Zinn CSR #9223, RPR, FCRR  
Belle Ball, CSR #8785, RMR, CRR  
Official Reporters - U. S. District Court

1 THE COURT: All right. Are you ready with your next  
2 witness?

3 MR. HIMMELSTEIN: Yes, your Honor. Plaintiffs call  
4 Arthur Olsen.

5 THE COURT: Are you Arthur Olsen?

6 THE WITNESS: Yes, sir. Yes, your Honor.

7 THE COURT: Raise your right hand, please.

8 ARTHUR OLSEN,  
9 called as a witness for the Plaintiff herein, having been first  
10 duly sworn, was examined and testified as follows:

11 THE COURT: Have a seat. It's going to make noise,  
12 but adjust the microphone so that it catches your voice.

13 THE WITNESS: Does that work?

14 THE COURT: You're going to have to pull it closer to  
15 you there. That's going to work. Thank you.

16 MR. HIMMELSTEIN: Your Honor, pursuant to the  
17 stipulation on the record that experts may have their reports  
18 in front of them while testifying, permission to approach and  
19 hand Mr. Olsen his two reports.

20 THE COURT: Sure, go ahead.

21 What kind of expert are you?

22 THE WITNESS: I'm a data expert. Database.

23 THE COURT: Are you the one that we had the deal with  
24 earlier in this case, about the computer?

25 THE WITNESS: Yes.

1 THE COURT: Okay. I remember now. All right.

2 DIRECT EXAMINATION

3 BY MR. HIMMELSTEIN

4 Q. Mr. Olsen, can you tell us who your employer is currently?

5 A. InfinIT Consulting.

6 Q. Your position with them?

7 A. Database consultant.

8 Q. Were you retained by plaintiffs' counsel in this case?

9 A. Yes, I was.

10 Q. What was your assignment?

11 A. May I refer to my report to answer that question?

12 MR. HIMMELSTEIN: Yes, with the Court's permission.

13 THE WITNESS: In this case --

14 MS. WINNER: If he's going to repeat, he shouldn't be  
15 reading from his report.

16 MR. HIMMELSTEIN: Your Honor.

17 THE COURT: What?

18 MR. HIMMELSTEIN: He was given a very precise  
19 assignment. It's a very important part of his testimony. We'd  
20 like to articulate it correctly.

21 THE COURT: So are you saying that you're unable to  
22 do that without reading it?

23 THE WITNESS: No.

24 THE COURT: Can you do it from memory? Do it -- try  
25 to do it from memory. Then, if you goof up, I'll let you look

1 at the written thing, but it's not supposed to be a script.

2 **MR. HIMMELSTEIN:** It was the only thing I was going  
3 to have him read all day. Literally, it's three sentences, but  
4 he can do it from memory.

5 **THE COURT:** Let's do it from memory. Okay.

6 **THE WITNESS:** First, I was asked to identify the  
7 customers that would have been charged less overdraft fees  
8 under different alternate -- or alternate sequencing scenarios,  
9 than the way that Wells Fargo originally posted transactions.

10 So under the original -- in other words, Wells Fargo  
11 originally processed transactions in a particular order. I was  
12 asked to reorder those under different scenarios, and identify  
13 the customers that would have been charged less overdraft fees.

14 **THE COURT:** When you say "original," don't you mean  
15 "actually"?

16 **THE WITNESS:** Actually. Yes.

17 **THE COURT:** All right. All right. Go ahead.

18 **MR. HIMMELSTEIN:** That's why I wanted him to read it.  
19 Go ahead.

20 **THE WITNESS:** The second -- the second portion of  
21 that was to quantify the amount of money associated with those  
22 overdraft fees -- the differences between the overdraft fees  
23 actually charged, and the overdraft fees that would have been  
24 charged under various alternative sequencing orders.

25

1 BY MR. HIMMELSTEIN

2 Q. And were there adjustments that you were supposed to make  
3 to those numbers in connection with that portion of your  
4 assignment?

5 A. Yes. I was supposed to apply a reversals under two  
6 different reversal methods. And I was asked to credit the  
7 damages with the -- what we defined as "uncollectibles"; so  
8 charge-offs when the accounts were closed with a negative  
9 balance.

10 Q. And what was -- any other tasks you were given by  
11 plaintiffs' counsel?

12 A. I was given a list of summary calculations to perform on  
13 the entire sample: Customers that were identified as potential  
14 class members, as well as customers that identified as class  
15 members.

16 Q. What type of summary calculations, just in general?

17 A. For example, the total number of overdraft charges, the  
18 total dollar amount of those overdraft charges, the number of  
19 transactions -- debit-card transactions that had timestamps,  
20 and a variety of other ones.

21 Q. All right. Over what time period were you instructed to  
22 make these calculations?

23 A. The time period was November 15th, 2004, to June 30th,  
24 2008.

25 Q. Did you have any data -- transactional data from

1 Wells Fargo that went beyond June 30th, 2008, when you made  
2 these calculations?

3 A. Yes. They provided data through July 31st of 2008.

4 Q. Now, if we call November 15th, 2004, through June 30th,  
5 2008, "the relevant time period" -- can we agree on that  
6 terminology for the remainder of your testimony?

7 A. I can agree on that, yeah.

8 Q. Okay. Were you able to perform your assignment?

9 A. Yes, I was.

10 Q. And what qualifies you to make those calculations?

11 A. I've been employed as an I.T. professional specializing in  
12 data and database work for the past 15 years.

13 Q. And can you briefly review, as quickly as possible, your  
14 work history in the field?

15 A. Originally, I was an Oracle database administrator. And I  
16 was hired by Microsoft to help them convert some systems that  
17 they purchased to their SEQUEL server from Oracle.

18 From there, I went to work at Hewlett-Packard as a  
19 database engineer. And I was actually then asked to do data  
20 analysis in support of their litigation against Gateway.

21 And after that, I kind of -- I've since been doing data  
22 analysis for financial reporting, and -- and other kind of  
23 reporting for Fortune 500 companies.

24 Q. Can you name one Fortune 500 company?

25 A. Cisco, for example.

1 Q. Have you ever testified as an expert before?

2 A. No.

3 Q. I mean, other than deposition testimony in this case?

4 A. Correct.

5 Q. And how much are you being paid?

6 A. I believe --

7 Q. By plaintiffs, I mean.

8 A. The consulting company?

9 Q. Yes.

10 A. 225 an hour.

11 Q. Okay. And do you know how much plaintiffs paid the  
12 consulting company?

13 A. Not off the top of my head, no. I'm sorry.

14 Q. Now, with respect to your work at HP, was that the only  
15 other litigation matter you've ever been involved with?

16 A. Yes, but there were several actual individual cases. They  
17 were all related to bill of materials and patent law, though.

18 Q. And that was in a patent dispute with Gateway?

19 A. Yes.

20 Q. And did HP go through several different contractors, in  
21 terms of getting that work done?

22 A. I know internally, they -- they tried to work with HP  
23 internally to get the data that they needed. And eventually, I  
24 was asked to bring in data from one division. And I -- over  
25 time, I was just asked to help with pulling the data from all

1 of the divisions.

2 Q. Okay. Did you prepare a report in this litigation?

3 A. Yes, I did.

4 Q. And did you write that report yourself?

5 A. Yes.

6 Q. What data were you given access to by Wells Fargo in  
7 connection with carrying out your assignment?

8 A. I was given transactional data which was pulled from their  
9 Hogan system. It consisted of four separate types of files  
10 which were EP, EW, CK, and HD.

11 Q. And did you use all of those in your analysis?

12 A. I looked at them, but I was able to get all of the  
13 information that I needed specifically from the CK and HD data.

14 Q. So you did not use the EP and EW files?

15 A. No, I did not.

16 Q. Any other data files you were given access to, rather, by  
17 Wells Fargo?

18 A. I was given KZ data, which I referred to as "settlement  
19 data."

20 Q. So can we agree we'll call that "settlement" -- it should  
21 be "settlement data," or "database"? What would you call it?

22 A. I'd call it "settlement data."

23 Q. Settlement data. Okay.

24 **THE COURT:** The word "settlement" -- in this context,  
25 what does that mean?

1           **THE WITNESS:** From what I understand, that data is  
2 pulled from a system that tracks when the -- the transaction is  
3 submitted for approval, so for authorization. So that data had  
4 the card number; the date of the transaction; authorization;  
5 the amount of the transaction.

6           **THE COURT:** Is it settlement, in the sense of  
7 settling up a transaction at the end of the day, or like  
8 settling a lawsuit?

9           **THE WITNESS:** I think more the former. It doesn't  
10 have anything to do with lawsuit. I mean, this is their  
11 normal, day-to-day data.

12           **THE COURT:** Okay.

13 **BY MR. HIMMELSTEIN**

14 **Q.** And the VTRAN data files that you got -- is that what  
15 we've also been calling "Hogan data"?

16 **A.** Correct.

17 **Q.** So if we call that "Hogan data" for the remainder of your  
18 testimony, you'll know what we mean?

19           **THE COURT:** I want you to use the word "Hogan." What  
20 does it refer to? What -- what --

21           **MR. HIMMELSTEIN:** Perhaps the witness should answer.

22           **THE WITNESS:** Hogan data is their -- is their  
23 transactional data. It's -- it's -- the data in the Hogan  
24 system, for example, is used to re-create their bank  
25 statements. It's all of the transactions that post to the

1 account.

2 **THE COURT:** Okay, but you said V-something.

3 **THE WITNESS:** Well, there was the nomenclature of the  
4 files that they gave me. So they were VTRAN, and then either  
5 "CK," which was for checks, "HD," which is for everything  
6 besides checks.

7 And then the "EP," "EW" -- I wasn't exactly sure what  
8 those stood for.

9 **THE COURT:** All right. Thank you.

10 **BY MR. HIMMELSTEIN**

11 **Q.** Okay. And did you use any other information provided by  
12 Wells Fargo in carrying out your assignment?

13 **A.** I was given or there was some BEV data, which I understand  
14 to be business event data, which appeared to come from their  
15 on-line system.

16 **Q.** What --

17 **A.** So, like, for Internet banking.

18 **Q.** What did you use that for?

19 **A.** All I pulled out of that was the account-open date; so the  
20 date each account was opened.

21 **Q.** Any other information you were given by Wells Fargo?

22 **A.** I was given a transaction code map.

23 **Q.** What did you do -- how did you utilize that, just  
24 generally speaking?

25 **A.** So each transaction has a transaction code. And those

1 codes are grouped into posting groups. So from the map, I got  
2 the posting group for each transaction, as well as a  
3 description of the transaction.

4 Q. Okay. Did you receive data on all California consumer  
5 checking accounts?

6 A. Yes.

7 Q. How many accounts?

8 A. The exact number --

9 Q. Yes.

10 A. -- is 8,639,971.

11 Q. And, from that mass of data, how did you go about  
12 isolating the data that was relevant to the tasks you were  
13 given?

14 A. I started with the Hogan data. I looked at it a month at  
15 a time. And I pulled out all of the instances where customers  
16 were charged multiple overdraft fees in a single day.

17 Q. And when you say "pulled out," this is not a manual  
18 process. This is a program you wrote to pull those out?

19 A. Correct. And they were stored in a table in the database  
20 that I was working in.

21 Q. Did the Hogan data have both the date and the time that  
22 the debit-card transactions were authorized?

23 A. The Hogan data did not have the time, but the date was  
24 included in the description field for the -- each transaction;  
25 each debit- and check-card transaction. So I was able to pull

1 the date of the transaction.

2 Q. And by "date of the transaction," you mean the day the  
3 transaction was authorized?

4 A. Even if the transaction wasn't authorized, there was the  
5 date available when the transaction occurred.

6 Q. Meaning, when the person went to the merchant and swiped  
7 their card?

8 A. Presumably, yes.

9 Q. How did you go about getting the times of the  
10 transactions?

11 A. So in the Hogan data, I had the card number of the debit  
12 or check card, I had the date of the transaction, and I had the  
13 amount of the transaction. So, using those three pieces of  
14 information, I went to the settlement data and looked for a  
15 match. And, in the case of a match, the settlement data would  
16 contain the time of the transaction.

17 Q. And were there some transactions you were unable to match  
18 and get times for?

19 A. Yes.

20 Q. What percentage of debit-card transactions were you -- the  
21 relevant transactions -- were you able to get times for?

22 A. Almost exactly 84 percent.

23 Q. Do you have an exact figure?

24 A. It's 83.96 percent.

25 **THE COURT:** May I ask this question on that

1 83-point-something percent?

2 You're saying that that is the time that the consumer  
3 actually did the transaction with a merchant?

4 **THE WITNESS:** Correct.

5 **THE COURT:** And you were able to get that 84 percent  
6 of the time?

7 **THE WITNESS:** Correct.

8 **THE COURT:** And it wasn't in Hogan, but it was in  
9 this other database --

10 **THE WITNESS:** Yes.

11 **THE COURT:** -- called "Settlement"?

12 **THE WITNESS:** Yeah. I'm not exactly sure what  
13 Wells Fargo calls that system internally. We always referred  
14 to it as "the settlement data." It's -- I mean, that's the  
15 data that was in that.

16 **THE COURT:** So sounds to me, then, like Hogan data is  
17 missing that one item, but the bank was maintaining a different  
18 database that did have that item; the time item?

19 **THE WITNESS:** Yes.

20 **THE COURT:** Am I understanding this right?

21 **THE WITNESS:** Yes.

22 **THE COURT:** Do you know what the bank called that  
23 other data?

24 **THE WITNESS:** I thought that the "settlement" -- the  
25 term "settlement data" came from the bank.

1 THE COURT: All right. Okay.

2 BY MR. HIMMELSTEIN

3 Q. Do you know if one of the reasons you had to use the KZ  
4 data to get times is because we were -- you were going back so  
5 far in time?

6 A. I suppose.

7 THE COURT: Well, look. Please don't ask your  
8 witness to just say "Yes" to something that you throw out  
9 there.

10 MR. HIMMELSTEIN: All right.

11 THE COURT: That's unfair to the witness. He's under  
12 oath. Don't put him out on that limb.

13 MR. HIMMELSTEIN: So --

14 THE COURT: You can prove that up in some other way.

15 MR. HIMMELSTEIN: All right.

16 Q. After you isolated the relevant transactional data and  
17 appended the available transaction times, were you then ready  
18 to begin the process of running the alternate sequencing  
19 scenarios you were given to run?

20 A. Yes, I was.

21 Q. And where did you obtain the alternate scenarios?

22 A. I was given the alternate scenarios by the counsel for the  
23 plaintiffs.

24 Q. So they were not your idea?

25 A. No.

1 Q. And did you or do you have or -- strike that.

2 Are you offering any opinion as to whether the scenarios  
3 that plaintiffs gave you are good or bad?

4 A. No.

5 Q. Are you offering any opinion as to whether the scenarios  
6 plaintiffs give you matched their theory of the case or not?

7 A. No.

8 Q. You just -- did you just perform the calculations, without  
9 inserting any opinions into your report?

10 A. I mean, I was instructed specifically what to do. And  
11 that's what I did.

12 Q. Okay. Were you able to calculate differences -- the  
13 differences for each scenario that you were given?

14 A. Yes, I was.

15 Q. And, generally speaking, how did you -- if you could give  
16 a description that would apply across the scenarios, so we  
17 don't have to go through it each time, generally speaking, how  
18 would you calculate that difference?

19 A. Generally speaking, I took the transactions which -- you  
20 want me to go through the whole process, or just the  
21 resequencing?

22 Q. Not too detailed. We don't have 92 pages of code that  
23 we're going to go through, but just a top-level view.

24 A. So once I identified the customers that had multiple  
25 overdraft charges in a particular day, I went back into the

1 Hogan data, and pulled out all of the transactions for those  
2 days.

3 I was then able to reorder those transactions for -- under  
4 each scenario, and then calculate how many of those  
5 transactions would have resulted in overdraft fees, had they  
6 been posted in one of the alternative orders.

7 And from there, I can say the difference between the  
8 actual overdraft fees assessed, and the fees that would have  
9 been assessed under a particular scenario -- alternate  
10 scenario. That would be -- I would call that "damages."

11 Q. Okay.

12 MS. WINNER: Just objection, your Honor.

13 I -- I don't mind if -- a little loose use of the  
14 terminology, if it makes it easier to get the testimony in so  
15 your Honor can understand it; but obviously, this witness is  
16 not qualified to provide testimony about whether this is  
17 actually damages. And I understand he's not purporting to do  
18 so. I just want to state that objection.

19 THE COURT: Why don't you use a different word?

20 Let's not use the word "damages." I can -- I don't need that  
21 kind of argument.

22 So just, you know, compare Method 1 against Method 2.  
23 I think that's we don't need to have this witness as an  
24 argument piece.

25 MR. HIMMELSTEIN: Shall we call it "the

1 differential," your Honor?

2           **THE COURT:** Call it a "differential." That will be  
3 fine.

4 **BY MR. HIMMELSTEIN**

5 **Q.** Were you able to calculate the differentials for each  
6 scenario you were given, versus what Wells Fargo had actually  
7 done?

8 **A.** Yes, I was.

9           **MR. HIMMELSTEIN:** Can I have the first slide, please?

10           **THE COURT:** May I ask a -- okay. Looks like you're

11 going to -- the question I was about to ask -- and if you're  
12 about to cover it, forget it; but when you said "more than one  
13 overdraft," did -- what if one overdraft was due to a check,  
14 and one overdraft was due to a debit, but there was only a  
15 debit card, but there was only one debit card? See what I'm  
16 saying?

17           Were you able to -- did you include -- when you say  
18 "multiple overdrafts," are there some instances included there  
19 where the check was part of the overdraft, and then -- but  
20 there was only one debit-card entry that was an overdraft?

21           **THE WITNESS:** I -- I suppose that's possible.

22 It's --

23           **THE COURT:** Why don't -- okay. If you don't know it  
24 off the top of your head, I'm going to save my question until  
25 you go through your -- looks like up on the screen you've got

1 something that might answer this. So let's see. Save my  
2 question until later.

3 **MR. HIMMELSTEIN:** All right.

4 **THE COURT:** Go ahead.

5 **BY MR. HIMMELSTEIN**

6 **Q.** If you'd take a look at the screen, slide sequencing order  
7 number one, does this accurately depict the sequencing order  
8 that you first -- the sequencing order you were asked to  
9 perform?

10 **A.** Yes, it does.

11 **Q.** And can you describe that for the Court, please?

12 **A.** The -- for the purposes of doing resequencing -- well, all  
13 that the resequencing orders in the original report -- one,  
14 two, and three -- I only resequenced the transactions in  
15 Priority Posting Group 50040, which included the debit and  
16 check cards, the checks and the ACH.

17 So technically, in this sequencing order, cash withdrawals  
18 were ordered from high to low and processed first; but that's  
19 also the way that Wells Fargo did it originally or actually.

20 So I didn't do anything with those. They just happened to  
21 come before the debit card, check cards, checks, and ACH. For  
22 those transactions, I just ordered them from low to high.

23 **Q.** I'm sorry. Which? The Group 2 transactions?

24 **A.** Right. The debit card, check cards, checks.

25 **Q.** So you're saying you basically began your processing where

1 the arrow is the? You started with whatever results  
2 Wells Fargo actually had after processing the Group 1  
3 transactions, and then you only resequenced the Group 2  
4 transactions?

5 A. Correct.

6 Q. Okay. And Group 1 -- does that have a technical name?

7 A. I believe for the most part, the cash withdrawals were in  
8 Priority Posting Group 50020.

9 Q. Does Group 2 have a technical name?

10 A. That was Group 50040.

11 Q. After you made your calculations, did you make any  
12 adjustments to the result?

13 A. I adjusted for reversals under the two different methods.

14 Q. And could you -- by "reversals," can you tell the Court  
15 what you mean?

16 A. In some instances, Wells Fargo refunded money for  
17 overdraft fees that were charged to the customer. And in -- we  
18 tried to -- in their data, there was no way to tie a specific  
19 overdraft fee to a specific reversal. So we came up with two  
20 methods to try to fairly apply the overdraft reversals to the  
21 overdraft fees.

22 Q. And what were those two methods, please?

23 A. The first method we called the "LIFO," or  
24 "last-in-first-out" method. And for each reversal, it was  
25 applied to the last overdraft fee charged to that customer

1 prior to that reversal.

2 Q. And the 30-day reversal method?

3 A. The 30-day reversal method -- we said, "For each case  
4 where there was a differential, we applied all of the reversals  
5 that occurred within 30 days following the differential to the  
6 differential."

7 Q. Okay. So what was the differential or any other  
8 adjustments that you made, please?

9 A. Yes. We also adjusted for what we called  
10 "uncollectibles," which is when an account was closed with a  
11 negative balance that was written off.

12 Q. And how did you make that adjustment?

13 A. We simply subtracted that amount from the overall  
14 differential.

15 Q. You mean for each class member?

16 A. For each class member, yes.

17 Q. So I just want to be sure I have this correct. You didn't  
18 look at total -- you weren't just taking total reversals for  
19 the class against total damages for the class? You were  
20 looking at each individual account, and making those  
21 calculations on an account-by-account basis?

22 MS. WINNER: Objection. Leading.

23 THE COURT: Well, it is leading.

24 MR. HIMMELSTEIN: I can rephrase, your Honor.

25 THE COURT: I will allow it in this instance, but try

1 not to lead.

2 All right. Go ahead and answer the question.

3 **THE WITNESS:** All of the calculations that I did were  
4 on an individual-account level and -- until it came time to  
5 produce the final numbers, which was just a sum of all of the  
6 individual differentials.

7 **BY MR. HIMMELSTEIN**

8 **Q.** Okay. So under the LIFO reversal method, after applying  
9 the charge-offs, what did you calculate the differential to be?

10 **A.** \$332,687,565.89.

11 **Q.** And under the 30-day reversal method, after the  
12 charge-offs, what did you calculate the differential to be?

13 **A.** That was \$317,981,211.33?

14 **THE COURT:** Now, those numbers are as compared to the  
15 sequencing order that was actually --

16 **THE WITNESS:** Correct. Those represent the  
17 differential.

18 **THE COURT:** Do you have a flowchart like that, that  
19 illustrates the way it was actually done?

20 **THE WITNESS:** It would look exactly like that, with  
21 the exception that Group 2 was ordered from high to low.

22 **THE COURT:** Okay. All right. I've got it.

23 **MR. HIMMELSTEIN:** Okay.

24 **THE COURT:** Thank you.

25

1 BY MR. HIMMELSTEIN

2 Q. Now, so you -- where are the individual class member  
3 damages figures located?

4 MS. WINNER: Objection.

5 MR. HIMMELSTEIN: I'm sorry. Pardon me.

6 Q. Where are the individual class member differential figures  
7 located?

8 A. I wasn't allowed to take account numbers out of the clean  
9 room, so those were -- those are in a table called "Class  
10 Damages" that was handed off to Wells Fargo.

11 Q. And when you say "the clean room," can you describe what  
12 you mean?

13 A. I'm sorry. That was the room at the Wells Fargo facility  
14 where I performed all of my analysis.

15 Q. You were not allowed to take any transaction information;  
16 only -- were you allowed to take any transaction information  
17 even as to individuals out of the clean room?

18 A. I erred on the side of caution. I knew that I wasn't  
19 supposed to take any account information out of there, so I  
20 only took summary information out of that.

21 Q. Now, on --

22 MR. HIMMELSTEIN: Next slide, please.

23 Q. Was this -- would you describe the Sequencing Order 2, as  
24 performed by plaintiffs' counsel?

25 A. Sequencing Order Number 2. Again, the cash withdrawals

1 were in a prior posting group, so they always occurred first;  
2 but in this case, we divided Group 50040 into two subgroups,  
3 the first being debit and check cards, and the second being  
4 checks and ACH.

5           The debit and check cards were ordered by timestamp.  
6 And where the timestamp wasn't available, it was left as the  
7 default timestamp, which is zero, or midnight. So those would  
8 have been processed first for a particular day.

9           The checks in the ACH were left from -- that's the  
10 wrong slide, but they were high to low, as per Wells Fargo's  
11 original -- or actual method.

12           **THE COURT:** Wait a second. Don't go any further.  
13 You say something's wrong about that chart?

14           **THE WITNESS:** Yes.

15           **THE COURT:** Don't go any further until we straighten  
16 that slide out.

17           **MR. HIMMELSTEIN:** Your Honor, we have the wrong thing  
18 up, your Honor.

19           Do you have the correct slides? This is not the  
20 package.

21           Pardon me just one moment, your Honor. We don't want  
22 to confuse you on this.

23           **THE COURT:** It's coming out of your time.

24           **MR. HIMMELSTEIN:** All right. We're going to use the  
25 Elmo, just to avoid errors here.

1           Yeah. Can I have number one back? I just want to  
2 compare it against the correct ones, and make sure that there  
3 was no error. I mean, I'll ask Mr. Olsen to do that as well.

4           **THE COURT:** You got the Elmo.

5           **MR. HIMMELSTEIN:** The other one. The one you showed  
6 previously.

7           **THE COURT:** All right. We're back to Sequencing  
8 Order Number 1 on the screen.

9           What was your question?

10           **MR. HIMMELSTEIN:** That is identical to the one we  
11 were supposed to be putting up.

12           **THE COURT:** I can't hear you. Are you trying to --

13           **MR. HIMMELSTEIN:** I'm sorry, your Honor. That is  
14 identical to the correct one. Let me just get the Elmo.

15           **THE COURT:** Let me see if the witness says that.

16           Is that the right one we were looking at a while ago?

17           **THE WITNESS:** Yes, it is, your Honor.

18           **THE COURT:** All right. Let's forget Number 1. Go to  
19 the Elmo and put up Number 2.

20           **MR. HIMMELSTEIN:** How do we work this?

21           **THE COURT:** Here it comes.

22           **MR. HIMMELSTEIN:** Okay.

23 **BY MR. HIMMELSTEIN**

24 **Q.** Can you describe for the Court your Sequencing Order  
25 Number 2, please?

1 A. Again, I -- the cash withdrawals were in a previous  
2 posting group, so they were processed first, as was done  
3 actually by Wells Fargo.

4 Group 2, or posting Group 50040, was divided into two  
5 subgroups. The first was debit cards and check cards; and the  
6 second were checks and ACH.

7 The debit cards --

8 Q. I'm sorry?

9 A. The debit cards and check cards were sequenced by  
10 chronological order. And so in the case of where the

11 timestamps were missing, they defaulted to zero time, or  
12 midnight. So they were processed first. And they were ordered  
13 from low to high.

14 The checks and ACH were left in the original or the actual  
15 posting order by Wells Fargo, which was high to low.

16 Q. Okay. It says under Group 1 -- under the number-one  
17 entry, "Without date time."

18 Were -- was both date and time missing, or just time?

19 A. Just time. I got the date out of the Hogan data or the  
20 transaction data. So I always had the date of the transaction,  
21 but I didn't necessarily have the time.

22 Q. And that's true, regardless of the scenario that you were  
23 running?

24 A. Correct.

25 Q. So when we see "Without date time," that means just: No

1 time?

2 A. Without time.

3 Q. Now, you said that the -- there was a time of zero  
4 assigned to the items under Group 1, Subpart 1?

5 A. Yeah. I mean, since I didn't have a time, it was zero.

6 Q. Now, is that something you assigned, or was that the time  
7 already resident in Wells Fargo's system?

8 A. Well, they didn't have a time, so I suppose, technically,  
9 I assigned it, although it seemed arbitrary which time I chose.

10 Q. All right. And assigning a time of zero resulted in the  
11 debit-card transactions --

12 When we say "debit cards," can we agree that that includes  
13 both debit and check cards, just for shorthand?

14 A. Agree, yes.

15 Q. So for the debit-card transactions without date and time  
16 which you assigned a default timestamp of zero, were those  
17 processed -- those were processed before, or after?

18 A. They were processed -- they were processed before the  
19 transactions with times.

20 Q. Okay. And the checks and ACH -- did you leave that  
21 processing in the order it was done by Wells Fargo, or did you  
22 change that in some way?

23 A. I left it in the original, early, actual order, which was  
24 high to low.

25 Q. So basically, you just -- your part of this was to the

1 Group 1; not the Group 2?

2 A. Correct.

3 Q. Did you make the same adjustments for Sequencing Order 2  
4 as you did for Sequencing Order 1?

5 A. For all of the scenarios, I made the same adjustments for  
6 reversals and uncollectibles.

7 Q. And did you come to a differential under the LIFO reversal  
8 method after charge-offs?

9 A. Yes.

10 Q. And what was --

11 A. \$214,185,676.96.

12 Q. And did you come to a differential figure on the 30-day  
13 reversal method, with -- after charge-offs?

14 A. Yes. And the amount was \$203,002,626.86.

15 Q. Now, with respect to the two numbers we just went over,  
16 and the analogous numbers on Sequencing Order 1, and the  
17 analogous numbers on the rest of the sequencing, do those  
18 include any differentials for people who have opted out of the  
19 class?

20 A. Those people were removed from the Class Damages table  
21 that we talked about earlier, and so they're not included in  
22 any of the numbers in the report.

23 THE COURT: How many people opted out?

24 MR. HIMMELSTEIN: A handful, your Honor.

25 Q. Do you have knowledge of that?

1 A. No. It was a very small number, though.

2 MR. HIMMELSTEIN: We can get your Honor that.

3 THE COURT: Okay. Let's move on.

4 MR. HIMMELSTEIN: All right. Can I have the next  
5 slide, please?

6 I'm sorry. Let me use the Elmo, just for safety here.

7 MR. HEIMANN: That's correct.

8 MR. HIMMELSTEIN: Can I have the third slide, please?  
9 Sounds like we can go back on the other thing. Third slide?

10 Q. Can you describe your Sequencing Order Number 3, please?

11 A. Sequencing Order Number 3.

12 Is that -- that's not quite correct, right?

13 MR. HEIMANN: It's not right.

14 MR. SOBOL: Use the Elmo, Barry.

15 MR. HEIMANN: Just use the Elmo, Barry.

16 THE WITNESS: Okay. Sequencing Order Number 3 was  
17 identical to Sequencing Order Number 2, with the exception of  
18 the transactions that check card -- or the debit-card  
19 transactions without timestamps. In those cases in Scenario 2,  
20 I ordered them from low to high. And in Scenario 3, I ordered  
21 them from high to low.

22 BY MR. HIMMELSTEIN

23 Q. Okay. And did you make the same adjustments to the  
24 resulting differentials?

25 A. I did.

1 Q. And what was the differential -- the aggregate  
2 differential, of course, under the LIFO reversal method after  
3 charge-offs for Sequencing Order Number 3?

4 A. It was \$195,015,357.30.

5 Q. And what was the differential under the 30-day reversal  
6 method after charge-offs for Sequencing Order 3?

7 A. It was \$184,604,919.21.

8 Q. Are the differentials that we've just gone over with  
9 respect to Sequencing Orders 1 through 3 summarized somewhere  
10 on one page?

11 A. Yes, they are. It's Exhibit C of the report, which is  
12 page 38.

13 MR. HIMMELSTEIN: Can I have the next?

14 MR. SOBOL: Use the Elmo.

15 MR. HIMMELSTEIN: All right. That one's all right?

16 MS. WINNER: Can you tell me which report we're  
17 referring to?

18 MR. HIMMELSTEIN: This is Mr. Olsen's November 20th  
19 2009 report.

20 Your Honor, we would move this into evidence,  
21 pursuant to Federal Rule of Evidence 1006, summaries.

22 Otherwise, we're going to have to, you know, just  
23 keep reading every figure into the record.

24 THE COURT: Well, I'm going to allow it. Is there an  
25 objection?

1 MS. WINNER: I don't -- if we're just talking about  
2 this one page of the report, I have no objection.

3 THE COURT: All right.

4 Before we do that, because there have been two or  
5 three snafus here, is the right -- look up on the screen or  
6 look at -- look at -- you know, what we need is an actual  
7 document with an exhibit tag on it.

8 MR. HIMMELSTEIN: We do have one, your Honor. That  
9 is what Mr. Olsen is looking at. There was only one version of  
10 this, so I know it's the correct one. And, Mr. Olsen, can you  
11 double-check those numbers against the document in front of  
12 you?

13 THE WITNESS: Yeah. Those are the correct numbers.

14 THE COURT: Let me see what the document looks like.  
15 That looks like the whole report. The whole report is not  
16 coming into evidence.

17 What I'm talking about is: Give me the exhibit that  
18 has one page.

19 MR. HIMMELSTEIN: Yes, your Honor.

20 We would like to discuss moving the whole report into  
21 evidence. Your Honor has a Bench trial guideline that, if the  
22 other side puts an exhibit on their list, we can introduce it.  
23 They put Mr. Olsen's report on their list.

24 MS. WINNER: We put the report on our list, and it  
25 specifically said, "for impeachment purposes only."

1 MR. HIMMELSTEIN: No, I didn't see that. It said  
2 "may offer." No.

3 THE COURT: Look, I'm not going to allow that. No.  
4 Even if they did, they shouldn't have.

5 MR. HIMMELSTEIN: All right.

6 THE COURT: But the -- I will allow this page.

7 MR. HIMMELSTEIN: All right.

8 THE COURT: And I will allow those scenario flow  
9 charts, if you get the right ones.

10 MR. HIMMELSTEIN: Yes, your Honor.

11 THE COURT: Because you put up on the screen two  
12 already that were bogus. So let's make sure the witness -- so  
13 what we ought to have is -- what is the exhibit -- what is that  
14 exhibit number of that report?

15 MR. HIMMELSTEIN: 212.

16 THE COURT: All right. So 212A ought to be the  
17 summary -- write this down -- summary page. 212B, C, and D  
18 ought to be those flow charts. That would be useful for the  
19 Court of Appeals to be able to have that.

20 MR. HIMMELSTEIN: Yes, your Honor.

21 THE COURT: And those will be received in evidence;  
22 but the rest of the report -- no. That's too much hearsay.

23 (Trial Exhibits 212A, 212B, 212C, 212D received in  
24 evidence)

25

1 BY MR. HIMMELSTEIN

2 Q. Now, did you also -- were you also able to calculate the  
3 summary statistics that we discussed earlier?

4 A. Yes, I was.

5 Q. And can I have the next slide, please?

6 Is this the summary statistics that you calculated?

7 A. Yes, it is.

8 Q. And --

9 THE COURT: Well, identify it in some way. You said  
10 this and it's on the screen.

11 MR. HIMMELSTEIN: I was going to go through it.

12 THE COURT: The Court of Appeals won't know what that  
13 is.

14 MR. HIMMELSTEIN: I was going to go through it,  
15 your Honor.

16 Q. So there are three groups of calculations here?

17 MS. WINNER: Your Honor, can we have this  
18 specifically identified for the record? This obviously is not  
19 in evidence at this point.

20 THE COURT: Page 37 of the report. Correct.

21 MR. HIMMELSTEIN: Yes, your Honor.

22 THE COURT: All right. So go ahead.

23 BY MR. HIMMELSTEIN

24 Q. There were three groups of calculations here. Can you  
25 describe each group, and the difference between them?

1 A. The first group there is summary calculations that were  
2 done for all accounts, regardless of whether they had overdraft  
3 fees or not.

4 The second group are summary calculations for all accounts  
5 that I identified as potential class members, which simply  
6 means that they had at least one instance of multiple overdraft  
7 charges on a single day somewhere in the Class Period.

8 And the third group are summary calculation force all  
9 accounts identified as class members. And those were members  
10 under Scenario 1 without -- or under the different scenarios

11 without any uncollectibles or -- or reversals applied. Those  
12 were the accounts that identified as having differentials.

13 MR. HIMMELSTEIN: All right. Your Honor, we'd move  
14 this into evidence under Rule 1006.

15 THE COURT: I think this ought to come in. Don't you  
16 think?

17 MS. WINNER: I -- I -- no objection.

18 THE COURT: That will be Number Sub -- Sub E.

19 Someone keep taking notes over there?

20 MS. BERNSTEIN: Yes.

21 (Reporter interruption)

22 MR. HIMMELSTEIN: That would be, I believe, 212E.

23 (Trial Exhibit 212E received in evidence)

24 THE COURT: 212E is received into evidence, along  
25 with 212A through D.

1 BY MR. HIMMELSTEIN

2 Q. After you completed your November 20th report, were you  
3 asked to run any additional scenarios?

4 A. Yes, I was.

5 Q. And were you present in the courtroom during the  
6 March 24th, 2010, hearing on the motion to -- on Wells Fargo's  
7 motion for summary judgment?

8 A. Yes, I was.

9 Q. And were you -- did you hear discussion of several  
10 criticisms by Wells Fargo at that hearing?

11 A. Yes. I think it was my understanding that there were  
12 three basic criticisms.

13 Q. And what was the first one?

14 A. The first criticism was in regard to Original Alternative  
15 Sequence Number 1. And they said that that did not match what  
16 Wells Fargo had done in the past.

17 Q. Okay. Can I have that?

18 MR. HIMMELSTEIN: Permission to approach, your Honor.

19 (Document displayed)

20 MR. HIMMELSTEIN: Can I have the next slide?

21 Before I put up the slide, Mr. Olsen --

22 Well, we'll put up the next slide.

23 Q. Mr. Olsen, looking at what's on the screen and what's in  
24 front of you, which --

25 MS. WINNER: What is in front of witness?

1           **MR. HIMMELSTEIN:** Yes. What is in front of the  
2 witness is the filing Wells Fargo made, at the Court's Order,  
3 after the March 24th hearing, to state what its posting orders  
4 were prior to April 2001.

5           **MS. WINNER:** Objection, your Honor. That's certainly  
6 not what this is. And it's not an exhibit. And I don't  
7 understand why this is --

8           **THE COURT:** Okay.

9           **MS. WINNER:** There was no order of the Court for us  
10 to state what our posting orders were.

11           **MR. HIMMELSTEIN:** I beg to differ.

12           **THE COURT:** Before we get to the witness, just give  
13 me two sentences on how you propose to use this.

14           **MR. HIMMELSTEIN:** This is going to explain one of the  
15 scenarios that Mr. Olsen ran, you know, and that he put in his  
16 April 12th report.

17           This is the model he used to run the scenario --  
18 overcost Scenario 1A is this document. He looked at this  
19 document, interpreted it. It was obvious to him what it meant;  
20 that's what he did.

21           **THE COURT:** Well, that seems true, Ms. Winner.

22           **MS. WINNER:** Your Honor, you may recall, we filed a  
23 correction about this (Indicating).

24           But in any event, I believe the witness has already  
25 testified that he did not develop the scenarios, that he'd used

1 the scenarios that Counsel told him to use.

2 So, I don't know that there's --

3 **MR. HIMMELSTEIN:** We didn't get to this one yet.

4 **THE COURT:** Well, I think he's about to say that  
5 after this hearing, he must have gone back and -- and, at the  
6 direction of counsel, recrunched the numbers with your -- your  
7 criticism in mind.

8 Right? That's what I think he's about to say,  
9 correct?

10 **MR. HIMMELSTEIN:** Yes.

11 **THE COURT:** So, what's wrong with that?

12 **MS. WINNER:** We can take it one step at a time. He  
13 was being asked to talk about the document. The document's not  
14 in evidence, and shouldn't come into evidence.

15 **MR. HEIMANN:** Well, Your Honor, we'll offer the  
16 document into evidence. A judicial admission, if nothing else.  
17 It's a pleading filed in this case, making representations of  
18 fact by counsel for Wells Fargo.

19 **MS. WINNER:** Your Honor, what happened --

20 **THE COURT:** Why isn't that right? Why can't they  
21 rely on your own pleadings?

22 **MS. WINNER:** What happened, Your Honor, is -- you may  
23 recall -- is they showed up at that hearing with a whole packet  
24 of supposed evidence to support his original Scenario 1, as  
25 reflecting what Wells Fargo used to do.

1 I have never seen this before. They just handed it  
2 up to the Court. You gave me 24 -- I think 24 hours, maybe 48  
3 hours, to provide a submission, which is included in here  
4 (Indicating), about what we thought that evidence showed. And  
5 that is supplied here.

6 I -- there -- the focus at the hearing was about what  
7 that evidence showed about debit card transactions. And, so  
8 that was the focus of the hearing. There is an error in the  
9 attached chart, which we, because it -- it has -- it includes  
10 in the chart something about checks.

11 And so, when we submit -- I submitted a correction to  
12 the Court, as soon as that came to our attention. We submitted  
13 a correction to the Court, in which we notified the Court that  
14 the -- that the portion of this chart refers to check -- not  
15 debit cards. All this stuff on here about debit cards was  
16 right, in terms of what the evidence showed.

17 But in terms of even what the evidence that the  
18 Plaintiffs had submitted showed, this chart is wrong as to  
19 checks.

20 **THE COURT:** But, how much later did you make the  
21 correction?

22 **MS. WINNER:** It was probably a couple of weeks later.

23 **MR. HIMMELSTEIN:** April 16th, Your Honor. Four days  
24 after Mr. Olsen submitted his report, when it was too late to  
25 do any other calculations. Ten days before trial.

1           **MR. HEIMANN:** And, if I -- I hate to double-team,  
2 Your Honor, but Counsel is putting a whole lot of spin on what  
3 these documents say.

4           So what I would suggest we do, we're fully entitled  
5 to have this admitted as a judicial admission by the  
6 Defendants. If they want to have in the so-called correction  
7 as a judicial admission as well, we are perfectly happy to see  
8 that as well.

9           **THE COURT:** All right. Here's the answer to this  
10 problem.

11           The memorandum by Ms. Winner is admissible. And, we  
12 will receive the -- we will allow this to come in as the next  
13 in order, whatever this is. By "this," I mean Defendant's  
14 memorandum. And then the witness can explain how he used it to  
15 do an alternative calculation.

16           And then, it will have to be on cross-examination  
17 where you hammer away at him for not using the corrected  
18 correction. And, maybe his excuse will be, well, he didn't get  
19 it in time. Or maybe your expert has done that correction. I  
20 don't know.

21           But, it -- the fact that you filed it -- I mean, you  
22 did file it with the Court.

23           **MS. WINNER:** No, absolutely, I know --

24           **THE COURT:** So he's entitled to -- and it sounds like  
25 he was entitled to accommodate your concern by at least running

1 another scenario. He then did it, and now you're trying to  
2 pull the rug out from under that.

3 So, I don't -- I'm going to let the witness testify  
4 to this.

5 And let me know, what is the next exhibit in order on  
6 Plaintiffs' exhibits?

7 **MR. HEIMANN:** I have it marked as 221, Your Honor.

8 **THE COURT:** 221 will be received.

9 (Trial Exhibit 221 received in evidence)

10 **THE COURT:** And we are going take a break at this  
11 point for 15 minutes.

12 (Recess taken from 9:29 to 9:45 a.m.)

13 **THE COURT:** All right, back to work. Please be  
14 seated.

15 Let's continue on.

16 (Off-the-Record discussion)

17 **THE COURT:** Okay. Go ahead, please.

18 **BY MR. HIMMELSTEIN:**

19 **Q** All right, Mr. Olsen, showing you what has been marked as  
20 Exhibit 221. Have you seen that document before?

21 **A** Yes, I have.

22 **Q** And if you would turn to the page before you that is up on  
23 the screen, labeled Exhibit A.

24 **A** Okay.

25 **Q** At the top is Plaintiffs' Scenario 1. Does that

1 accurately reflect the posting order of the Scenario 1 we  
2 previously described?

3 A Yes, it does.

4 Q And, under the heading "Wells Fargo's Previous Posting  
5 Orders Pre-April, 2001," can you tell the Court, you know, what  
6 you understand that posting order to be?

7 A I understand that posting order to be that cash  
8 withdrawals and debit card transactions were grouped together  
9 by Wells Fargo, and ordered low to high. And then checks and  
10 ACH transactions were then processed, low to high.

11 MR. HIMMELSTEIN: Okay. If I could have the next  
12 slide, please.

13 (Document displayed)

14 BY MR. HIMMELSTEIN:

15 Q In terms of the alternate sequencing scenarios that you  
16 were asked to run subsequent to your November 2009 report, is  
17 this one of the scenarios, up on the screen?

18 A Correct, yes.

19 Q And, can you describe how this scenario compares to the  
20 one we just went over on Exhibit A, under the heading "Prior to  
21 April, 2001"?

22 A This is just another picture of the exact same thing.  
23 Cash withdrawals, debit and check cards, low to high. And  
24 then, checks and ACH, low to high.

25 Q And did you rely on Exhibit A -- Exhibit 221 -- Exhibit A

1 of Exhibit 221 that we just went over, in determining that this  
2 was the sequencing order that you were to run to emulate what  
3 Wells Fargo had done prior to April, 2001?

4 **A** Counsel for the Plaintiffs instructed me to do this  
5 scenario after we had discussed that document, the previous  
6 slide. And this was supposed to be in accordance with that  
7 slide.

8 **Q** And were the calculations that you did with respect to,  
9 over time, Sequencing Order 1A, done, generally speaking,  
10 process-wise, the same way as the other calculations that we've  
11 gone over?

12 **MS. WINNER:** Objection, leading. This whole thing is  
13 leading. I mean, to save time, I'm sort of sitting here for  
14 most of it. But --

15 **THE COURT:** Sustained. You are leading the witness.

16 **BY MR. HIMMELSTEIN:**

17 **Q** Were there any differences in the process you used to  
18 arrive at what we have been calling the differentials with  
19 respect to Sequencing Order 1A, as compared to the process that  
20 we've previously discussed that you used for calculating  
21 differentials with respect to Sequencing Orders 1 through 3?

22 **MS. WINNER:** I think that's the same leading  
23 question.

24 **MR. HIMMELSTEIN:** It's not leading.

25 **THE COURT:** No, it's better. It's not as leading.

1 Overruled.

2 Go ahead.

3 **THE WITNESS:** Originally when we did the Sequencing  
4 Orders 1, 2 and 3, I only resequenced the transactions that  
5 were in priority posting group 50040. The cash withdrawals  
6 were interspersed in prior to posting group 50020.

7 So the fundamental difference between 1A and 1 is  
8 that the cash withdrawal transactions in the previous posting  
9 group had to be identified, and then essentially moved into  
10 priority posting group 50040, so that they could be sorted with  
11 the debit and check cards.

12 Q And, were you able to do that?

13 A Yes, I was.

14 Q And aside from that, any other differences in the process?

15 A No. It was essentially the same.

16 Q And when you -- and were you able to calculate those  
17 differentials?

18 A Yes. Under the LIFO reversal method, with uncollectables.

19 Q So, did you make the same adjustments to your calculations  
20 as with Scenarios 1 to 3?

21 A Yeah. Again, all of the adjustments were made to all -- I  
22 mean, all the scenarios -- the adjustments were made to all the  
23 scenarios.

24 Q And if you would just remind the Court, again, of those  
25 adjustments?

1 A The adjustments are for the two reversal methods and for  
2 the -- what we're calling uncollectables.

3 Q And with respect to the sequencing orders that you  
4 performed subsequent to your November 20, 2009 report, do any  
5 of what we have been calling the differentials contain damages  
6 from class members who -- well, who were class members, but  
7 excluded themselves from the class?

8 A None of the figures include those individuals.

9 Q What was the differential you calculated under Sequencing  
10 Order 1A using the LIFO reversal method after charge-offs?

11 A \$351,494,698.49.

12 Q And what was the differential you calculated using the  
13 30-day method after charge-offs, under Sequencing Order 1A?

14 A \$336,080,284.76.

15 Q Did you perform any additional alternate sequencing  
16 scenarios?

17 A I did.

18 Q And, what complaint of Wells Fargo, if you will, was the  
19 next scenario you ran intended to address?

20 A The next -- the second complaint that I intended to  
21 address was that Wells Fargo did not like the fact that I left  
22 the transactions without timestamps at Time Zero.

23 So, instead of processing them at the beginning of the  
24 day, I changed the time to 11:59:59 p.m. and processed them  
25 last in the day.

1 Q And did you anticipate that that would make any  
2 significant difference in the resulting differential?

3 A I felt like it would make almost no difference, in the  
4 aggregate.

5 Q And why is that?

6 A Well, if you move those transactions to the end of the  
7 day, they could be after large transactions, or they could be  
8 after small transactions. It's -- it's random.

9 MR. HIMMELSTEIN: Okay. And, can we have the next  
10 slide, please.

11 THE COURT: I would like for Sequencing Order 1A to  
12 be Exhibit -- sub F.

13 MR. HIMMELSTEIN: Thank you, Your Honor. Move in  
14 212F.

15 THE COURT: Received into evidence.  
16 (Trial Exhibit 212F received in evidence)  
17 (Document displayed)

18 BY MR. HIMMELSTEIN:

19 Q Okay. Can you describe -- well, does this accurately  
20 depict the scenario that you've performed that we have been  
21 calling Sequencing Order 2A?

22 A 2A is identical to 2, with the exception that the  
23 transactions without timestamps were processed last in the day  
24 for the debit and check cards.

25 Q And, did you make the same adjustments for reversals and

1 uncollectables?

2 A Yes, I did.

3 Q And, what was the differential under Sequencing Order 2A  
4 with the LIFO reversal method after charge-offs?

5 A \$214,379,710.68.

6 Q And what was the differential after the -- applying the  
7 30-day reversal method after charge-offs?

8 A \$202,994,035.46.

9 Q Did you at some point compare these results with the  
10 numbers -- excuse me, the differentials that you got for

11 Sequencing Order No. 2?

12 A I did.

13 Q Did you calculate the difference between those numbers?

14 MS. WINNER: Objection, Your Honor, his report.

15 THE COURT: This came up so late, because --

16 MS. WINNER: No, I mean, this is not in the new  
17 report.

18 MR. HIMMELSTEIN: Actually, Your Honor, it is a  
19 matter of dividing one number in the report by another number  
20 in the report.

21 We can just point to those numbers if --

22 THE COURT: Just show me, what was the earlier  
23 number?

24 MR. HIMMELSTEIN: Can you put up Sequencing Order 2,  
25 please.

1 THE COURT: That might be the ELMO thing.

2 MR. HIMMELSTEIN: Oh, yes.

3 THE WITNESS: I can read it.

4 (Document displayed)

5 MR. HIMMELSTEIN: We have it on the screen now. We  
6 fixed that.

7 THE COURT: Okay. Is that the correct one before --

8 MR. HIMMELSTEIN: Yes, Your Honor. I triple-checked.  
9 And so we have -- you can see the numbers there. 214 million,  
10 203 million.

11 Can we now quickly flip to 2A so the Judge can  
12 compare them?

13 (Document displayed)

14 MR. HIMMELSTEIN: 214 million, 210 million. And  
15 change.

16 Okay. Can we have the next slide, please.

17 (Document displayed)

18 BY MR. HIMMELSTEIN:

19 Q Was there anything else that Wells Fargo complained about  
20 that you adjusted for?

21 A They didn't like the fact that we -- or that I put the  
22 debit and check card transactions prior to the -- prior to  
23 checks and the ACH.

24 Q And so, can you explain what sequencing -- does this  
25 accurately depict your Sequencing Order 2B?

1 A Yes, and 2B is the same as Scenario 2, with the exception  
2 that checks and ACH, the group containing checks and ACH was  
3 processed prior to the group containing debit cards and check  
4 cards.

5 MR. HIMMELSTEIN: Pardon me, Your Honor. My  
6 colleagues remind me that I should move 2A into evidence as  
7 Exhibit 212G.

8 THE COURT: All right. Received.

9 (Trial Exhibit 212G received in evidence)

10 BY MR. HIMMELSTEIN:

11 Q Now, with respect to the Group 1 transactions, did you do  
12 anything -- did you have to do anything this time with those,  
13 as opposed to under your Scenario 2?

14 A No, they were left in the actual order as originally  
15 posted by Wells Fargo, which was high to low.

16 Q But that -- okay. Thank you.

17 MR. HIMMELSTEIN: Move into evidence Sequencing Order  
18 2B as 212H.

19 THE COURT: Received.

20 (Trial Exhibit 212H received in evidence)

21 BY MR. HIMMELSTEIN:

22 Q Were you able to calculate damage figures -- excuse me,  
23 differentials after reversals and charge-offs for Sequencing  
24 Order 2B?

25 A Yes. Under the LIFO reversal method, it was

1 \$98,612,151.93. And under the 30-day reversal method, it was  
2 \$92,935,315.91.

3 MR. HIMMELSTEIN: May I have the next slide, please.

4 (Document displayed)

5 BY MR. HIMMELSTEIN:

6 Q Does this accurately depict your Sequencing Order 2C?

7 A Yes, it does.

8 Q And, can you describe that, please.

9 A It's essentially the same as 2B, except for in this case,  
10 as opposed -- for the debit card transactions without

11 timestamp, they were processed last in the day, as opposed to  
12 first.

13 Q And, were you able to calculate differentials after  
14 reversals and charge-offs for Sequencing Order 2C?

15 A Yes, I was. And --

16 Q What are those differentials?

17 A Under the LIFO reversal method, it was \$98,596,704.27.  
18 And under the 30-day reversal method, it was \$92,920,530.85.

19 MR. HIMMELSTEIN: Move 2C into evidence as 212I.

20 THE COURT: Received.

21 (Trial Exhibit 212I received in evidence)

22 MR. HIMMELSTEIN: Next slide, please.

23 (Document displayed)

24 BY MR. HIMMELSTEIN:

25 Q Does this accurately depict your Sequencing Order 3A?

1 A Yes, it does.

2 Q And can you describe for the Court what that order was?

3 A This method is the same as Sequencing Order 3, with the  
4 exception that debit card transactions without timestamps were  
5 processed last in the day, as opposed to first.

6 Q And, were you able to calculate differentials after  
7 reversals and charge-offs?

8 A Yes, I was.

9 Q And what were those?

10 A Under the LIFO method, it was \$195,215,270.88. And under  
11 the 30-day method, it was \$184,616,247.52.

12 MR. HIMMELSTEIN: Move 3A into evidence as 212J.

13 THE COURT: Received.

14 (Trial Exhibit 212J received in evidence)

15 MR. HIMMELSTEIN: Next slide, please.

16 (Document displayed)

17 BY MR. HIMMELSTEIN:

18 Q Does this accurately depict your Sequencing Order 3B?

19 A Yes, it does.

20 Q Can you describe that for the Court, please?

21 A 3B is the same as 3, except for the checks and ACH were  
22 processed before the debit card transactions, as opposed to  
23 after the debit card transactions.

24 Q And, were you able to calculate differentials after  
25 reversals and charge-offs?

1 A I was.

2 Q What were those differentials, please?

3 A Under the LIFO method, it was \$73,806,898.60. And under  
4 the 30-day method, it was \$69,386,603.74.

5 MR. HIMMELSTEIN: Your Honor, move into evidence as  
6 212J.

7 MS. BERNSTEIN: K.

8 MR. HIMMELSTEIN: K, excuse me.

9 THE COURT: Received.

10 (Trial Exhibit 212K received in evidence)

11 MR. HIMMELSTEIN: Next slide, please.

12 (Document displayed)

13 BY MR. HIMMELSTEIN:

14 Q And is this the last alternative sequencing that you did?

15 A Yes, it is.

16 Q Does that slide accurately depict your Alternative  
17 Sequencing Order 3C?

18 A Yes, it does.

19 Q Can you describe it for the Court, please.

20 A 3C is the same as 3B, with the exception that for check or  
21 debit card transactions without timestamp, they were processed  
22 last in the day, as opposed to first.

23 Q And, were you able to calculate differentials under  
24 Sequencing Order 3C?

25 A I was.

1 Q And, after reversals and charge-offs, what were those  
2 differentials?

3 A Under the LIFO method, it was \$73,824,056.73. And under  
4 the 30-day method, it was \$69,402,498.90.

5 MR. HIMMELSTEIN: Move this document into evidence as  
6 212L.

7 THE COURT: Okay. Received.

8 (Trial Exhibit 212L received in evidence)

9 MR. HIMMELSTEIN: That is all, Your Honor. I have  
10 nothing further.

11 THE COURT: Thank you. Cross-examination.

12 MS. WINNER: Your Honor, before I begin, I'm sure we  
13 can --

14 MR. HIMMELSTEIN: I apologize, Your Honor. There was  
15 one more document, just the summary page that had all the  
16 numbers on it, that I neglected to move in.

17 Can we have the -- the screen back up, please?

18 (Document displayed)

19 BY MR. HIMMELSTEIN:

20 Q Was there somewhere in your report where you summarized  
21 the differentials, as we have been calling them, with respect  
22 to Sequencing Orders 1A, 2A, 2B, 2C, 3A, 3B --

23 (Reporter interruption)

24 THE COURT: Why don't you ask him to tell us what it  
25 is.

1 BY MR. HIMMELSTEIN:

2 Q What is this? What is this? Sorry.

3 A Page 27 in my report is Exhibit B. And this is a summary  
4 of all of the differentials for all of the -- for the seven  
5 additional sequencing scenarios that I performed in my --  
6 subsequent to the original report.

7 And it includes numbers before reversals and before  
8 uncollectables; before reversals, after uncollectables; after  
9 LIFO reversals, before uncollectables; after LIFO reversals,  
10 after uncollectables; after 30-day reversals before

11 uncollectables; and after 30-day reversals after  
12 uncollectables.

13 And all those numbers for all those scenarios, including  
14 the counts of the number of customers affected under each of  
15 those, as well as the dollar amount.

16 Q And under "count," when you say "number of customers  
17 affected," can you explain what you mean by that?

18 A So, it is the number of customers under that scenario with  
19 those conditions that had a differential.

20 Q And, with respect to 212A, where the word "count" appears,  
21 did you intend the same thing? That was the other summary of  
22 scenario results for 1, 2 and 3.

23 A Yes.

24 MR. HIMMELSTEIN: Move this document into evidence,  
25 Your Honor, as 212N.

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**THE COURT:** All right. Received.

(Trial Exhibit 212N received in evidence)

**MR. HIMMELSTEIN:** Nothing further.

**THE COURT:** Okay. Now, can we go to the cross? All right.

**MS. WINNER:** Your Honor, I don't -- just for the Record, I don't believe we yet have physical hard-copy stickered versions of what's been received as 212A through whatever. And we can clean that up later, I would think.

**MR. HIMMELSTEIN:** We have them here, Your Honor.

**MS. WINNER:** Oh, okay.

**MR. HIMMELSTEIN:** If Ms. Winner would like to use them.

**MS. WINNER:** That would be great. Thank you very much.

**THE COURT:** So we do have them, is that what you're saying?

**MS. WINNER:** They were just handed to me.

**THE COURT:** Okay. Great.

**MR. HEIMANN:** Do you want us to put them up on the screen for you, as you're going through your examination?

**MS. WINNER:** I think we probably have them. Thank you.

CROSS EXAMINATION

1  
2 BY MS. WINNER:

3 Q Good morning, Mr. Olsen.

4 A Good morning.

5 Q I'm going to start off with a question that I think His  
6 Honor asked you at the beginning, just to -- or early on, just  
7 to make sure we've got that clear.

8 You said, as you described the process you went through,  
9 one of the steps you did, correct, was to extract from the data  
10 for everybody, the customers who incurred more -- at least one  
11 overdraft fee, correct?

12 A Only the customers that had multiple overdraft fees in a  
13 single day.

14 Q And the only days you analyzed, then, were days that had  
15 multiple overdraft fees in a single day. Correct?

16 A Well, instances where a customer had -- a specific  
17 customer had multiple overdraft fees on a given day, I analyzed  
18 that customer for that day.

19 Q Okay. And just to get at the Court's question, by  
20 "multiple overdraft fees," in that context, you meant multiple  
21 overdraft fees for any reason. So it could have been -- it  
22 could have been somebody who had only checks posting that day.

23 A Correct.

24 Q Now, let's look first, if I could have Scenario 1 up.

25 (Document displayed)

1 MS. WINNER: Thank you very much.

2 BY MS. WINNER:

3 Q Your Scenario 1 does not have anything to do with the  
4 impact of ordering transactions in chronological order, does  
5 it?

6 A No, it does not.

7 MR. HIMMELSTEIN: Objection, Your Honor. Vague and  
8 ambiguous.

9 THE COURT: I'm sorry, what was the -- what's the  
10 objection?

11 MR. HIMMELSTEIN: Vague and ambiguous as to the use  
12 of the term "chronological."

13 THE COURT: Well, this is cross-examination. So the  
14 witness can fend for himself, I think. So, I'm going to  
15 overrule the objection.

16 Go ahead.

17 THE WITNESS: No, it does not have anything to do  
18 with chronological order.

19 BY MS. WINNER:

20 Q And the same thing is true of Scenario 1A, correct?

21 MS. WINNER: If we could have that one up?

22 (Document displayed)

23 BY MS. WINNER:

24 Q That also doesn't have anything to do with ordering in  
25 chronological order, does it?

1 A No.

2 Q Okay. And on each of these scenarios --

3 MS. WINNER: And let's go back to 1, thank you.

4 (Document displayed)

5 BY MS. WINNER:

6 Q What you did is you mixed debit cards, checks, and ACH  
7 transactions all together, and ordered all of them from low to  
8 high. Correct?

9 A That's technically correct. They were already mixed  
10 together. So I didn't actually mix them together, I just

11 reordered them.

12 Q But you didn't unmix them?

13 A I didn't unmix them, correct.

14 Q And so, and then -- all right. So your -- as a result of  
15 that, this scenario is not limited to differentials associated  
16 with debit card transactions, is it?

17 A No.

18 Q So it also includes differentials associated with fee,  
19 overdraft fees incurred for other types of transactions, like  
20 checks and ACH transactions. Right?

21 A It does.

22 Q And, similarly, for your -- for your Scenario 1A, your --  
23 the differentials you measured --

24 MS. WINNER: If we can go back to that one.

25 (Document displayed)

1 MS. WINNER: Thank you.

2 BY MS. WINNER:

3 Q The differentials you measured for that one also included  
4 overdraft fees on checks and ACH transactions. Correct?

5 A Correct.

6 Q And in fact, there was even more of that effect in your  
7 Scenario 1A than there was in your Scenario 1, correct?

8 MR. HIMMELSTEIN: Objection, characterization, Your  
9 Honor.

10 THE COURT: Overruled.

11 Please answer.

12 THE WITNESS: That would be correct. Because the  
13 checks and ACH were processed last.

14 BY MS. WINNER:

15 Q Now, am I correct, then, that -- let's put 1 and 1A aside,  
16 and talk about your other scenarios.

17 Am I correct that your other scenarios did have -- each of  
18 them had a chronological component of some kind?

19 A Yes.

20 Q But none of those attempted to sequence transactions in  
21 genuine chronological order according to when the customer  
22 initiated the transaction, did they?

23 MR. HIMMELSTEIN: Objection. Vague and ambiguous.

24 THE WITNESS: Well --

25 THE COURT: You answer it the best way you can. If

1 you have to divide it into parts, go ahead, but you can -- I  
2 think it's clear enough.

3           **THE WITNESS:** Okay. I ordered -- I tried to order  
4 the debit card and check card transactions in the order in  
5 which they occurred. The rest of the transactions were just  
6 left in the order as actually posted by Wells Fargo.

7 **BY MS. WINNER:**

8 **Q** Okay, let me focus in more on debit card transactions, to  
9 be a little clearer.

10 If a transaction made on -- that the customer made on

11 Monday did not post until Friday, you did not attempt to  
12 sequence that before a Tuesday debit card transaction that  
13 posted on Wednesday, did you?

14 **A** The resequencing was limited to a single posting day. So  
15 they were only relative to the other transactions that posted  
16 that day.

17 **Q** And as a result of that, your sequencing does not reflect,  
18 going across time, the genuine -- the full chronological order  
19 in which the customer initiated the transactions. Correct?

20 **A** As far as I understand the question, that's correct.

21 **Q** Is there something about the question you think you don't  
22 understand?

23 **A** Can you maybe reword it? Just --

24 **Q** Sure. Let me try.

25 **A** Okay.

1 Q When I was trying to use my example earlier of a  
2 transaction made on Monday that doesn't post until Friday  
3 versus one that is made on Tuesday and posts on Wednesday, your  
4 scenarios don't emulate the exact order in which, over time,  
5 the customer posted the transactions. Correct?

6 A That's correct.

7 Q Now, for each of your alternative scenarios that did have  
8 a chronological element, you tried to sort the debit card  
9 transactions chronologically within the day they were submitted  
10 to the bank for payment. Correct?

11 A Correct.

12 Q But you couldn't do that for all the debit card  
13 transactions, because not all of them had timestamps. Is that  
14 correct?

15 A Partially correct. All of them had dates. So, there are  
16 a small percentage of them that didn't have timestamps, so that  
17 is partially correct.

18 Q Okay. So, I was referring to timestamps.

19 A Correct.

20 Q And approximately 20 percent of them had no timestamps,  
21 correct?

22 A As it worked out, it's 16 percent.

23 Q Well, you -- well --

24 A I mean, after I asked that -- answered that question, I --  
25 before, I said approximately 20 percent, when I was asked that

1 question.

2 So, you go back and take the two numbers in the report and  
3 actually do the division, and it's 16 percent.

4 Q Okay, but you testified -- you recall testifying earlier  
5 that it was 20 percent.

6 A I said "approximately." Right.

7 Q Approximately 20 percent. Let's be fair.

8 A Yes.

9 Q Okay. And your understanding was that one reason for that  
10 was that some debit card transactions aren't authorized.

11 Correct?

12 A That was my understanding, yes.

13 Q And so, there would be no data in that settlement system  
14 you talked about for an authorization time. Correct?

15 A Correct.

16 Q And then, there were also transactions that might have  
17 been authorized, but you couldn't match them up with the  
18 authorization. Correct?

19 A That is correct.

20 Q And, the way -- the way you matched transactions would be  
21 to look at the -- the customer's name or the customer's  
22 identifier, whatever you were using, and the dollar amount and  
23 the date, and you would go back into the settlement file  
24 records and try to match it up with an authorization.

25 Correct?

1 A Correct.

2 Q So for example, if on Tuesday there is a settlement file  
3 for Erin Walker for \$22, or there's a posting transaction for  
4 \$22 for Erin Walker, dated May 5th, you would look back in the  
5 authorization records and look for a May 5th transaction for  
6 Erin Walker and \$22.

7 Correct?

8 A Correct.

9 Q And, most of the time you could find a match, and a  
10 significant proportion of the time you couldn't. Right?

11 A Correct.

12 Q Okay. Now, if the transaction amount was different from  
13 the authorization amount, you weren't able to match it. Right?

14 A Right.

15 Q And then you assigned it either -- depending on your  
16 scenario, either you put it all -- all of those at the very  
17 beginning or you put all of those at the very end of the day on  
18 which the transaction was dated.

19 A That is correct.

20 MS. WINNER: Now, I would like to, if we could put up  
21 on the screen just for illustrative purposes -- we can offer  
22 this into evidence if the Court would find it helpful -- but,  
23 Exhibit 591:

24 (Document displayed)

25 MS. WINNER: Let me show a copy to the witness, if I

1 may approach, Your Honor.

2 THE COURT: Sure. Is this already in evidence?

3 MS. WINNER: It is not in evidence, Your Honor.

4 THE COURT: All right.

5 (Witness examines document)

6 MS. WINNER: It's just -- it's just an example.

7 THE COURT: Sure.

8 MS. WINNER: For illustrative purposes.

9 THE COURT: Well, we'll -- this is something that the  
10 lawyers -- you just want to use this as, like, a hypothetical.

11 MS. WINNER: Exactly. It's for a hypothetical.

12 THE COURT: All right, then it will be part of a  
13 record as 591, not in evidence, because -- just a hypothetical.  
14 But it will be there for the Court of Appeals.

15 MS. WINNER: Thank you, Your Honor.

16 (Defendant's Exhibit 591 made a part of the Record,  
17 not received in evidence)

18

19 BY MS. WINNER:

20 Q Do you recognize 591 from your deposition?

21 A Yes, I do.

22 Q And this, I would like to focus your attention on the top  
23 part of this -- the top table. And this is a hypothetical set  
24 of transactions that post on a particular day, we'll call it  
25 March 13th.

1 Do you see that?

2 **A** Yes.

3 **Q** Now, which transaction, from the customer's point of view,  
4 which of these transactions is the one that occurred first,  
5 chronologically?

6 **A** The debit card transaction on March 11th at 9:00 a.m. for  
7 \$400.

8 **Q** From the customer's point of view? If he wrote a check on  
9 March 8th, that isn't earlier?

10 **A** I guess I'm not really qualified to answer that, because  
11 if -- from my point of view, when I write a check, I know that  
12 the bank doesn't know about it until the bank gets it.

13 So, I mean -- but technically, they wrote the check prior  
14 to that debit card transaction, yes.

15 **THE COURT:** He's not qualified to answer that  
16 question, is he? He was asked various scenarios that the  
17 lawyers came up with.

18 **MS. WINNER:** I can move on, Your Honor.

19 **THE COURT:** Now you're asking him to testify as an  
20 expert on what the consumer --

21 **MS. WINNER:** I'm not actually trying to ask that  
22 question, Your Honor.

23 **THE COURT:** All right.

24 **MS. WINNER:** So, I'll move on. I'll move on.

25 **THE COURT:** All right. You can ask a hypothetical,

1 that's okay.

2 MS. WINNER: Okay. Hypothetically --

3 THE COURT: You could work around that problem, but  
4 you --

5 MS. WINNER: That's what I'm going to do.

6 THE COURT: -- to get him to testify as an expert on  
7 what consumers think. And he's -- he hasn't been qualified in  
8 that area.

9 MS. WINNER: I'll move on.

10 THE COURT: All right.

11 BY MS. WINNER:

12 Q Which transaction on this list occurred -- was the last to  
13 occur?

14 A The deposit on March 13th.

15 Q Okay. And let's look at the second table, the bottom  
16 table on this page.

17 MS. WINNER: And let's leave them both up, please.

18 (Document displayed)

19 BY MS. WINNER:

20 Q Does the second table show how you would have ordered  
21 these transactions under your Scenario 2 and 3? Assuming you  
22 actually had the date and time for each of these transactions.

23 A Correct.

24 Q And, this is also the way you would have sorted them under  
25 2A and 3A. Correct?

1 A Correct.

2 Q Okay. Now, so if the -- for example, if the -- if you  
3 didn't have the date and timestamp, say, for the March 11th,  
4 2:00 p.m. transaction, that would have flipped with the  
5 previous one, for your Scenario 2. Correct?

6 A Correct.

7 MS. WINNER: Now, I would like to actually use the --  
8 (Off-the-Record discussion)

9 MS. WINNER: I'm going try a little math, which is a  
10 little scary.

11 BY MS. WINNER:

12 Q Now, these transactions just on this list, under the way  
13 you would sequence them under 2, 3, 2A and 3A, they -- this  
14 customer would have gotten one overdraft fee on this day.

15 Correct?

16 A Correct.

17 Q Okay. If we put checks at the beginning, do you know how  
18 many overdraft fees this customer would get? Or would you have  
19 to run the math?

20 A Well, I suppose we have to run the math.

21 Q Okay, well, let's do it. We start with \$50 (Indicating on  
22 paper on easel). Right?

23 A Yes.

24 Q Okay. What do we do next?

25 A Deposits.

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1 Q Okay. And, so for this scenario, let's assume we had two  
2 deposits. That we add \$500. That gives us \$550, right?

3 A Correct.

4 Q And then we start subtracting.

5 A Yes.

6 Q What do we subtract first?

7 A Under Scenario 2?

8 Q For, I said if you -- if you put the checks first.

9 A If we put the checks first, then we would subtract the  
10 \$200 from the check.

11 Q Okay. And then we have \$350, is that right?

12 A Yes.

13 Q And then we have a \$400 debit card transaction to take  
14 out?

15 A Yes.

16 Q So that's minus \$50 now?

17 A Yes.

18 Q So now we have an overdraft fee, right?

19 A Correct.

20 Q Now, what do we take out next?

21 A We take out the \$15 debit card transaction for March 11th.

22 Q Okay. And, what do we end up with then?

23 A \$15 less.

24 Q Yeah, minus -- minus 65. So that's another overdraft fee,  
25 right?

1 A Yes.

2 Q And then we have -- the \$20 transaction comes out?

3 A Yes.

4 Q And then, so, it's 85, right?

5 A Correct.

6 Q So we have three overdraft fees.

7 A Correct.

8 Q And that's the same number for these transactions as --  
9 that you'd get if you sequenced high to low, correct?

10 We can do that one, too, if you want.

11 A No, it appears correct, yes.

12 Q Okay. Now, what happens, then, if we don't do the credit  
13 first? Should we run that one?

14 A Sure.

15 Q Just do them all in order by the dates that are on the  
16 top. Okay? We'll just do everything in chronological order.

17 So we start with \$50. And then, what do we do next? We  
18 take out 200?

19 A Okay.

20 Q Is that the next thing we do?

21 A Well, this is your scenario, and --

22 Q Okay, well, I'm asking if we do it chronologically.

23 A Okay.

24 Q According to the dates that are here on the first parts of  
25 the checks written March 8, debit cards are done in this order,

1 the deposit is done last?

2 MR. HIMMELSTEIN: Your Honor, I renew my objection to  
3 the use of "chronologically." Now it's being used in a  
4 different way.

5 THE COURT: Well, no, I understand. Ms. Winner is  
6 saying everything is literally done in chron order.

7 MS. WINNER: Yes.

8 THE COURT: I can understand that.

9 MR. HIMMELSTEIN: But Mr. Olsen said, well, by chron  
10 order for checks, you know, what's the appropriate point in

11 time. When it's written or received by the bank. That's  
12 ambiguous.

13 THE COURT: Well, in this example, it's only for one  
14 check, and it's only for one date, and it's unique. So we  
15 don't have that problem in this example. Maybe in other  
16 examples, but not here.

17 All right, so go ahead with your example.

18 MS. WINNER: Okay.

19 BY MS. WINNER:

20 Q So, first thing is we subtract 200?

21 A Assuming that you're looking at the check on the date it  
22 was written, as opposed to when it was submitted to the bank,  
23 yes.

24 Q Well, you don't know -- we don't know when it's submitted  
25 to the bank. Right?

1 A I assume it was March 13th, because that's the day it  
2 posted.

3 Q Well, I'm taking the March -- okay. I understand what  
4 you're saying. Okay.

5 But anyway, so we take it down to -- at that point it's  
6 minus 250? No, it's minus --

7 A 150.

8 Q 150. So we have an overdraft fee, right?

9 A Okay.

10 Q And then, all those other transactions at that point,

11 they're all going to post into overdraft. Correct?

12 A Correct.

13 Q We are going to have four overdraft fees under that  
14 scenario. Correct?

15 A Correct.

16 Q And that's more than under high to low with credits first.  
17 Correct?

18 A Correct.

19 Q And that's more than under the chronological order with  
20 credits first that we just went through.

21 A It is, yes.

22 Q Now, scenarios 2B and 3B.

23 MS. WINNER: Let's just put up 3B.

24 (Document displayed)

25

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1 BY MS. WINNER:

2 Q 3B. 2B and 3B, those, those -- you were -- you said you  
3 were in the courtroom the day of the hearing?

4 A Yes, I was.

5 Q 2B and 3B were the ones the Judge wanted you to do.  
6 Correct?

7 MR. HIMMELSTEIN: Objection. The Record speaks for  
8 itself, Your Honor.

9 THE COURT: Well, I don't remember well enough. Is  
10 that true?

11 MS. WINNER: That's my understanding, but --

12 THE COURT: Well, you did that in response to what  
13 Counsel asked you to do after the hearing. Right?

14 THE WITNESS: Yes, I did.

15 THE COURT: Okay. That's probably correct.

16 BY MS. WINNER:

17 Q Did you review the order that the Judge issued after that  
18 hearing?

19 A No, I just spoke with counsel for the Plaintiffs.

20 Q Okay. So, they didn't show you what the Judge said in his  
21 order?

22 A I saw the -- the sheet that -- the pre-2001, with the  
23 boxes, the exhibit that they put up earlier. But I didn't  
24 actually read the full document.

25 Q Okay. Well, that -- that wasn't the Judge's document.

1 That was mine.

2 A Okay.

3 Q So, so you haven't seen anything -- have you ever seen  
4 anything that -- any of the orders that have been issued in  
5 this case?

6 Have you ever read any of them?

7 A I don't think so.

8 Q Now, am I correct that in all of your various alternate  
9 scenarios, you only analyzed the impact of posting order on  
10 transaction days that class members had multiple overdraft

11 fees?

12 Correct?

13 A Correct.

14 Q So, for none of your scenarios did you analyze any  
15 possible impact on overdraft fees on days when the class member  
16 only got one overdraft fee, correct?

17 A That is correct.

18 Q And, am I correct that for none of your scenarios did you  
19 analyze -- let me try that question again.

20 For none of your scenarios did you analyze any possible  
21 impact -- any of your different sequences on customers who did  
22 not have multiple overdraft fees that you pulled?

23 A I only did analysis on days where customers received  
24 multiple overdraft charges in a single day.

25 Q And, am I also correct that you didn't do any analysis for

1 any offsetting costs that might result from any of your  
2 different scenarios, different costs to the customer?

3 **MR. HIMMELSTEIN:** Objection, vague and ambiguous.

4 **THE COURT:** I don't understand. What costs are you  
5 talking about?

6 **BY MS. WINNER:**

7 **Q** Well, for example, if a different sequencing order -- if  
8 your Sequencing Order 1A resulted in a customer having a check  
9 returned unpaid, and incurred additional fees from the bank and  
10 others as a result, you didn't do any analysis of that, did

11 you?

12 **A** I -- I mean, I -- no, I -- I analyzed just the -- what we  
13 talked about before, right.

14 **Q** Okay. And if an item was paid in the real world, if a  
15 check was paid in the actuality, for purposes of your analysis,  
16 you just assumed that it would also have been paid in your  
17 alternative scenarios.

18 Correct?

19 **A** Correct.

20 **Q** Now, let's talk a little bit about the reversals. The  
21 reversal methodologies. You had a LIFO methodology and a  
22 30-day methodology, correct?

23 **A** Correct.

24 **Q** And those were just methodologies that counsel instructed  
25 you to use. Correct?

1 A Correct.

2 MS. WINNER: I would like to put up Exhibit 592,  
3 which is also for illustrative purposes. It's another  
4 hypothetical.

5 (Document displayed)

6 BY MS. WINNER:

7 Q And you have seen this one before, too, right?

8 A I believe so, yes.

9 Q This is -- I discussed this one with you in your  
10 deposition. Correct?

11 A Correct.

12 Q Okay. We're assuming that on Day 1, the customer has a  
13 starting balance of \$100, and ending balance of \$50. In real  
14 life, got three overdraft fees. Under your scenario, whichever  
15 one, got two overdraft fees.

16 And now, my exhibit uses the word "damages," but we're  
17 using the word "differential" here. Your measured differential  
18 is one overdraft fee.

19 I'm just asking you to assume that. Okay?

20 A Okay.

21 Q And then, assume that, then, on Day 2, the starting  
22 balance is negative. So if the starting balance is negative,  
23 any transaction that comes in and posts that day is going to  
24 post into overdraft.

25 Right?

1 A Correct.

2 Q And so, you're not going to measure any differential in  
3 that situation. Correct?

4 A That is correct.

5 Q Posting order doesn't matter in that situation.

6 A It does not.

7 Q Okay. And then, so, the actual and your number will be  
8 the same. Correct?

9 A Correct.

10 Q Now, under that situation, let's assume that a month

11 later, the customer reviews his account statement, complains  
12 about the overdraft fees, says "I shouldn't have gotten three  
13 fees on that day, I should have only gotten two."

14 And the bank says, "Gosh, you're a great customer, we want  
15 to accommodate you, we'll reverse one."

16 Assume that. Okay?

17 In that situation, when you did your LIFO methodology, you  
18 would have assigned that reversal to Day 2. Correct?

19 A Correct.

20 Q And that would have been true consistently for any  
21 situation like that, that you encountered. Correct?

22 A That is correct.

23 Q And also, if this reversal occurred more than 30 days  
24 after the -- the overdraft fee was assessed, you wouldn't count  
25 it. Right?

1 A Are we still on the LIFO method?

2 Q I'm now on your 30-day method. And, thank you for the  
3 clarification.

4 Under your 30-day method, you wouldn't count it if it's  
5 more than 30 days.

6 A I would not.

7 Q Now, let's go back to your Scenario 1A and what you relied  
8 on for that. Exhibit 221, which is -- do you still have that  
9 in front of you?

10 We don't have it on the screen, but it is the Defendant's

11 Supplemental Memorandum on Preemption. Do you see that?

12 A Okay.

13 Q And, this is the exhibit that includes the chart that you  
14 used for Exhibit 1A, correct?

15 A Correct.

16 Q And did you -- did Counsel give you anything except this  
17 chart?

18 A Well, this is the chart that we based our conversation on,  
19 yes.

20 Q No, my point is, did they give you the whole document? Or  
21 just the chart?

22 A I'm not sure. The only thing I looked at was the chart,  
23 though.

24 Q Okay. So you didn't read any of the rest of it?

25 A No.

1 Q Did counsel give you any of the actual evidence that is  
2 discussed in this document?

3 A It -- it's not really relevant to me, so I -- I don't  
4 believe so.

5 Q Did they tell you about -- for example, about  
6 Mr. Zimmerman's testimony, deposition testimony, that the check  
7 processing order had changed in 1999?

8 MR. HEIMANN: Well, objection --

9 MR. HIMMELSTEIN: Objection, vague and ambiguous as  
10 to --

11 (Counsel speaking simultaneously)

12 MR. HEIMANN: That wasn't his testimony.

13 MS. WINNER: His deposition testimony?

14 MR. HEIMANN: His deposition testimony was that it  
15 changed some time in 1999 or 2000.

16 MS. WINNER: I correct my question. I correct my  
17 question. I think -- there's some ambiguity in that, but I  
18 will ask it this way.

19 BY MS. WINNER:

20 Q Did they tell you that Mr. Zimmerman had testified that  
21 the check processing order changed in 1999 or 2000?

22 A From my perspective, all I was concerned about was what  
23 alternate scenarios did they want me to process the  
24 transactions in. I -- it was up to them to make the decision  
25 on -- on those scenarios, and what those scenarios were to be.

1 I mean, I would have suggestions in how that would be  
2 practically applied, based on the data. But other than that,  
3 I'm -- I wasn't really concerned with where that decision --  
4 where the information came from to make the decision to do  
5 that, a particular scenario.

6 Q So they -- they were making the decision about what the  
7 scenario should be, not you. Correct?

8 A Correct.

9 Q So, in saying that you relied on Exhibit A, you -- you  
10 used Exhibit A because counsel handed it to you and said "Use  
11 this." Correct?

12 A Yeah. This is what the basis of our discussion was on,  
13 yes.

14 Q And you didn't make any independent assessment of whether  
15 Exhibit A was an appropriate thing to use. Correct?

16 A No, my part was only to say how it would be done,  
17 technically.

18 (Off-the-Record discussion)

19 MS. WINNER: Your Honor, I would like to show the  
20 witness what we have marked as Trial Exhibit 702.

21 May I approach?

22 (Witness examines document)

23 BY MS. WINNER:

24 Q Mr. Olsen, this is a document entitled Notice of  
25 Correction. It's dated April 16, 2010.

1 A Okay.

2 Q Have you ever seen this before?

3 A I heard about it, but I didn't actually see it, no.

4 Q When did you hear about it?

5 A Well, after I was done with the report for the  
6 supplemental scenarios.

7 Q So this came to your attention after you had already  
8 finished your work. Correct?

9 A Correct.

10 MS. WINNER: Your Honor, just for completeness

11 purposes, I would like to offer Exhibit 702 into evidence.

12 This is -- this (Indicating) goes with the exhibit, the Exhibit  
13 221.

14 THE COURT: Well, it's the one where you say there  
15 was a correction.

16 MS. WINNER: Yes.

17 THE COURT: New information. What is wrong with  
18 having that in there, too?

19 MR. HEIMANN: I'm not going to object to that, I  
20 suppose, Your Honor. But technically, it's not admissible.  
21 She made a judicial admission in the document.

22 THE COURT: Well, I know.

23 MR. HEIMANN: And she's not -- having made a judicial  
24 admission, normally I would argue that counsel cannot come back  
25 and say, "Now I've supplemented it, I did something else and I

1 want to take away the original judicial admission."

2 But, I won't object.

3 **THE COURT:** Well, it still may be an admission, but  
4 in fairness and rule of completeness, if something is highly  
5 related. So I'm going to allow it in.

6 So, what is that Exhibit number?

7 **MS. WINNER:** 702.

8 **THE COURT:** 702 is received.

9 **MS. WINNER:** Thank you.

10 (Trial Exhibit 702 received in evidence)

11 **MS. WINNER:** Now, let's put up Scenario 2 again, if  
12 we could. And then have Scenario 2A.

13 (Document displayed)

14 **BY MS. WINNER:**

15 **Q** Your Scenario 2 and your Scenario 2A --

16 **MS. WINNER:** Can you put that up? It's a little hard  
17 to compare them.

18 **BY MS. WINNER:**

19 **Q** Those scenarios, am I right, are identical in what you  
20 did, except that Scenario 2 has the non-timestamped debit card  
21 transaction sequenced at the beginning of each day, and  
22 Scenario 2A sequences non-timestamped debit card transactions  
23 at the end of each day. Correct?

24 **A** That's correct.

25 **Q** And the total aggregate numbers you end up with are very

1 similar. Correct?

2 A Very similar, yes.

3 Q They are very close to one another?

4 A Yes.

5 Q But that's at an aggregate level, correct?

6 A Correct.

7 Q It is not true that each pair of scenarios results in the  
8 same list of customers, individual customers who are identified  
9 as being affected. Correct?

10 A There -- any time you change the scenario or the posting

11 order, that will have an effect on some individuals, yes.

12 Q So, for Sequencing Order 2A -- 2 and 2A, the list of  
13 affected -- individual affected customers is different for each  
14 of those scenarios. Correct?

15 A There will be differences, yes.

16 Q And that's the same -- that is that same, the same -- is  
17 the same true for each pair of scenarios in which you did the  
18 same adjustment, moving the non-timestamped debit card  
19 transactions either to the beginning or to the end?

20 A That is correct.

21 Q So the aggregate numbers are very similar, but who is  
22 being identified as affected is different. Correct?

23 A Correct.

24 MS. WINNER: I have no further questions.

25 MR. HIMMELSTEIN: Just a couple of redirect.

1 MS. WINNER: Let me get out of your way.

2 REDIRECT EXAMINATION

3 BY MR. HIMMELSTEIN:

4 Q Mr. Olsen, Ms. Winner asked you if you assumed checks  
5 under -- were paid under your various scenarios.

6 Did you make any assumption about that, one way or the  
7 other?

8 A I guess I didn't make an assumption. It's just that if a  
9 check was paid by the bank, it shows up as a -- a transaction  
10 for that day, a debit transaction. And so, I didn't change

11 that.

12 Q And, with respect to each of your scenarios, do you have a  
13 -- or did you create a separate list or table which has each of  
14 the -- the account numbers and the differential amounts, you  
15 know, by class member for each of the different scenarios?

16 A For every single summary number that we put up there, for  
17 every combination of reversal method, uncollectables yes or no,  
18 for every scenario, it's broken down by individual customer.

19 Q So if the Court were to select any one of your scenarios  
20 as an appropriate measure of amounts to be paid to the class,  
21 should we prevail in this litigation, you would have a list of  
22 exactly what accounts should get exactly how much money.

23 A Well, Wells Fargo has that list now. So, assuming that I  
24 could get back in there, I would have it too.

25 MR. HIMMELSTEIN: Nothing further, Your Honor.

1 THE COURT: Any more?

2 MS. WINNER: No further questions.

3 THE COURT: All right. Before the witness steps  
4 down, I have a question.

5 But first I need ask Counsel something. If you don't  
6 want the witness here, I will send him out. I don't think it  
7 will --

8 MR. HIMMELSTEIN: That's fine with us.

9 THE COURT: I don't think it really should make a  
10 difference.

11 Do we have a scenario done by anybody that would  
12 correspond to this? The exact method used by Wells Fargo prior  
13 to going high to low on cards?

14 MR. HIMMELSTEIN: We believe that's our Scenario 1A.

15 THE COURT: Do you think that's 1A?

16 MR. HIMMELSTEIN: Yes, Your Honor.

17 THE COURT: Is that 1A?

18 MS. WINNER: No.

19 THE COURT: It's not? Do you have an expert who's  
20 done that?

21 MS. WINNER: No, Your Honor.

22 THE COURT: Well, do you have it in writing someplace  
23 where you think -- what you think was the exact scenario used  
24 by Wells Fargo prior to the bank going high to low on cards?  
25 Which, I think, was some time in 2001.

1 But, whenever, it doesn't really matter. Whenever it  
2 was, --

3 MS. WINNER: Yes.

4 THE COURT: -- there was a scenario.

5 MS. WINNER: Yes.

6 THE COURT: And, the bank computer was set up to do  
7 something.

8 MS. WINNER: Yes.

9 THE COURT: What is that scenario?

10 MS. WINNER: Well, there's been testimony about that.

11 It was -- Do you want me to try to describe it here?

12 THE COURT: Well, what is your main --

13 MS. WINNER: I don't want to get it wrong again, Your  
14 Honor.

15 THE COURT: All right, but, look --

16 MS. WINNER: I would rather, you know, stick with the  
17 evidence.

18 MR. HEIMANN: I can tell you what the evidence is,  
19 Your Honor. It's very straightforward.

20 THE COURT: What do you say?

21 MR. HEIMANN: There has been testimony from -- in  
22 depositions and in trial, that the processing order before  
23 April of 2001 -- that was a point in time in which debit cards  
24 were switched from low to high to high to low.

25 The testimony has been variously that --

1 THE COURT: Wait, excuse me. I thought they were in  
2 serial order at that point.

3 MS. WINNER: That's --

4 MR. HEIMANN: No, no, no, no, that's where I'm coming  
5 to.

6 Please, ma'am, don't interrupt me now. I've got the  
7 floor.

8 THE COURT: Let me hear you out totally on your --

9 MR. HEIMANN: There has been testimony, both here at  
10 trial and before, that the order agreeing before April 2001 was

11 high to low -- excuse me, low to high -- high to low for  
12 checks, low to high for debit cards. And that that -- in  
13 California. And that that change was made, high to low for  
14 checks, sometime in 1999 or 2000. That was Mr. Zimmerman's  
15 testimony.

16 Since then, actually within a week or so before we  
17 began the trial, a document was submitted, the one that was  
18 recently -- just marked a moment ago, in which the defense  
19 said, whoa, actually it may have been -- I emphasize "may," you  
20 need to read the document carefully to see this -- it may have  
21 been that for some period of time prior to April of 2001, the  
22 sequencing order for checks was sequential, and the sequencing  
23 order for debit cards was low to high. And that that was  
24 changed, then, in April, 2001, to high to low for both,  
25 batching debit cards before checks.

1 So, the bottom line is, we don't have a definitive  
2 record as to what the processing order for checks was prior to  
3 April of 2001. There is a conflict in the evidence.

4 THE COURT: All right. Wait, wait, wait. I have --  
5 I have a two-part question. Surely we know this.

6 When did, for cards only, the bank go high to low,  
7 regardless of what it was before?

8 MR. HEIMANN: April, 2001.

9 THE COURT: April, 2001. Is that -- is that what you  
10 think, too?

11 MS. WINNER: We have stipulated to that, I believe.

12 MR. HEIMANN: I think we did stipulate to that  
13 yesterday.

14 THE COURT: All right, okay. So, so now, my question  
15 concerns March of that year.

16 MS. WINNER: Yes.

17 THE COURT: In March of that year, for cards only,  
18 what was the sequencing?

19 MR. HEIMANN: Low to high.

20 MS. WINNER: That's pursuant to our stipulation.  
21 That's what we have stipulated to.

22 THE COURT: Then in March of that year, what was it  
23 for checks?

24 MR. HEIMANN: We didn't know. It was either high to  
25 low, or sequential, based on the evidence.

1 THE COURT: What do you say?

2 MS. WINNER: We say -- basically, we say what he  
3 said.

4 The one thing I just wanted to make clear is that the  
5 evidence is clear that it was not low to high at that point.  
6 It was either sequential, or high to low.

7 MR. HEIMANN: Well, I would say there's no  
8 affirmative evidence it was low to high; but the ambiguity in  
9 the testimony leaves that open as a possibility, in my  
10 judgment.

11 THE COURT: Now --

12 MS. WINNER: Well, there actually is -- they've put  
13 into evidence document contemporaneous evidence that said it  
14 was serial.

15 MR. HEIMANN: Well, and he heard the testimony from  
16 Ms. Moore the other day that she may have believed that at the  
17 time, but she may have been mistaken.

18 THE COURT: Now, on this witness' scenarios --

19 MS. WINNER: Mm-hm.

20 THE COURT: -- did he have a scenario where the  
21 checks were serial, and the cards were low to high?

22 MR. HIMMELSTEIN: No, your Honor. He was not  
23 instructed to do serial. That didn't come up until April 16th,  
24 after he had finished his work.

25 MR. HEIMANN: But he could.

1           **THE COURT:** But did he have -- all right. So I'm  
2 just trying to figure out what -- did he have a scenario that  
3 was checks high to low, but cards low to high?

4           **MR. HIMMELSTEIN:** I don't want to misspeak, either.  
5 So we're better off getting our charts, given this experience.

6           **THE COURT:** All right. We'll take -- yeah. Look at  
7 your chart for a moment.

8           **MS. WINNER:** I have mine.

9           **MR. HIMMELSTEIN:** Perhaps Mr. Olsen should answer the  
10 question.

11           **THE COURT:** All right. Let him answer it.

12           Do you understand what I'm asking?

13           **THE WITNESS:** So you're saying: Do we have a  
14 scenario where checks were high to low, and that debit-card  
15 transactions were low to high?

16           **THE COURT:** Correct.

17           **THE WITNESS:** No.

18           **THE COURT:** You don't have that?

19           **THE WITNESS:** Not that exact scenario.

20           **MS. WINNER:** So we don't have a scenario that is --  
21 whichever it is of the two, he didn't do a scenario with either  
22 of one of those. He only did low to high.

23           **THE COURT:** For checks?

24           **MS. WINNER:** For checks.

25           **THE COURT:** All right.

1           **THE WITNESS:** Well, all of the scenarios -- 2 and 2A,  
2 2B, 2C, 3A, 3B, 3C -- all of those scenarios process checks  
3 from high to low; but then it's -- the reason why the answer  
4 was "No" to your previous question was because the debit-card  
5 transactions are in chronological order. And those, as best as  
6 I could -- they're not in straight low to high.

7           **THE COURT:** Here's what I'm trying to find out.  
8 Could it be done that we run a scenario that would be identical  
9 to what existed in March 2001, to see how it would have played  
10 out if -- if that change had not been made, just on cards,  
11 going high to low?

12           **MR. HIMMELSTEIN:** Well, assuming, your Honor, that we  
13 know what they were doing in March 2001. We have a judicial  
14 admission. That's about the best we've got at this point, as  
15 far as settling on what they were doing.

16           **MS. WINNER:** We also have the actual evidence in the  
17 record of -- of what it was.

18           **MR. HIMMELSTEIN:** But we are --

19           **MR. HEIMANN:** I think the answer is: I think -- and  
20 Mr. Olsen would have to answer this. I think we could run  
21 almost any sequencing that your Honor would be interested in  
22 hearing about. I mean, that's basically what we did the last  
23 go-around, was to -- to do multiple different scenarios based  
24 on different assumptions.

25           **MR. HIMMELSTEIN:** Our approach, your Honor --

1 MS. WINNER: I'm being double-teamed.

2 MR. HEIMANN: You can have a second person.

3 THE COURT: All right. Go ahead, Ms. Winner.

4 MS. WINNER: Your Honor, one of the key things in all  
5 of this is, as I believe the witness just testified -- is that  
6 all of the scenarios -- all of these scenarios measure heavy  
7 amounts of -- of differentials, as we've called them, that are  
8 based on overdraft fees on checks. This is not a case --

9 THE COURT: I'm sorry. They're based on what?

10 MS. WINNER: Overdraft fees on checks that he's

11 these -- his 1, his 1A -- all of those measure based on checks.

12 This case is not about whether Wells Fargo acted  
13 improperly -- acts improperly in the way it processes checks.

14 And that's why your Honor ordered, in your last  
15 order -- ordered them to do what became 2B and 2C, which is to  
16 put checks first, so that the only differential that was being  
17 measured was on overdraft -- on debit-card fee overdrafts.

18 THE COURT: But he said is did that.

19 MS. WINNER: He did do that. That's 2B and 2C.  
20 That's not going, looking back into history, and trying to see  
21 what happened in the past. That's doing his -- I mean, that's  
22 doing the -- his chronological order, which is -- their whole  
23 theory of this case is about chronological. That's his -- the  
24 chronological ordering. And he put checks first, as your Honor  
25 instructed, so that we wouldn't end up in there with any

1 overdraft fees on checks; that those would be sort of off the  
2 table.

3           **THE COURT:** Well, chronological is one way to look at  
4 it, but I was listening to your cross-examination and thinking,  
5 well, another way to look at it would be: What if the bank had  
6 just continued in April of 2001 to do exactly what it had been  
7 doing, in terms of sequencing, for both checks and cards, right  
8 up until today?

9           But then it seems to me that that would be relatively  
10 easy to run, now that it's all set up.

11           **MS. WINNER:** It wouldn't be; not in the middle of  
12 trial, your Honor, no. You've given them two new opportunities  
13 to do this already.

14           **MR. HIMMELSTEIN:** And we did it based on  
15 misinformation provided by Ms. Winner. And she's complaining  
16 about that? Come on.

17           **MS. WINNER:** If I may finish, the fact of the matter  
18 is that, in terms of what the theory of this case is, there's a  
19 lot of scenarios we could run.

20           This case is not about whether we have to go back to  
21 what we used to do.

22           The case is about: What can we lawfully, do versus  
23 what they say we cannot lawfully do.

24           That's the proper comparison here, is --

25           **MR. HIMMELSTEIN:** Your Honor.

1 MS. WINNER: May I please finish?

2 THE COURT: Go ahead, Ms. Winner.

3 MS. WINNER: Okay. So that's the appropriate  
4 differential.

5 What is the -- if there's a finding that not sorting  
6 debit-card transactions in chronological order -- or whatever  
7 the fining is about what we do on debit-card transactions -- if  
8 there is a finding about that, what is the -- what would be the  
9 impact on customers, the incremental income [sic] -- impact  
10 versus what the bank could lawfully do.

11 And so in a case that doesn't involve ordering of  
12 checks, we shouldn't be dealing with scenarios that are  
13 measuring impact damages; differential -- whatever you want to  
14 call it -- based on overdraft fees on checks.

15 MR. HIMMELSTEIN: May I respond?

16 MS. WINNER: That's the point here.

17 THE COURT: Well --

18 MS. WINNER: There are thousands of scenarios we  
19 could run. I'm sorry, your Honor.

20 THE COURT: Let me, before Mr. Himmelstein jumps  
21 in -- that's why I raise this question. It's which would  
22 control --

23 I'm sorry. My voice is not so good today.

24 It would control for check problem by doing exactly  
25 the way it was done in March of 2001 as to everything,

1 including checks, with the sole difference being that the cards  
2 were accounted for in the posting. And it was the very same  
3 method that the bank was using prior to going to high to low,  
4 which, I understand from your stipulation, is cards only was  
5 low to high.

6 So if that one scenario were run, it could not  
7 possibly result in overdrafts on checks.

8 MS. WINNER: Yes, it can, your Honor.

9 THE COURT: Well, you're a genius, and you may be  
10 able to explain to me why, but I don't see how.

11 MS. WINNER: The reason is that the bank's prior --  
12 the bank also made adjustments in the order in which it did  
13 different types of transactions. So it used -- before  
14 April 2001, it was putting all of the debit cards first, and  
15 the checks were later. It could lawfully put the debit -- the  
16 put the checks first.

17 THE COURT: Well, let's say it did all that. Those  
18 changes, let's say, were made, and came on line in the  
19 real-life -- in the scenario --

20 MS. WINNER: Yeah.

21 THE COURT: -- at the same time they did in real  
22 life, so that literally the only -- the only change I'm asking  
23 "Could it be run" would be to see what would be the  
24 differential if -- if the film were played back exactly as it  
25 unfolded in real life, but at all times in question, the cards

1 were done low to high, which was the system used in March of  
2 2001.

3 MS. WINNER: But the -- but the -- there are other  
4 differences that are getting interjected. There are other  
5 changes that were made that are getting interjected here that  
6 are causing there to be damages measured in checks.

7 THE COURT: Like the shadow line, for example, that  
8 in --

9 MS. WINNER: I'm not talking like anything about  
10 that.

11 THE COURT: I can see that being a huge impact here.

12 MS. WINNER: That's not what I'm talking about.

13 THE COURT: What are you talking about?

14 MS. WINNER: The -- what I'm talking about is the  
15 fact that before 2001, checks were processed before debit  
16 cards. Excuse me. I mean, debit cards were processed before  
17 checks.

18 There's no -- there's no -- the claim in this case is  
19 not whether checks have to go before or after debit cards; it's  
20 about what order the debit cards have to go in.

21 If you just replay the clock, you're forcing us --  
22 you're forcing Wells Fargo to put the debit cards first; and  
23 therefore, as the witness testified, a very large percentage of  
24 what you end up measuring, because you put all of the checks at  
25 the end, are differentials based on checks.

1           **THE COURT:** Well, no, no. I'm suggesting the  
2 opposite to you.

3           You want checks to go first.

4           **MS. WINNER:** Yes.

5           **THE COURT:** Well, then do it.

6           **MR. HIMMELSTEIN:** But they never did that,  
7 your Honor. They --

8           Never, ever, ever, ever, ever, ever did they put  
9 check before debit cards.

10           **THE COURT:** Well, whatever was done in real life, if  
11 the checks came first.

12           **MR. HIMMELSTEIN:** They never came first. Never.

13           **THE COURT:** What did come first?

14           **MR. HIMMELSTEIN:** Debit cards were non-recourse  
15 items. They always came first until November 2001, when they  
16 batched everything together, high to low.

17           Until that point, look at everything. Debit cards  
18 are always before checks, not after. Always before.

19           **THE COURT:** I don't know why. I must be having a bad  
20 day.

21           I am asking very simple thing.

22           Give -- give Wells Fargo the benefit of whatever  
23 overall sequencing method that it wants that was --

24           Let me rephrase that.

25           -- that was actually used at the time that

1 Wells Fargo brought it on line; but with respect to the card  
2 part, rearrange the card transactions so that it's low to high,  
3 as it was in March of 2001. It seems to me that ought to be  
4 eminently doable.

5 MR. HIMMELSTEIN: We're happy to do that, your Honor.

6 MS. WINNER: Well, your Honor --

7 THE COURT: Yes.

8 MS. WINNER: Two problems.

9 Again, the same problem. First of all, we are -- I  
10 believe they're about to rest their case. And we ought to --

11 we need to proceed. We've been redoing things over and over  
12 again, you know, for over a year now. And there's got to be  
13 some end of it.

14 But the second thing I will say is that at the end of  
15 the day, this is while -- anything that said you have to go  
16 back to something Wells Fargo used to do is a wild-goose chase  
17 here, because it does not properly measure the difference  
18 between what they say we can't do, we're not allowed to do,  
19 what's the unlawful thing that -- what they're claiming is  
20 unlawful, versus what we could do that would be lawful. What  
21 we used to do was not the only thing we could do that would be  
22 lawful. There's lots of other things we could do that would be  
23 lawful.

24 THE COURT: Well, but then -- but it didn't happen --  
25 let's say that if the plaintiffs are able to prove that

1 inadequate notice was given, or that the contract with  
2 Wells Fargo included discretion which under *Perdue versus*  
3 *California* would write into it a covenant of good faith and  
4 fair dealing, and the duty by the bank to exercise that  
5 discretion with the customers' interest in mind; then,  
6 arguably, the plaintiffs can demonstrate that the system that  
7 was actually used was unlawful.

8           And I don't know where the bank can't then come back  
9 and say, "Well, we did it unlawful, but we could have -- if we  
10 had done it right, we could have done it in this alternative

11 way, under which the damages would have been very nominal."

12 That --

13           **MS. WINNER:** Well, the numbers aren't nominal,  
14 your Honor. You saw their scenarios 2B and 3B. They're not.  
15 Those are not nominal.

16           **THE COURT:** Well, of course not; but I -- I think  
17 every time a scenario is done, there's a criticism of it. And  
18 they -- they -- I think they've made an effort to try to say,  
19 "Okay. Let's run the numbers with that."

20           So, listening to your examination just now, I  
21 thought: All right. Let's assume that that's a valid point.  
22 How could we control for that?

23           And one way, seems to me, would be the way that I  
24 just suggested.

25           All right. I'm not going to leave on anything right

1 now. I'm just asking a question.

2 Okay. Can we excuse the witness?

3 MR. HIMMELSTEIN: Yes, your Honor.

4 THE COURT: Why don't we do 15 more minutes of  
5 another witness?

6 Mr. Olsen, thank you for all of the many scenarios  
7 you've brought.

8 What kind of a room, by the way, did they have you  
9 in? Was it a windowless room?

10 THE WITNESS: Oh, yes.

11 THE COURT: Did you at least have adequate lighting?

12 THE WITNESS: Yeah. For the most part, yes.

13 THE COURT: All right. Did it have fresh air coming  
14 in?

15 THE WITNESS: Well, yeah. I mean, it was fine. It  
16 was a conference room.

17 THE COURT: Okay. All right. Well, thank you for  
18 all of that work. I don't know whether we'll have more  
19 assignments for you or not. We'll see. All right. You're  
20 free to go, but leave behind our exhibits. Don't take any of  
21 your exhibits.

22 Next witness.

23 MR. HEIMANN: Plaintiffs rest our case in chief,  
24 your Honor.

25 THE COURT: Wonderful. Maybe we will take a

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 1:09-MD-02036-JLK**

**IN RE: CHECKING ACCOUNT  
OVERDRAFT LITIGATION**

**MDL No. 2036**

**THIS DOCUMENT RELATES TO:**

*Swift v. BancorpSouth, Inc.*,  
S.D. Fla. Case No. 1:10-cv--23872-JLK

**DECLARATION OF ARTHUR OLSEN  
IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

I, Arthur Olsen, declare as follows:

My Assignment

1. I was retained by Plaintiff in the above-referenced action to perform consulting and expert work regarding database analysis, data extraction, and damage calculation issues.

2. One of my initial assignments was to review and analyze the historical customer transactional data that BancorpSouth maintains to determine the feasibility of using such data to: (a) identify those BancorpSouth customers who were "harmed" (*i.e.*, assessed additional overdraft fees) as a result of BancorpSouth's practice of posting debit card transactions in the order of highest-to-lowest in dollar amount as compared to alternative

posting orders; and (b) calculate the amount of harm (*i.e.*, additional overdraft fees) each such customer incurred as a result of such practice.

3. I was also asked to perform calculations using data provided by BancorpSouth relating to the named plaintiff's account and transactions, and to calculate, using such data, the additional overdraft fees that the named plaintiff incurred due to BancorpSouth's practice of posting debit card transactions in the order of highest-to-lowest in dollar amount.

#### Summary of My General Qualifications

4. I have over 15 years of professional information technology experience, specializing in the areas of database development, database administration and database support. I have received extensive training related to Oracle Corporation ("Oracle") database software in the areas of relational database design, architecture and administration, as well as SQL and PL/SQL, application tuning, database tuning and advanced database concepts. I was also trained by Microsoft Corporation ("Microsoft") in database architecture and administration, database tuning and TSQL.

5. I worked as a database engineer for Microsoft where my responsibilities primarily involved database design and administration. Among other duties at Microsoft, I participated in the design, implementation and support of an extensive data warehousing solution for Microsoft's licensing division, and managed and supported numerous databases throughout the company. I received multiple awards and recognitions from Microsoft for my database-related work at the company.

6. In addition to my experience working for Microsoft, I worked for Hewlett-Packard Co. as a database engineer. Among other responsibilities at Hewlett-Packard, I served as the primary database administrator for both Oracle and SQL Server systems that

supported multiple Hewlett-Packard divisions. My responsibilities at Hewlett-Packard also included serving as lead analyst in charge of compiling, analyzing and processing data from various internal database systems throughout Hewlett-Packard for use in litigation support.

7. In addition to my work for Microsoft and Hewlett-Packard, I have provided database services to a number of other large corporations, including Cisco Systems, Inc. My responsibilities in that regard have included utilizing database systems for financial reporting services. I have also managed the development of data integration solutions for small to mid-size companies, and developed a solution for integrating an automated process for the calculation of inventory reserves with Oracle Financials.

8. My qualifications and background are set forth in more detail in my consultant profile, which is attached hereto as **Exhibit A**.

My Specific Experience Analyzing These Issues in *Gutierrez v. Wells Fargo*

9. In addition to my general qualifications set forth above and in the attached consultant profile, I have specific experience that is directly relevant to my assignments in this litigation. I was retained by plaintiffs as a consultant and expert in the case *Gutierrez v. Wells Fargo Bank, N.A.*, Case No. 07-05923WHA (N.D. Cal.), a class action brought on behalf of Wells Fargo California customers challenging Wells Fargo's high-to-low re-sequencing practices. Similar to my assignment here regarding BancorpSouth, in *Gutierrez*, I was asked to review and analyze the historical transactional data maintained by Wells Fargo, and to provide my opinion regarding the feasibility of using such data to re-create alternative posting orders for the customers' transactions (*i.e.*, where the same transactions are sequenced in a different order than the bank actually posted them) for the purpose of comparing the number of overdraft charges Wells Fargo assessed each customer pursuant to

its actual posting order with the number of overdraft charges Wells Fargo would have assessed had the alternative posting order been used. Having determined that it was, in fact, feasible to do so on an automated basis using the available data, I was ultimately asked to perform calculations using class-wide data to: (a) identify the Wells Fargo California customers who were assessed additional overdraft fees due to Wells Fargo's high-to-low posting order (as compared with certain alternative posting orders) during the class period in that case (November 15, 2004 through June 30, 2008); and (b) calculate the amount of the additional overdraft charges each such customer was charged during that time period. As set forth below, my analysis survived multiple challenges by Wells Fargo. Furthermore, Judge Alsup found me to be qualified and found my analysis to be reliable, and after I presented my analysis at trial, Judge Alsup adopted my analysis as the basis for his \$203 million restitution award in the case. For this Court's convenience, I have attached hereto as **Exhibit B** the transcript of my trial testimony from the *Gutierrez* case. My work in the *Gutierrez* case is described in more detail immediately below.

*My Sample Analysis in Gutierrez*

10. In *Gutierrez*, I was initially provided with transactional data for a sample set of 10,000 Wells Fargo California customers during a 30 day period. I was asked to review the data and determine, among other things, whether it was possible to use that data to re-create an alternative posting scenario where the customers' debit card transactions were posted each day in chronological order, based on the date and time of authorization, instead of in high-to-low order. The data that I was provided included:

- a. "BEV" data, which originated from Wells Fargo's online banking system and included the date each account was opened. This data was provided in text files.
- b. Transactional data from Wells Fargo's "BMG" data warehouse. This archived data originated from Wells Fargo's Hogan processing system, and included the account activity for each account on each day. This data was broken up into two sources, one source that included the data for check transactions (V\_TRAN\_DETAIL\_CK data), and another source that included the data for transactions other than checks (V\_TRAN\_DETAIL\_HD data). I will refer to this data collectively as the "Hogan data." The Hogan data was provided in text files.
- c. Transactional data from Wells Fargo's Settlement system (KZ\_CZ Reports), which included information about settled transactions including the date and time of authorization. I will refer to this data as the "Settlement data." The Settlement data was provided in text files.

11. For each debit card transaction, the following information was available in the "BEV," "Hogan," and "Settlement" data that was provided to me:

- a. The posting date of the transaction;
- b. The dollar amount of the transaction;
- c. Merchant identification information;
- d. A "transaction code," which identified the type of transaction;
- e. The date the transaction occurred; and

f. The authorization date and time for debit card transactions for all but a small number of those transactions.

12. In addition, the data that I was provided included the ending account balance for each account on each day, as well as data identifying the order in which Wells Fargo posted the transactions each day. Finally, the data also included information about all overdraft transactions.

13. I was also provided with a declaration submitted in the *Gutierrez* case by Mark Lentz, a manager with Wells Fargo's analytics team. In his declaration, Mr. Lentz described Wells Fargo's transaction processing systems, databases, and data archives, and indicated that it would not be possible to re-sort the customers' debit card transactions on an automated basis using the available historical data. Mr. Lentz stated that re-sorting such transactions would require a manual, account-by-account review of the transactional information.

14. Upon reviewing the data that I was provided, I determined that Mr. Lentz was not correct. Specifically, I determined, among other things, that for the vast majority of debit card transactions, all of the necessary information was available to sequence the transactions that posted each day in chronological order based on the date and time of authorization, and that the format of the data made it possible to do so on an automated basis.

15. Having determined that the necessary data was available to re-sort the transactions through automated means, I was next asked to perform calculations using the sample data. Specifically, plaintiffs' counsel provided me with various alternative posting "scenarios" (*i.e.*, alternative ways to sequence the transactions), and asked me re-sort the transactions in the sample group to match the alternative posting "scenarios," and to compare the overdraft charges that Wells Fargo assessed pursuant to its actual posting order to the

overdraft charges that would have been assessed had the same transactions been posted pursuant to the various alternative posting “scenarios.” One of the alternative “scenarios” I was asked to analyze was chronological posting of debit card transactions.

16. To perform this assignment, I first had to load the data provided by Wells Fargo into tables in a Microsoft SQL Server database using code that I created. I was then able to work with the data to perform the calculations requested. That process involved the following steps:

- a. I first isolated those instances in the data where customers were charged multiple overdraft fees in a single day, and extracted the transactional data for those days. I did this using Wells Fargo’s Hogan data and software code that I wrote for this purpose. The reason that I isolated this data is because Wells Fargo’s high-to-low posting could not have caused any additional overdrafts in a given day unless the customer had at least two overdrafts that day.
- b. Next, in order to create an alternative chronological posting order, I had to identify authorization dates and times for the debit card transactions that posted on the multiple overdraft dates. Wells Fargo’s Hogan data included the authorization dates and all of the other information that I needed for this purpose, with the exception of the authorization times. Wells Fargo’s Settlement data, however, included authorization times for the vast majority of debit card transactions. In order to match the authorization times in the Settlement data with the right transactions, I developed “logic” to programmatically match the information in the two data sources. Through this process, I was able to identify transaction times for the vast majority of debit card transactions.

- c. From there, using software code that I developed, I programmatically re-sorted the transactions to match the alternative posting “scenarios” that I was provided, and calculated the number of overdraft fees that would have been assessed under each such “scenario.” For the “scenario” based on chronological posting of debit card transactions, for each posting day, I sorted all debit card transactions for which authorization time information was available in chronological order based on the date and time of authorization, and sorted all debit card transactions for which authorization time information was not available in order of lowest-to-highest in dollar amount.
- d. Next, for each alternative “scenario,” I calculated the “differential” between the overdraft fees that would have been assessed to each customer in the sample under that alternative posting order and the overdraft fees that Wells Fargo actually assessed under its actual posting order. I then added up the differentials for all of the customers to calculate the “damages” to the sample group under each “scenario.”

17. Through this sample analysis, I was able to identify, for each “scenario,” the customers in the sample group who were “harmed” (*i.e.*, would have had fewer overdrafts under the alternative posting order) and the amount they were harmed during the sample period.

18. I understand that the plaintiffs in *Gutierrez* thereafter provided my sample analysis to an expert in statistics, Charles Cowan, Ph.D, who extrapolated my findings as to the sample in order to approximate the damages for the entire class in *Gutierrez*. I understand that the estimated class damages (based on Dr. Cowan’s extrapolation of my

sample analysis) for the “chronological” scenario (*i.e.*, comparing Wells Fargo’s high-to-low posting to chronological posting) was approximately \$200 million for the class period.

*My Comprehensive Analysis in Gutierrez*

19. Having developed a methodology to use Wells Fargo’s historical transactional data to identify customers who were affected by Wells Fargo’s high-to-low posting practices and calculate the extent of their harm, and having applied that methodology to a 30 day sample, I was thereafter asked by plaintiffs’ counsel in *Gutierrez* to perform a similar analysis for the entire class period using Wells Fargo’s transactional data for all California customers during the class period (November 15, 2004 through June 30, 2008).

20. In performing this comprehensive analysis, I was provided access to the same data sources that I used in performing the sample analysis, including the Hogan data, Settlement data, and BEV data. In addition, I was provided with a “Transaction Code Map,” which identified the types of transactions associated with the various “transaction codes” that were in the data I was provided.

21. To perform my comprehensive analysis, I used the same data sources and basic methodology that I had used for the earlier sample analysis. I performed the comprehensive analysis to: (a) identify customers who would have been charged fewer overdrafts (*i.e.*, “harmed” customers); and (b) calculate how much less each such customer would have been charged in overdraft fees (*i.e.*, amount of “harm”), under several alternative posting “scenarios” which were provided to me by plaintiffs’ counsel.

22. Among the alternative “scenarios” that I analyzed for the comprehensive analysis were “scenarios” designed to compare Wells Fargo’s actual posting practice for debit card transactions with chronological posting of debit card transactions. These

chronological posting “scenarios” varied based on: (a) where in the posting sequence, and in what order, debit card transactions without authorization time information were posted; and (b) where the debit card transactions were posted in relation to checks and ACH transactions.<sup>1</sup>

23. Using the same methodology that I used for the sample analysis, I was able to determine the raw “differentials” (*i.e.*, the difference between the number of overdrafts each customer was assessed and what they would have been assessed under the alternative sequencing) for each customer, for each of the chronological and other “scenarios.”

24. To accurately measure the “harm” to each customer under each “scenario,” I developed and applied methodologies to adjust the raw “differentials” to account for: (a) “uncollectibles” (where the customer closes the account with a negative balance and Wells Fargo does not collect the assessed overdraft fee); and (b) “reversals” (where Wells Fargo reverses the assessed overdraft fee).

25. For uncollectibles, I was told to assume that if an account was closed after a write-off for a negative balance, it was to be considered uncollectible. In such instances, I simply reduced the customer’s “differential” under each “scenario” by the amount of such negative balance. If the remaining “differential” after that adjustment was zero or negative, then the customer was not considered “harmed” under that “scenario.”

26. For reversals, the data that I was provided contained the amount and reversal posting date (*i.e.*, when the reversed amount was credited to the account) for all overdraft fee reversals, but the data did not indicate which overdraft fee reversals were tied to which

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<sup>1</sup> Initially, each of the chronological “scenarios” that I analyzed involved posting debit card transactions before checks and ACH transactions. I was later asked to run additional analyses of “scenarios” that placed checks and ACH transactions before debit card transactions.

assessed overdraft fees, making it impossible to precisely determine the impact of reversals on the “harm” caused by Wells Fargo’s posting order. I thus used two alternative methods to adjust for fee reversals.

- a. The first method was the “Last-In-First-Out” or “LIFO” method. Under the LIFO method, each overdraft fee reversal was tied to the last overdraft fee that was posted before the reversal.
- b. The second method was the “30-day” method. Under the 30-day method, all overdraft fee reversals that occurred in the 30 days after any “differential” (*i.e.*, after any instance where the customer would have had fewer overdraft charges under the “scenario” in question) were used to offset such “differential.”

27. Under both the “LIFO” and “30-day” methods, if the overdraft fee reversals equaled or exceeded the “differential,” then the customer was not considered “harmed” under that “scenario.” Under both methods, if the overdraft fee reversals were less than the “differential,” then the “differential” (the harm) was reduced by the amount of the reversals.

28. After adjusting the raw “differentials” under each “scenario” to account for uncollectibles and reversals, any customer with a remaining “differential” was identified as a “harmed” customer under that “scenario” (*i.e.*, identified as someone who would have paid fewer overdraft fees if that alternative sequencing had been used instead of Wells Fargo’s actual posting practice), and the remaining “differential,” was the amount of their “harm” under that “scenario.”

29. Thus, for example, under my “2A” chronological posting “scenario” (the “scenario” that Judge Alsup ultimately adopted),<sup>2</sup> my analysis yielded the following results for Wells Fargo California during the class period in *Gutierrez* (November 15, 2004 through June 30, 2008):

	<b>Customers Harmed</b>	<b>Amount of Harm</b>
<b>Raw “Differentials” (Before Uncollectibles, Before Reversals)</b>	1,491,806	\$278,643,858.97
<b>After Uncollectibles, Before Reversals</b>	1,352,862	\$254,892,697.93
<b>After Uncollectibles, After LIFO Reversals</b>	1,192,364	\$214,379,710.68
<b>After Uncollectibles, After 30-Day Reversals</b>	1,144,577	\$202,994,035.46

30. After I completed my comprehensive analysis and it was provided to Wells Fargo in advance of trial, Wells Fargo sought to exclude my analysis from trial, submitting competing expert testimony and raising various challenges to my qualifications and the methodology that I used to perform my analysis. Judge Alsup rejected Wells Fargo’s attacks on my methodology, and found that, given my background and experience, I was “clearly qualified to perform” the tasks I was asked to perform.

31. I presented my comprehensive analyses at the bench trial in *Gutierrez* on April 29, 2010. I was subjected to cross-examination by Wells Fargo’s counsel during the trial. Moreover, Wells Fargo presented competing testimony from its own experts, who attempted to challenge my methodology and the reliability of my results.

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<sup>2</sup> Under the “Scenario 2A” alternative posting order, transactions were sequenced in the following order: (1) Credits; (2) Priority debit transactions (cash withdrawals and equivalents, ATM withdrawals, and money orders); (3) Debit Card Transactions with date/time information in chronological order based on authorization; (4) Debit Card Transactions without date/time information in low-to-high order; and (5) Checks and ACH transactions in high-to-low order.

32. After trial, Wells Fargo submitted proposed findings to the Court. In its proposed findings, Wells Fargo again sought to discredit my analysis and the methodology that I used.

33. On August 10, 2010, Judge Alsup issued his findings after trial in the *Gutierrez* case. Judge Alsup found that I did “a professional and careful job in laying out the impacts of various alternative posting protocols,” and adopted my “2A scenario” analysis as the basis for his \$203 million Class restitution award.<sup>3</sup>

My Specific Experience Analyzing These Issues in This Multi-District Litigation.

34. In addition to my work in the *Gutierrez* case, I have done considerable work analyzing these issues with respect to several of the banks/cases that are part of this Multi-District Litigation.

35. For example, I performed essentially the same tasks that I was retained to perform here, in connection with four First Tranche Banks: Wells Fargo, Wachovia, Chase, and Union Bank. As here, I was asked in each of those cases to review and analyze the historical customer transactional data the banks maintained to determine the feasibility of using such data to: (a) identify which customers were harmed as a result of the banks’ practice of posting debit card transactions in the order of highest-to-lowest in dollar amount as compared to alternative posting orders; and (b) calculate the amount of harm (*i.e.*, additional overdraft fees) each such customer incurred as a result of such practice. As here, I was also asked in each of those First Tranche cases to perform calculations using data provided by the banks relating to the named plaintiffs’ accounts and transactions, and to

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<sup>3</sup> Judge Alsup found that the “30 day” method for adjusting for “reversals” was the most appropriate method to use, and so his class restitution award was equal to my calculated “harm” under “scenario 2A,” after uncollectibles and after 30-day reversals.

calculate, using such data, the additional overdraft fees that each named plaintiff incurred due to the banks' practice of posting debit card transactions in the order of highest-to-lowest in dollar amount. In all four of these First Tranche cases, I was able to perform these tasks, and I submitted declarations in support of Plaintiffs' class certification motions in all four cases, describing my findings and conclusions regarding these tasks.

36. In the Union Bank case, this Court specifically referenced my declaration in its class certification Order, noting that Union Bank did not dispute my "ability to calculate damages on an account-by-account basis using the bank's own computerized records, a method upon which Mr. Olsen previously relied, with court approval, in *Gutierrez v. Wells Fargo Bank, N.A.*"

Information Reviewed in Connection With My Assignment In This Case

37. In connection with my assignment in this litigation, I have thoroughly reviewed the work that I did in the *Gutierrez* case, including my trial testimony and my deposition testimony in that case, and the materials that I reviewed and relied upon in that case.

38. In addition, I reviewed my declarations submitted in the First Tranche cases in this Multi-District Litigation against Wells Fargo, Wachovia, Chase, and Union Bank.

39. In addition, with respect to BancorpSouth, I reviewed the transcript of the deposition of BancorpSouth's Jeff Jagers, taken in this litigation on October 12, 2011. Mr. Jagers' deposition testimony concerned BancorpSouth's transaction processing systems, transactional databases, and other sources of historical transactional information, and other issues relevant to my assignments in this litigation.

40. In addition, I have reviewed interrogatory responses provided by BancorpSouth regarding its transaction processing systems and transactional databases and other sources of historical transactional information.

41. In addition, I have reviewed the following data and information provided by BancorpSouth regarding the transactions and account of the named plaintiff in this litigation:

- a. Data that derives from BancorpSouth's DDA transaction processing system, ("IMPACS"). With regard to historical data, "IMPACS" data is stored in Bank's document retention systems, ("TREEV" for data prior to 2006, and "X Net" for the remainder). As such, data produced was actually pulled from those systems. This data is essentially the BancorpSouth equivalent of the Wells Fargo Hogan data that I used in the *Gutierrez* case.
- b. Data that derives from BancorpSouth's transaction settlement system, ("FDR"), which is managed by a third party vendor. With regard to historical data, this data is also stored in the Bank's document retention systems, ("TREEV" and "X Net"). As such, this data was actually pulled from those systems. This data is essentially the BancorpSouth equivalent of the Wells Fargo "Settlement" data that I used in the *Gutierrez* case.
- c. Data reports showing the named plaintiff's daily and monthly ending balances.

42. I have also reviewed documents and charts provided by BancorpSouth that identify and describe the various transaction codes (i.e., the type of transactions that are

described by each transaction code), included in the data sources that BancorpSouth provided.

Conclusions Regarding Feasibility of Identifying Class Members and Harm in This Litigation

43. Based on the information and data that I have reviewed in connection with my work in this litigation, it appears that BancorpSouth has maintained, and can provide me access to, the data necessary for me to perform here, for the class period, the same type of comprehensive analysis that I performed in the *Gutierrez* case. It appears that the data that BancorpSouth has maintained includes data that is equivalent to the Hogan data, Settlement data, and other data that I utilized to perform my analysis in the *Gutierrez* case, both in terms of the categories of relevant transactional information (data points) it contains and in terms of usability of the format it is maintained in.

44. BancorpSouth's data sources, most notably their document retention systems, ("TREEV" and "X Net"), include the following information for customers' transactions:

- a. The posting date of the transaction;
- b. The dollar amount of the transaction;
- c. Merchant identification information;
- d. A "transaction code," which identified the type of transaction (including for fee reversals);
- e. The date the transaction occurred; and
- f. The authorization date and time for debit card transactions for all but a small number of those transactions.

45. In addition, the data reports include the ending account balance for each account on each day, as well as data identifying the order in which BancorpSouth posted the transactions each day. Finally, the data also includes information about all overdraft transactions.

46. Based on my experience in the *Gutierrez* case and my review of the above information, and given the availability of, at a minimum, the same data points in this litigation as I used to perform my analyses in the *Gutierrez* case, I am confident that I can apply a very similar methodology as I used in *Gutierrez* here to: (a) identify the specific customers who were “harmed” by BancorpSouth’s posting practice during the class period, as compared to an alternative posting order where debit card transactions are posted in chronological order based on authorization date and time; (b) calculate the amount of such “harm” to each such customer; and (c) adjust gross “harm” for each customer to account for reversals and uncollectables.<sup>4</sup> I could compare BancorpSouth’s actual posting order to the “Scenario 2A” alternative posting order that was adopted in the *Gutierrez* case, and could compare BancorpSouth’s actual posting order to other alternative posting orders as well, including the other “scenarios” that I analyzed in the *Gutierrez* case. I am prepared to perform such an analysis if asked to do so in this litigation.

47. My analysis of the named plaintiff’s “harm,” described immediately below, further supports my conclusion that I can perform a comprehensive “harm” analysis for the class in this litigation.

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<sup>4</sup> I can apply the same methodologies as I used in *Gutierrez*, described above, to account for reversals (i.e. the “30 day” and “LIFO” methods) and to account for “uncollectables.”

Named Plaintiff Harm

48. As described above in paragraph 41, in connection with my work in this litigation, I was provided access to BancorpSouth data regarding the named plaintiff's account and transactions.

49. I have applied the same methodology as I used in the *Gutierrez* case in order to calculate the extent of "harm" to the named plaintiff using the data provided to me by the bank. I do not mean to suggest that this is the proper damage analysis for this litigation. I have simply chosen this method to illustrate my ability to calculate "harm" for the named plaintiff. Specifically, for purposes of this declaration, I compared the overdraft fees BancorpSouth charged the named plaintiff with the overdraft fees it would have charged him had his transactions been posted pursuant to the following alternative posting order, which is similar to the "Scenario 2A" alternative posting "scenario" that the Court adopted in the *Gutierrez* case. Unless otherwise noted, transactions in each of the groups below were left in the original order that was imposed by BancorpSouth during processing:

- a. Credits;
- b. Fees and other non-customer-initiated debits;
- c. Debit card transactions with time information (chronologically);
- d. Debit card transactions without time information (low-to-high);
- e. All other customer initiated debits, including Checks, ACH transactions, and cash withdrawals.

50. Only small adjustments to the methodology I used in *Gutierrez* were necessary to develop and implement the methodology I used to analyze the "harm" to the named plaintiff here.

51. It should be noted that the data that I was provided was not produced in the “native” format in which BancorpSouth will ultimately provide the data for the entire class and class period. Instead of providing the “native” data, BancorpSouth appears to have “cut and pasted” data from the “native” reports into documents produced in PDF format.

52. It should also be noted that the data that I was provided for the named plaintiff was not complete. For example, I was not provided some of the data for the named plaintiff for the period prior to 2007, and I was only provided data for those dates surrounding the dates where the named plaintiff’s bank statements showed multiple overdraft fees were charged.

53. Based on my analysis, the named plaintiff incurred “harm” as a result of BancorpSouth’s posting practice, as compared to the alternative posting “scenario.” My calculations are based on the data provided by BancorpSouth for the plaintiff. There may be additional “harm” for the named plaintiff if there is data that was not provided to me by BancorpSouth. This analysis is intended for the purposes of class certification. It is not intended to be a final calculation of damages.

54. The following summarizes my findings as to the named plaintiff:<sup>5</sup>

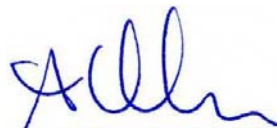
- a. Shane Swift suffered \$1,016 in “harm” from 31 additional overdraft fees which would not have resulted under the alternative posting method.

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<sup>5</sup> For purposes of this analysis, I used the “30-day” method, described above, to adjust for reversals, if any. The necessary data was available to apply the “LIFO” method as well.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 19th day of December, 2011 at San Jose, CA.

A handwritten signature in blue ink, appearing to read 'A. Olsen', is written above a solid horizontal line.

ARTHUR OLSEN