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ENDORSED
FILED
San Francisco County Superior Court

NOV 14 2006

GORDON PARKER, Clerk
BY WESLEY RAMIREZ
Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

DAVID COLE and JUANA COLE, on behalf
of themselves and a class of person similarly
situated,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., a California
Corporation, and DOES 1-100 inclusive,

Defendants.

Case No. CGC-06-456453

CLASS ACTION

FIRST AMENDED CLASS ACTION
COMPLAINT FOR

1. BUSINESS AND PROFESSIONS CODE SECTION 17500 ET SEQ.;
2. BUSINESS AND PROFESSIONS CODE SECTION 17200 ET SEQ.;
3. NEGLIGENT MISREPRESENTATION;
4. CALIFORNIA LEGAL REMEDIES ACT SECTION 1750 ET SEQ.;
5. UNJUST ENRICHMENT;
6. VIOLATIONS OF INSURANCE CODE SECTION 781.

(JURY TRIAL DEMANDED)

Complaint Filed: May 22, 2006
Trial Date: None

1 Plaintiffs, by and through their attorneys, based on their individual experiences, the
2 investigation of counsel, and information and belief allege as follows:

3 **INTRODUCTION**

4 1. Plaintiffs and Class members were induced through Defendants' promotional mailer
5 to participate in a "no obligation" insurance pitch in exchange for receiving \$15 in free gasoline.
6 However, upon information and belief, Defendants failed to provide the promised gasoline
7 certificates to thousands of Class members even though they called the 1-800 numbers identified
8 on their respective promotional mailers and listened to the solicitation. Moreover, where the
9 "gasoline certificates" were provided, Defendants made it nearly impossible to redeem them.
10 Specifically, Defendants divided the promised "\$15 in gasoline" into three separate "rebates"
11 worth \$5 each that could not be redeemed at the same time, but rather had to be mailed to
12 Defendants at three different intervals and within specific 30-day windows. And even after
13 Plaintiffs did jump through each of Defendants' redemption hoops, Defendants never paid any of
14 the three gasoline rebates.

15 2. Plaintiffs, on behalf of themselves and all others similarly situated, seek damages
16 and equitable relief for violations of the Business and Professions Code § 17200 et seq., Business
17 and Professions Code § 17500 et seq., California Legal Remedies Act §1750 et seq., Negligent
18 Misrepresentation, and violations of the California Insurance Code.

19 **PARTIES**

20 3. Plaintiffs David Cole and Jauna Cole (collectively, "Plaintiffs") are citizens of
21 Arizona. Plaintiffs participated in Defendants' promotional mailer for \$15 in free gasoline, which
22 Defendants never provided, despite Plaintiffs' repeated attempts to procure the promised benefits.

23 4. Upon information and belief, Defendant Wells Fargo Bank, N.A., is, and at all
24 relevant times was, a California corporation doing business in California and having its principal
25 place of business in San Francisco, California. References to "Defendants" shall include Wells
26 Fargo Bank's agents, representatives, affiliates, officers, managers, employees and predecessors in
27 interest (collectively "Defendants").

28 5. Defendants named as Does 1 through 100, inclusive, are sued under fictitious names

1 because their true names or identities or the existence of causes of action against known entities are
2 presently unknown to Plaintiffs. Once their names or identities or the existence of causes of action
3 against known entities are ascertained, Plaintiffs will seek leave to amend this Complaint.

4 Plaintiffs are informed and believe and thereon allege that Does 1 through 100, inclusive, are,
5 along with Defendants, subject to all or part of the relief being sought by this Complaint. Any
6 reference in this Complaint to a named defendant shall be deemed to also be a reference to all
7 fictitiously named defendants.

8 6. Plaintiffs are informed and believe and thereon allege that at all relevant times
9 Defendant and Doe Defendants 1 through 100, inclusive, and each of them, were and are the
10 agents, principals, servants, masters, employees, employers, representatives, co-conspirators,
11 and/or joint venturers of each other and were at an relevant times acting within the course and
12 scope of those agency, employment, conspiracy and joint venture relationships.

13 7. Plaintiffs are informed and believe and thereon allege that at all relevant times there
14 existed or exists, as to Doe Defendants 1 through 100, inclusive, a unity of interest and ownership
15 with Defendant and the other Doe Defendants such that any individuality and separateness has
16 ceased to exist. Defendant and the Doe Defendants are the alter-egos of each other in that the
17 individual defendants have used assets of each other for their personal uses, have caused assets of
18 those entities to be transferred without adequate consideration and have withdrawn funds from
19 each others' bank accounts for their personal use. Defendant and Doe Defendants 1 through 100
20 have controlled, dominated, managed, operated and intermingled their personal assets with each
21 other to suit their convenience and whim. Fraud and injustice would be promoted by adhering to
22 the fictions of Defendant and the Doe Defendants remaining separate and apart from each other,
23 and they should not be allowed to evade justice by asserting the corporate or other limited liability
24 veil.

25 **JURISDICTION AND VENUE**

26 8. This Court has jurisdiction over this action pursuant to California Code of Civil
27 Procedure section 410.10. Venue in San Francisco County is proper pursuant to California Code of
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1 Civil Procedure section 395.5, because the injuries and obligations being sued upon arose at least
2 in part in San Francisco County.

3 **FACTUAL BACKGROUND**

4 9. Plaintiffs and Class members maintained bank accounts with Defendants.

5 10. In or about mid-2005, Plaintiffs received a promotional mailer from Defendants
6 along with their monthly statement.

7 11. Plaintiffs reviewed the promotional mailer and observed that the front-page of
8 Defendants' promotional mailer stated as follows:

9 **Could you use \$15.00 in gasoline? To receive your \$15.00 in**
10 **gasoline certificates call: 1-800-353-1054.**

11 12. The reverse side of the promotional mailer contained similar language, stating in
12 prominent type:

13 **No Obligation to Buy. Get \$15 of gasoline. Just Call 1-800-353-1054.**

14 13. Defendants' promotional mailer promised Plaintiffs that they only had to listen to
15 information "about a great new insurance program" to get their \$15 of gasoline.

16 14. The promotional mailer concluded by stating "IT'S THAT EASY."

17 15. Upon information and belief, certain Class members may have received the same
18 promotional mailer except that the mailer promised \$10 in free gasoline rather than \$15.

19 16. Upon information and belief, all of the language included in Defendants'
20 promotional mailer was created, designed and approved (either in whole or in part) by its
21 employees residing in California, including those employees and officers located at its
22 headquarters in San Francisco, California.

23 17. Relying on Defendants' promise of "\$15 of gasoline," Plaintiffs dialed the 800
24 number listed on their promotional mailer shortly after reviewing it in mid-2005.

25 18. After Defendants answered Plaintiffs' call, they assumed, without inquiring, that
26 Plaintiffs wanted to purchase the insurance being offered and immediately signed them up for
27 coverage.

28 19. Plaintiffs asked Defendants when the \$15 in gasoline certificates would be

1 forthcoming. Defendants answered that the certificates would not arrive for six to eight weeks.

2 20. Although Plaintiffs were told during this telephone call that their \$15 in gasoline
3 certificates would not come for approximately two months, the documents associated with
4 Defendants' insurance plan arrived within several days.

5 21. After more than eight weeks had passed without Plaintiffs ever receiving any
6 gasoline certificates from Defendants, Plaintiffs again called the 800 number listed on Defendants'
7 promotional mailer.

8 22. Upon information and belief, Defendants failed to send the gas certificates to
9 Plaintiffs and Class members unless the consumers followed up with Defendants and again asked
10 for the certificates. Defendants required a "follow-up" call even though the duty to provide the
11 money arose, at the latest, upon completion of the call.

12 23. Defendants then belatedly provided Plaintiffs with what it misleadingly referred to
13 as "gasoline certificates." However, rather than being redeemable for \$15 in gas at a gas station,
14 the certificates (without prior notice to Plaintiffs) were divided into three \$5 coupons that could
15 only be redeemed by mailing a receipt for the purchase of gasoline to Defendants using the
16 consumers own postage and envelopes. The gasoline coupons were therefore more akin to
17 "rebates," not certificates as Defendants had advertised.

18 24. Besides illegally converting the gasoline certificates into a rebate (for the obvious
19 purpose of decreasing the redemption rate), Defendants imposed additional obligations on each \$5
20 rebate form it provided to Plaintiffs for the purpose of further reducing the redemption rate.
21 Specifically, Defendants indicated, for the very first time, upon providing the \$5 rebate forms to
22 Plaintiffs that they could not be redeemed simultaneously but rather had to be mailed individually
23 and within separate 30-day windows. In addition, Defendants disguised the gasoline certificates in
24 a way that made them appear to be junk mail, so that they would be discarded by Plaintiffs and
25 Class members.

26 25. Notwithstanding the onerous requirements associated with redeeming the \$5 rebate
27 forms, Plaintiffs satisfied each of the aforementioned obligations.

1 members who filed a claim on an insurance policy purchased as a result of the promotional mailer
2 distributed by Defendants.

3 32. The persons in the Class are so numerous that individual joinder of all members is
4 impracticable under the circumstances of this case. Although the precise number of such persons is
5 unknown, the exact size of the Class is easily ascertainable, as each class member can be identified
6 by using Defendants' records. Plaintiffs are informed and believe that there are tens of thousands
7 of Class members.

8 33. There are common questions of law and fact specific to the Class that predominate
9 over any questions affecting individual members, including:

- 10 (a) Whether class members received the same or substantially similar promotional mailer
11 from Defendants;
- 12 (b) Whether class members were promised or entitled to \$10 or \$15 in gasoline certificates
13 for dialing an 800-number and listening to an insurance pitch;
- 14 (c) Whether Defendants systematically failed to provide \$10 or \$15 in gasoline certificates
15 to class members who called the 800 number listed on the promotional mailer;
- 16 (d) Whether Defendants' promise of \$10 or \$15 in free gas without disclosing material
17 conditions constitutes an unlawful or unfair business practice;
- 18 (e) Whether Defendants imposed unreasonable material conditions upon the redemption of
19 the gasoline certificates after class members called the 800 number listed on the
20 promotional mailer;
- 21 (f) Whether the \$5 vouchers Defendants provided class members constituted rebates rather
22 than gasoline certificates;
- 23 (g) Whether Defendants designed the \$5 rebate forms to resemble junk mail;
- 24 (h) Whether Defendants paid class members when they satisfied all of the onerous
25 requirements associated with the \$5 rebate forms;
- 26 (i) Whether class members have been damaged by Defendants' conduct.

27 34. Plaintiffs' claims are typical of the Class' claim, as they arise out of the same course
28 of conduct and the same legal theories as the rest of the Class, and Plaintiffs' challenge the
practices and course of conduct engaged in by Defendants with respect to the Class as a whole.

1 part of a plan or scheme to induce Plaintiffs and Class members to call certain 800 numbers
2 without ever providing \$15 or \$10 in gasoline as advertised.

3 42. Plaintiffs and Class members are accordingly entitled to restitution and injunctive
4 relief, plus interest and attorneys' fees, pursuant to California Code of Civil Procedure § 1021.5,
5 and request the following relief: (a) That Defendants be ordered to cease and desist from
6 continuing to engage in the business acts and practices, which are misleading or likely to deceive
7 the general public as alleged herein. These practices include, but are not necessarily limited to,
8 inducing consumers into purchasing insurance by promising free gas certificates, but never actually
9 providing such certificates and/or making it unduly burdensome to redeem the certificates; (b) That
10 Defendants make full restitution to Plaintiffs and Class members, plus interest.

11 **SECOND CAUSE OF ACTION**

12 **(California Business & Professions Code § 17200, et seq.)**

13 **(Against all Defendants)**

14 43. Plaintiffs reallege and incorporate herein by reference Paragraphs 1 through 42 of
15 this Complaint as if fully set forth herein.

16 44. The Defendants' conduct, as previously alleged, constituted and constitutes unfair,
17 unlawful, and fraudulent business practices in violation of § 17200 et seq. of the California
18 Business and Professions Code. The conduct is unfair, unlawful, and fraudulent because among
19 other things it violates California Business and Professions Code § 17500, et seq, and the
20 California Insurance Code as alleged below.

21 45. Defendants' conduct has further caused, and is causing, damage and irreparable
22 injury to Plaintiffs and Class Members. Plaintiffs and Class members are accordingly entitled to
23 restitution and injunctive relief, plus interest and attorneys' fees, pursuant to California Code of
24 Civil Procedure § 1021.5, and request the following injunctive relief: (a) That Defendants be
25 ordered to cease and desist from continuing to engage in the business acts and practices which are
26 described herein and are unfair, unlawful and deceptive; (b) That Defendants make full restitution
27 to the Plaintiffs and Class members, plus interest.

1 **THIRD CAUSE OF ACTION**

2 **(Negligent Misrepresentation)**

3 **(Against All Defendants)**

4 46. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 45 of this
5 Complaint as if set forth herein in full.

6 47. In or about mid-2005, Defendants knew or should have known, but misrepresented,
7 omitted, failed to reveal and suppressed the material fact that they did not intend to provide \$15 to
8 Plaintiffs and Class members. In addition, Defendants knew or should have known, but failed to
9 disclose, that they were placing many onerous restrictions on the redemption of the "gasoline
10 certificates," including the fact that, among other things, the forms would not arrive for at least six
11 weeks, were divided into three separate \$5 rebate forms that could not be redeemed simultaneously
12 and were packaged as junk mail that would make it unduly burdensome or impossible to redeem
13 the certificates.

14 48. The suppression of these material facts was likely to mislead Plaintiffs and Class
15 members, and did mislead them, particularly in light of Defendants' representations that the \$10 or
16 \$15 in gasoline certificates would be provided in exchange for simply dialing an 800 number and
17 listening to an insurance pitch.

18 49. Plaintiffs and Class members were ignorant of the existence of the facts which
19 Defendants suppressed and failed to disclose. Had Plaintiffs been aware of the existence of the
20 facts suppressed by Defendants, they would never have called the 800 number listed on their
21 promotional mailer or signed up for any insurance.

22 50. Plaintiffs and Class members relied and were justified in relying on Defendants
23 misrepresentations.

24 51. As a direct and proximate result of Defendants' suppression of the foregoing
25 material facts, Plaintiffs and Class members have been damaged in amount equal to the value of
26 the gasoline certificates promised to Plaintiffs and Class members, plus interest, and any and all
27 insurance premiums paid to Defendants.

1 attained by their actions. Accordingly, Plaintiffs and members of the Class seek full restitution of
2 Defendants' enrichment, benefits, and ill gotten gains acquired as a result of the unlawful and/or
3 wrongful conduct alleged herein.

4 **SIXTH CAUSE OF ACTION**

5 **(Violation of Insurance Code § 781)**

6 **(Against All Defendants)**

7 65. Insurance Code § 781 prohibits a person from making statements that s/he knows, or
8 should have known, to be a misrepresentation to any other person for the purpose of, inter alia,
9 inducing or tending to induce such other person to either take out a policy of insurance.

10 66. Defendants violated Insurance Code § 781 by, inter alia, misrepresenting to
11 Plaintiffs and class members that they would receive \$15 in free gas for the purpose of inducing or
12 tending to induce them to take out a policy of insurance.

13 67. Defendants' violations of Insurance Code § 781 entitle Plaintiff and Class members
14 to damages in an amount to be determined at trial.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

17 A. Certification of the action as a Class Action pursuant to the California Code of Civil
18 Procedure Rules of Court, and appointment of Plaintiffs as Class Representatives and their counsel
19 of record as Class Counsel;

20 B. Restitution and/or Damages in the amount of \$10 or \$15 per class member and
21 rescission of all contracts resulting from Defendant's solicitations arranged by the offer of gasoline
22 certificates and the return of all consideration provided therefor;

23 C. Actual damages, statutory damages, punitive or treble damages, and such other
24 relief as provided by the statutes cited herein;

25 D. Prejudgment and post-judgment interest on such monetary relief;

26 E. Equitable relief in the form of restitution and/or disgorgement of all unlawful or
27 illegal profits received by Defendants as a result of the unfair, unlawful and/or deceptive conduct
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1 alleged in herein;

2 F. Other appropriate injunctive relief;


3 G. The costs of bringing this suit, including reasonable attorneys' fees;

4 H. All other relief to which Plaintiffs and members of the Class may be entitled at law
5 or in equity; and

6 I. For all claims arising under the California Legal Remedies Act only, Plaintiffs and
7 class members specifically disavow any claims for monetary damages and assert only claims for
8 injunctive relief. Plaintiff and class members, however, retain the right to amend their complaint in
9 the future to seek monetary damages under the CLRA.

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11 DATED: November 14, 2006

HAGENS BERMAN SOBOL SHAPIRO LLP

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13
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Attorneys for Plaintiffs Cole

1 DECLARATION OF SERVICE

2 I, the undersigned, declare:

3 1. That declarant is and was, at all times herein mentioned, a citizen of the United
4 States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or
5 interested in the within action; that declarant's business address is 700 South Flower Street, Suite
6 2940, Los Angeles, California 90017-4101.

7 On November 14, 2006, I served the foregoing document(s) described as

8 **FIRST AMENDED COMPLAINT**

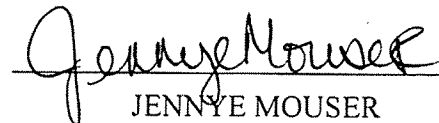
9 on the parties stated below, by placing a true copy thereof in an envelope addressed as shown
10 below by the following means of service:

11 Gail E. Lees
12 Eileen M. Ahern
13 GIBSON, DUNN & CRUTCHER, LLP
14 333 South Grand Avenue
15 Los Angeles, CA 90071
16 Telephone: (213) 229-7000
17 Facsimile: (213) 229-7520

- 18 [X] **BY MAIL** By placing a true copy thereof enclosed in sealed envelopes address as above. That
19 there is a regular communication by mail between the place of mailing and the places so addressed.
20 I am readily familiar with the firm's practice for collection and processing correspondence for
21 mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this
22 date with postage thereon fully prepaid at Los Angeles, California in the ordinary course of
23 business.
- 24 [X] **BY FACSIMILE** By causing the above listed document to be served via facsimile to the
25 attorney(s) of record at the telecopier number(s) so indicated above.

26 I declare under penalty of perjury under the laws of the State of California that the above is
27 true and correct.

28 Executed on November 14, 2006 at Los Angeles, California.


JENNYE MOUSER