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9
10 *Attorneys for Plaintiffs, the Proposed Class and Subclasses*

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 ARMANDO HERRERA, EDUARDO
SALCEDO, DENA LUCERO,
15 FREDERICK BROWN, VANITY
ARRINGTON, KASHIF Z. AWAN,
16 GRETTA CARTER, JAMES
ATKINS, ILKA ROBINSON-
17 EATON, JANET CORPES, TERRI
JONES, HEIDI HUMPHREYS, RIA
18 MARTEINS, BRIAN T. SWEENEY,
NAKECIA M. DEAN, and VON
19 GRIFFIN each individually and on
behalf of all others similarly situated,

20 **Plaintiffs,**

21 vs.

22 WELLS FARGO BANK, N.A. D/B/A
23 WELLS FARGO DEALER
SERVICES, INC., a national
24 association, and WELLS FARGO &
COMPANY, a corporation

25 **Defendants.**
26
27
28

Case No.: 8:18-cv-00332-JVS-MRW

CLASS ACTION

FIRST AMENDED COMPLAINT FOR:

- (1) BREACH OF CONTRACT;
- (2) VIOLATIONS OF THE TRUTH-IN-LENDING ACT;
- (3) MONEY HAD AND RECEIVED;
- (4) VIOLATIONS OF THE CALIFORNIA UNFAIR BUSINESS PRACTICES ACT;
- (5) VIOLATIONS OF THE CALIFORNIA CONSUMER LEGAL REMEDIES ACT; and
- (6) DECLARATORY RELIEF

JURY TRIAL DEMANDED

1 Plaintiffs Armando Herrera (California), Eduardo Salcedo (California), Dena
2 Lucero (Colorado), Frederick Brown (Delaware), Vanity Arrington (Illinois), Kashif Z.
3 Awan (Illinois), Gretta Carter (Illinois), James Atkins (Kentucky), Ilka Robinson-Eaton
4 (Maryland), Janet Corpes (New Jersey), Terri Jones (Ohio), Heidi Humphreys
5 (Pennsylvania), Ria Marteins (Pennsylvania), Brian T. Sweeney (Texas), NaKecia M.
6 Dean (Wisconsin), and Von Griffin (Wisconsin) (collectively “Plaintiffs”), on behalf of
7 themselves and all others similarly situated, bring this action against Defendants Wells
8 Fargo Bank, N.A. d/b/a Wells Fargo Dealer Services, Inc. and Wells Fargo & Company
9 (collectively, “Wells Fargo”) to recover monetary damages, injunctive relief, and other
10 remedies for breach of contract, violations of the Truth-in-Lending Act, money had and
11 received, violations of the California Unfair Business Practices Act, violations of the
12 California Consumer Legal Remedies Act and declaratory relief. The following
13 allegations are based upon Plaintiffs’ personal knowledge with respect to their own acts
14 and based upon information and belief as to all other matters.

15 **INTRODUCTION**

16 1. This action concerns Wells Fargo’s practice of knowingly collecting
17 unearned fees for Guaranteed Automobile Protection Waivers (“GAP Waiver”). GAP
18 Waivers are included in automobile finance agreements as an addendum to the
19 agreement. Wells Fargo collects the unearned fees when customers pay off their finance
20 agreements early (i.e., before the end of the original loan term). Wells Fargo knows these
21 fees have not and will never be earned but collects them anyway. Wells Fargo then
22 refuses to refund this unearned money, even though Wells Fargo is contractually
23 obligated to do so as the creditor and assignee of the finance agreement and GAP Waiver.
24 As a result of this practice, Wells Fargo knowingly collects and keeps approximately
25 \$100 million *per year* in unearned fees from its customers. It has been engaging in this
26 practice for more than a decade.

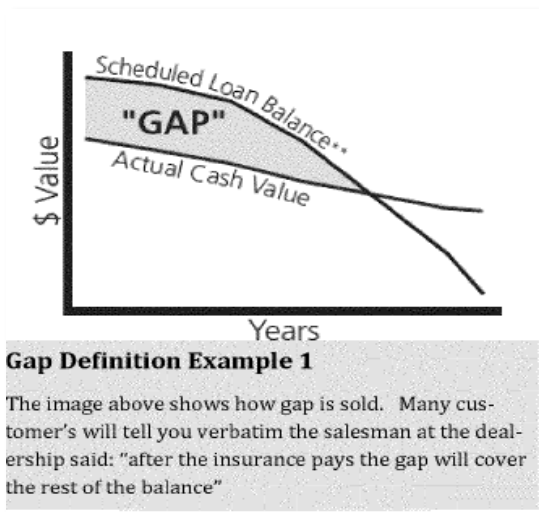
27 2. At a Congressional Hearing on March 10, 2020, Wells Fargo’s new C.E.O.,
28 Charles Scharf, was asked questions about this lawsuit and Wells Fargo’s practice of

1 collecting and failing to refund unearned GAP fees. Specifically, Mr. Scharf was asked
 2 by Representative Katie Porter whether Wells Fargo would “commit to giving customers
 3 this money back.” Mr. Scharf testified in response: “There’s no question if we’ve harmed
 4 customers, that we should in fact do that, and we’ll go back and take look at the specific
 5 example and understand why it hasn’t been done and how we can move quickly to rectify
 6 it.” Wells Fargo has not yet lived up to this promise.

7 **FACTUAL BACKGROUND**

8 **3. What is a Finance Agreement?** Customers often finance the purchase of
 9 their car by entering into a finance agreement with the automobile dealership (the
 10 “dealer”). Under the finance agreement, the customer agrees to pay for the car in monthly
 11 installments, with interest, over a multi-year term. These finance agreements are
 12 commonly referred to as “retail installment sales contracts” (“RISC”), because the car is
 13 being purchased over time in “installments.”

14 **4. What is a GAP Waiver?** A GAP Waiver is an addendum to the finance
 15 agreement. It provides that if a customer suffers a “total loss”¹ and the insurance payout
 16 for the car is insufficient to pay off the remaining loan balance, then the creditor on the



17 finance agreement will agree to waive the
 18 difference. This difference is known as the
 19 “GAP.” For example, assume a customer’s car
 20 is stolen and they still owe \$10,000 on their
 21 finance agreement. Also, assume the customer’s
 22 liability insurer only agrees to pay \$8,000 for the
 23 “total loss,” because that is the car’s “actual cash
 24 value.” Without a GAP Waiver addendum, the
 25 customer would still owe the \$2,000 difference
 26 to the creditor on the finance agreement, even

27 though the customer no longer possesses the vehicle. However, if the finance agreement

28 ¹ A “total loss” means the customer’s car is stolen or damaged beyond repair.

1 has a GAP Waiver, then the creditor is required to “waive” the \$2,000 difference.

2 **5. How does a Customer obtain a GAP Waiver?** To obtain a GAP Waiver,
3 the customer and the dealer execute a GAP Waiver form which amends the terms of the
4 finance agreement and becomes a part of the contract. The GAP Waiver addendums are
5 standard form contracts that are offered to the customer on a “take-it-or-leave it” basis
6 (i.e., they are contracts of adhesion.)

7 **6. How does a Customer Pay for a GAP Waiver?** The customer finances
8 the cost of the GAP coverage for the full term of the loan – for example, \$800 for a four-
9 year loan (“GAP fees”). The GAP fees are included as a separate line item in the finance
10 agreement. They are incrementally paid in monthly installments by the customer over
11 the life of the loan, with interest, along with the rest of the purchase price of the car. In
12 other words, while the customer is told up-front what the total cost of the GAP coverage
13 would be for the full term of the loan, the customer actually pays this amount
14 incrementally over time to the creditor on a month-to-month basis as part of their “car
15 payments.” These GAP fees are often referred to as “GAP premiums,” because they are
16 similar to insurance premiums.

17 **7. What are “Unearned GAP Fees”?** Every GAP Waiver provides that if the
18 finance agreement is paid off early, or if the GAP coverage is otherwise cancelled before
19 the end of the loan term, then the customer is entitled to a refund of the unused portion
20 of the GAP fees. For example, if the total GAP fees for four years of GAP coverage are
21 \$800, but the customer pays off their finance agreement in two years, then the customer
22 would be entitled to a refund of half of the GAP fees (\$400) for the unused half of the
23 loan.² Wells Fargo and the rest of the financial industry refer to the unused portion of
24 the fees as “unearned” GAP fees. They are “unearned” because once the finance
25 agreement is paid-off early, there is no possibility of a GAP and the customer is no longer
26 receiving anything of value by paying for GAP protection. Thus, the customer is entitled

27 _____
28 ² Some GAP Waiver addendums also include an early cancellation fee provision which
may reduce the refund if applicable.

1 to their money back for the unused term of the loan. The unearned GAP fees are
2 analogous to unearned insurance premiums which are refunded to a customer when they
3 cancel their homeowners or automobile liability insurance before the end of the policy
4 period.

5 **8. How Does Wells Fargo Become the “Creditor” on the Finance**
6 **Agreement and GAP Waiver?** As noted above, the customer initially enters the finance
7 agreement and GAP Waiver with the dealer -- who is the initial “creditor” on the loan.
8 However, the dealer then sells and assigns the finance agreement with the GAP Waiver
9 to a financial institution, like Wells Fargo. This sale and assignment often occurs
10 simultaneously with the sale of the car, or within the next 72 hours. Thereafter, all of the
11 customer’s payments and interactions concerning the finance agreement are with Wells
12 Fargo. Once Wells Fargo purchases the finance agreement and GAP Waiver, Wells
13 Fargo, as the assignee, “steps into the shoes” of the dealer and becomes the “creditor” on
14 the loan, legally assuming all of the benefits and contractual obligations under the finance
15 agreement and GAP Waiver. This includes the obligation to refund any unearned GAP
16 fees it collects as a result of the early termination of the finance agreement.

17 **9. Wells Fargo Pre-Approves All GAP Waiver Addendums Before**
18 **Purchasing Loans from Dealers.** Before Wells Fargo purchases a finance agreement,
19 it knows if the finance agreement contains a GAP Waiver addendum. The front page of
20 the finance agreement indicates if it includes a GAP Waiver, and it will also separately
21 list the amount of the GAP fees. Wells Fargo also receives a copy of the customer’s
22 finance agreement and GAP Waiver addendum from the dealer. In addition, Wells Fargo
23 pre-approves all GAP Waiver forms used by the dealers it does business with, so Wells
24 Fargo is well aware of the GAP Waiver’s refund obligations.

25 **10. Does the Dealer Continue to Owe GAP Waiver Obligations to the**
26 **Customer after the Assignment to Wells Fargo?** No. As one of the widely used GAP
27 Waiver forms explains, once the contract is assigned to a financial institution like Wells
28 Fargo, the dealer will “no longer be a party to the GAP Addendum and the agreement

1 will be between the customer and the assigned financial institution.” This, of course,
2 makes sense because, after the assignment, the customer owes all of the installment
3 payments and interest to Wells Fargo, not the dealer. Consequently, if the customer
4 suffers a “total loss,” Wells Fargo is the only party capable of waiving the “GAP” because
5 Wells Fargo is the creditor that is owed the payments. In fact, it would be impossible for
6 anyone other than the current creditor (Wells Fargo) to waive the customer’s remaining
7 loan balance. Likewise, if there was an overpayment of GAP fees as a result of the early
8 termination of the finance agreement, it is Wells Fargo’s obligation to refund the
9 overpayment to the customer.

10 **11. How is Wells Fargo Collecting Unearned GAP Fees?** When a customer
11 wants to pay off their finance agreement early (i.e., before the end of the loan term),
12 Wells Fargo informs the customer of the total payoff amount. But when it does so, Wells
13 Fargo includes the *full remaining cost* of the GAP Waiver in the total payoff amount and
14 does not provide any credit reduction for the unearned GAP fees. In other words, at the
15 time of payoff, Wells Fargo collects the unearned GAP fees for the remaining term of the
16 loan, even though Wells Fargo knows these fees are not earned, and can never be earned,
17 because the finance agreement is terminating early. Wells Fargo will then keep those
18 unearned fees unless the customer takes further action to obtain a refund.

19 **12. Wells Fargo has Collected and Failed to Refund Over \$100 Million Per**
20 **Year in Unearned GAP Fees.** Wells Fargo knows customers are entitled to a refund of
21 unearned GAP fees when they pay off their finance agreement early, but it collects the
22 unearned GAP fees anyway. Wells Fargo’s management admitted in a deposition the
23 company is aware most customers will not know or remember they are entitled to this
24 money back. This has enabled Wells Fargo to collect and keep over \$100 million per
25 year in unearned GAP fees that rightfully belong to their customers. For example, in this
26 lawsuit, Wells Fargo produced financial records for an approximate six-year period from
27 August 31, 2012 to September 15, 2018. The records indicate out of 1,817,554 loans
28 with GAP Waivers that were paid off early, only 94,079 customers (approximately 5%)

1 received a refund. During this same six-year period, Wells Fargo collected and failed to
 2 refund an average of approximately \$357.65 per customer in unearned GAP fees from
 3 1,723,475 customers. As a result, during this six-year period, Wells Fargo pocketed over
 4 \$616.3 million dollars of money that rightfully belongs to its customers. And this
 5 practice continues to this day.

Summary of Unearned GAP Fees Collected and Unrefunded By Wells Fargo for Customers Who Paid Off Their Loans Early (August 31, 2012 – September 15, 2018)	
Number of Loans with GAP Waivers Paid Off Early	1,817,522
Number of Customers Who DID NOT Receive Refunds	1,723,475
Number of Customers Who DID Receive Refunds	94,079
Percentage of Customers Who DID NOT Receive Refunds	94.8%
Average Amount of Unearned Fees Per Customer Collected and Unrefunded By Well Fargo (Using Pro Rata Method)	\$357.65
TOTAL UNEARNED FEES COLLECTED & UNREFUNDED BY WELLS FARGO	\$616,396,342

13. **Wells Fargo Actively Conceals its Obligation to Issue the Refund.** After
 23 customers' loans are paid off early, Wells Fargo sends them an "early payoff" form letter.
 24 In this letter, Wells Fargo uniformly and misleadingly informs customers that they "may"
 25 be entitled to a refund of a portion of their GAP fees and they should contact the dealer
 26
 27
 28

1 if they have questions about the “possible refund.”³ These statements are misleading for
 2 two reasons. First, Wells Fargo knows GAP Waivers provide for a refund when
 3 customers pay off their finance agreement early, and Wells Fargo can calculate the
 4 amount of the refund owed to each of its customers from its own records.⁴ So, using the
 5 words “may” and “possible refund” is deceptive and false. Second, Wells Fargo is the
 6 party that owes the contractual obligation to the customers to issue the refund.
 7 Consequently, misdirecting customers to contact the dealer -- with whom the customer
 8 may not have had any interaction since the vehicle was purchased -- is another way to
 9 deter customers from obtaining their money back from Wells Fargo. As indicated above,
 10 Wells Fargo knows most customers will not go back to the auto dealership where they
 11 originally purchased their vehicle to find out if they “may” be entitled to a refund of some
 12 undisclosed amount.

13 **14. Wells Fargo Wrongfully Denies it has as a Contractual Obligation to its**
 14 **Customers to Issue the Refund of Unearned GAP Fees.** In an attempt to excuse its
 15 wrongful conduct, Wells Fargo contends the dealer is the party contractually obligated to
 16 issue the refund to the customer under the GAP Waiver, not Wells Fargo. In other words,
 17 even though the customer pays the unearned fees to Wells Fargo, Wells Fargo contends
 18 the customer has to go back to the original auto dealership that sold them the vehicle to
 19 obtain the refund. This is wrong as a matter of law and fact for the following reasons,
 20 among others:

21 a. *First*, when Wells Fargo accepts the assignment of the finance
 22 agreement and GAP Waiver from the dealer, it “steps into the shoes” of the dealer and
 23

24 ³ A later version of the “early payoff” form letter adopted in 2018 indicates that the
 25 customer may also contact the “GAP Insurance Administrator” to inquire about the
 26 “possible refund amount.”

27 ⁴ If the GAP Waiver has an applicable early “cancellation fee” provision, it is theoretically
 28 possible the cancellation fee will be greater than the unearned GAP fees depending on
 how late in the term the contract is paid off. But Wells Fargo is fully able to calculate
 these amounts, and therefore knows when a customer is entitled to a refund.

1 becomes the sole “creditor” on the agreement. As the assignee and creditor, Wells Fargo
2 assumes all the benefits and obligations of the finance agreement, including, but not
3 limited to, the GAP Waiver’s contractual obligation to the customer to refund the
4 unearned GAP fees after the early payoff of the finance agreement. In other words, just
5 like Wells Fargo assumes the obligation as the creditor to waive the GAP in the event of
6 a “total loss” of the vehicle, it also assumes the GAP Waiver’s contractual obligation to
7 issue the refund of the unearned GAP fees. Simply put, after the assignment, there are
8 only two parties to the contract: Wells Fargo and the customer. Therefore, Wells Fargo
9 is the only remaining party to the contract that the customer may “look to” to enforce the
10 GAP Waiver’s contractual refund obligations.

11 b. *Second*, every finance agreement in this case, as a matter of federal
12 law, is required to include a provision disclosing that: “Any holder of this consumer credit
13 contract is subject to all claims and defenses which the debtor could assert against the
14 seller of goods or services obtained pursuant hereto or with the proceeds hereof” up to
15 the amount paid by the debtor under the agreement. (16 C.F.R. § 433.2.) This regulation,
16 known as the “holder rule,” codifies the principle that the assignee of the finance
17 agreement (Wells Fargo, the “holder” of the consumer credit contract) steps into the
18 shoes of the original seller (the dealer), and is responsible for all claims the debtor (the
19 customer) could have originally asserted against the seller (the dealer). Consequently,
20 whereas the dealer initially owed the GAP Waiver’s refund obligations to the customer
21 as the original seller of the service, Wells Fargo took over those obligations once it
22 became the “holder” of the contract as the assignee.

23 c. *Third*, a number of States have enacted specific statutes or regulations
24 concerning GAP Waivers, which likewise codify the principle that the assignee of the
25 finance agreement is the party required to refund the unearned GAP fees to the customer.⁵
26

27 _____
28 ⁵ Wells Fargo has admitted these states include, at a minimum, Alabama, Colorado,
Indiana, Iowa, Massachusetts, Oregon, Texas, Vermont and Wisconsin.

1 d. *Fourth*, the GAP Waivers contain language evidencing this legal
2 principle. For example, the GAP Waiver forms typically contain assignment provisions
3 stating that the addendum is between the customer and the dealer, or if assigned, with the
4 assignee. The forms also typically define the term “We” as including the assigned
5 financial institution (Wells Fargo) and provide that “We will issue the refund” or “We
6 will waive” the GAP. In sum, the common law and evidence establishes that Wells Fargo
7 is the party contractually obligated under the GAP Waiver to refund the unearned GAP
8 fees to the customer.

9 15. **Wells Fargo Always Receives Written Notice of an Early-Payoff.** As a
10 fallback position, Wells Fargo contends customers forfeited the right to their money back
11 by failing to comply with notice provisions in the GAP Waiver addendums. Specifically,
12 Wells Fargo argues these provisions require written notice of the early payoff be sent to
13 Wells Fargo, the dealer, or their agents, as a precondition to the refund. This is wrong as
14 a matter of law and fact for the following reasons, among others:

15 a. *First*, Wells Fargo, as the creditor and recipient of the final payoff of
16 the finance agreement, always receives written notice that the loan has been paid off early
17 thereby entitling customers to a refund of the unearned GAP fees. Specifically,
18 customers make their final payments to Wells Fargo in the form of written checks, wires
19 or electronic payments, and Wells Fargo notes the final payments, in writing, in their
20 records and confirms the same, in writing, to the customer. As such, customers have
21 always complied with any purported “written notice” requirements to Wells Fargo
22 because Wells Fargo actually received written notice of the early payoff.

23 b. *Second*, as established above, after the assignment, Wells Fargo is the
24 party with the refund obligation. Consequently, Wells Fargo is the only party that needs
25 to be placed on notice of the early payoff (i.e., the event triggering the refund), not the
26 dealer or an agent.

27 c. *Third*, under the “substantial compliance” doctrine, customers do not
28 forfeit their rights to refunds by failing to strictly comply with notice provisions, so long

1 as the deficiency in performance is not “so dominant or pervasive as in any real or
2 substantial measure to frustrate the purpose of the contract.” In other words, “technical
3 deviations” from a contract provision will not result in a forfeiture when one party to the
4 contract “substantially obtained the benefit it expected” and “it would amount to an
5 injustice to deny relief” to the other party. In the context of the present case, any
6 “technical deviations” from the GAP Waiver’s notice provisions did not “frustrate the
7 purpose” of such provisions, because the party with the refund obligation (Wells Fargo)
8 did, in fact, receive actual notice that it was obligated to make the refund as a result of
9 the early termination of the finance agreement. Wells Fargo does not need any additional
10 information from its customers to determine the customers’ entitlement to a refund in
11 these circumstances. This is starkly demonstrated by the fact that, after the filing of this
12 lawsuit, Wells Fargo began automatically and directly refunding unearned GAP fees to
13 its “early payoff” customers in certain limited States (as discussed in Paragraph 16
14 below). It would be an injustice to find that customers forfeited their rights to a refund
15 by failing to provide some form of further notice to Wells Fargo, the dealer or their
16 agents, when Wells Fargo already knows it is required to issue the refund. To hold
17 otherwise would allow Wells Fargo to inequitably profit at the expense of its customers
18 by keeping hundreds of millions of dollars of fees that have not been earned and will
19 never be earned, simply because the customer did not perform some act that Wells Fargo
20 does not need to determine its refund obligations.

21 **16. Wells Fargo Has Been Aware Since at least 2014 It was Violating**
22 **Certain State Laws and Regulations by Failing to Directly Refund Unearned GAP**
23 **Fees.** No later than 2014, Wells Fargo’s compliance department determined Wells Fargo
24 was violating certain state laws and regulations by failing to directly refund unearned
25 GAP Fees to customers after the early payoff of their loans. Nevertheless, Well Fargo
26 did not begin refunding customers in those states until December 2018, more than 10
27 months *after* the filing of this lawsuit in February 2018. At that time, Wells Fargo
28 publicly stated it would pay past refunds to customers in those states -- Alabama,

1 Colorado, Indiana, Iowa, Massachusetts, Nevada, Oregon, Texas, Vermont and
2 Wisconsin -- going back as far as 2008. However, Wells Fargo refuses to pay the
3 substantial interest that has accrued on those unpaid amounts to each of the affected
4 customers in those states. Further, there is evidence Wells Fargo is not *actually* refunding
5 customers in those states, even though it publicly represented it would do so. This is why
6 an adjudication of Wells Fargo's refund obligations in the aforementioned states remains
7 necessary.

8 **17. Wells Fargo Continues to Collect and Fail to Refund Unearned GAP**
9 **Fees for the Majority of the States.** For the rest of the country, including California,
10 Wells Fargo is continuing its unlawful practice of collecting unearned GAP fees upon an
11 early payoff of the loan, and refusing to automatically refund those fees to its customers.
12 Accordingly, Plaintiffs on behalf of themselves and a Class of similarly situated
13 consumers are seeking:

14 a. An order requiring Wells Fargo to refund all unearned GAP fees it
15 collected after the early payoff of the finance agreement to every customer in the United
16 States;

17 b. An order requiring Wells Fargo to pay the interest that accrued on the
18 delinquent refunds;

19 c. An order requiring Wells Fargo, on a go forward basis, to either: (i)
20 refrain from collecting unearned GAP fees upon an early payoff of the finance agreement;
21 or (ii) directly refund those unearned fees back to the customer promptly after the
22 termination of the finance agreement; and

23 d. Damages, restitution and all other relief as may be just and proper.

24 **THE HISTORY AND STRUCTURE BEHIND GAP WAIVERS**

25 18. For background purposes, it is helpful to understand the history of why GAP
26 Waivers were created and the structure behind them.

27 19. **GAP Waivers were Created as an Alternative to GAP Insurance.** GAP
28 Waivers were created as an alternative to GAP Insurance. GAP Insurance is a contract

1 between an insurance company and a customer, in which the insurer agrees to cover the
2 customer's GAP in the event of a total loss of the vehicle. For example, with GAP
3 Insurance, if a total loss occurs and the current value of the vehicle is worth less than the
4 amount owed to the creditor, then the insurance company will pay the creditor the
5 difference. In other words, the insurance company is paying off the loan balance on the
6 customer's behalf. The customer pays insurance premiums directly to the insurance
7 company for this coverage.

8 **20. What are the Key Differences Between GAP Waivers and GAP**
9 **Insurance?** From the customer's perspective, GAP Insurance provides the same
10 protection as a GAP Waiver, because under both products, the customer will no longer
11 owe any further payment obligations to the creditor in the event of a total loss of the
12 vehicle. However, there are a number of key differences:

13 a. *First*, with a GAP Waiver, the customer is directly contracting with
14 the creditor, whereas with GAP Insurance, the customer is directly contracting with a
15 third-party insurance company;

16 b. *Second*, with a GAP Waiver, the creditor is agreeing to waive the
17 GAP, whereas with GAP Insurance, the insurer is agreeing pay the creditor the amount
18 of the GAP on the customer's behalf;

19 c. *Third*, with a GAP Waiver, the customer is directly paying the
20 creditor for the GAP protection, whereas with GAP Insurance, the customer is paying
21 premiums to a third-party insurance company; and

22 d. *Fourth*, GAP Insurance is subject to state insurance regulations,
23 whereas GAP Waivers typically are not.

24 **21. GAP Waivers were Created by the Auto Lending Industry as a means**
25 **to Avoid Insurance Regulations.** The fact that GAP Insurance is subject to state
26 insurance regulations posed a particular problem for the auto lending industry. This is
27 because auto dealers may need an insurance license to offer GAP Insurance to their
28 customers. To circumvent this regulation, the auto lending industry created GAP

1 Waivers, whereby the creditor on the finance agreement agrees to waive the GAP in the
2 event of a total loss of the vehicle. This way, a GAP Waiver is considered to be a “debt
3 cancellation agreement,” rather than insurance, because the creditor is writing-off the
4 remaining balance. And, because “debt cancellation agreements” are generally not
5 subject to insurance regulations, the dealers can offer GAP Waivers without an insurance
6 license. While this may be a creative solution to avoid insurance regulations, it comes
7 with the consequence that the creditor (rather than the insurance company) is now directly
8 assuming contractual obligations under the GAP Waiver to the customer, including the
9 obligation to refund the unearned GAP Fees when there has been an early termination of
10 the finance agreement.

11 **22. What is a GAP Administrator?** A GAP Administrator is a company that
12 provides administrative services to the creditor on the GAP Waiver. In other words, the
13 GAP Administrator serves as the agent of the creditor (which is initially the dealer, but
14 then becomes Wells Fargo after the assignment.) The GAP Administrator agrees to
15 provide its services for each GAP Waiver addendum sold by the dealer to its customers,
16 and to provide those services to the new creditor (Wells Fargo) after the assignment of
17 the finance agreement and GAP Waiver. In exchange, the dealer is required to pay a fee
18 to the GAP Administrator for each GAP Waiver addendum it sells. The GAP
19 Administrator provides the dealer with its own GAP Waiver forms.⁶ The GAP
20 Administrator also obtains insurance on the creditor’s behalf, so that if the ultimate
21 creditor on the GAP Waiver addendum (Wells Fargo) has to waive a GAP, it will be
22 reimbursed by the GAP Administrator’s insurer.

23 **23. Are GAP Administrators Parties to the GAP Waiver?** No. GAP
24 Administrators do not execute the GAP Waiver and are not parties to the contract with

25 _____
26 ⁶ As noted above, unless Wells Fargo has pre-approved the GAP Waiver form, Wells
27 Fargo will not acquire a loan from the dealer that includes a GAP Waiver addendum. The
28 reason for this is obvious: When Wells Fargo acquires the loan, it is doing so subject to
the terms of the GAP Waiver addendum – so Wells Fargo naturally wants to ensure the
terms meet with its approval.

1 the customer. Instead, GAP Administrators owe their obligations to the creditor pursuant
2 to a separate agreement between the administrator and the dealer.

3 **24. How Does Wells Fargo Benefit from the Sale of GAP Waivers?** As a
4 result of this structure, Wells Fargo receives two primary benefits from the sale of GAP
5 Waivers. *First*, because the cost of a GAP Waiver is financed, Wells Fargo receives
6 interest on the GAP fees, which amounts to tens of millions of dollars of additional
7 revenue each year to Wells Fargo. *Second*, Wells Fargo receives insurance protection
8 from the GAP Administrator’s insurer because Wells Fargo will be made whole in the
9 event of a “total loss” of the car. Without a GAP Waiver, if there is a “total loss,” Wells
10 Fargo’s loan becomes uncollateralized, meaning if the customer cannot or will not pay
11 the remaining loan balance, there is no car (i.e., collateral) to repossess and Wells Fargo
12 will have to write-off the balance as “bad debt.” And even if Wells Fargo could collect
13 the deficiency, it would need to incur the time, effort and cost of collection. So, the GAP
14 Waiver actually protects the creditor as much as it does the customer.

15 **25. What Happens if the Dealer Does Not Pay the GAP Administrator?**
16 Sometimes a customer enters a GAP Waiver addendum, but the dealer fails to pay the
17 GAP Administrator the fee related to the GAP Waiver. As a result, the GAP
18 Administrator will rightly refuse to provide any services to the creditor (Wells Fargo) for
19 that customer’s GAP Waiver. Further, the GAP Administrator’s insurer will refuse to
20 reimburse the creditor (Wells Fargo) if the creditor has to waive a loan balance under that
21 GAP Waiver addendum. In these circumstances, Wells Fargo will still waive the loan
22 balance (i.e., the “GAP”) if the customer suffers a “total loss” because Wells Fargo is
23 still contractually obligated to do so under the finance agreement and GAP Waiver with
24 its customer. This underscores the key difference between GAP Insurance and a GAP
25 Waiver: under a GAP Waiver, the obligations to the customer are owed directly by the
26 creditor on the finance agreement (Wells Fargo), not an insurer.

1 **JURISDICTION AND VENUE**

2 26. This Court has subject matter jurisdiction pursuant to the Class Action
3 Fairness Act of 2005, 28 U.S.C. § 1332(d), because at least one Class member is of
4 diverse citizenship from one of the defendants, there are 100 or more Class members
5 nationwide, and the aggregate amount in controversy exceeds \$5,000,000.

6 27. Venue is proper in the Central District of California under 28 U.S.C. § 1391.
7 Wells Fargo regularly conducts business in the Central District and a substantial part of
8 the events giving rise to the claims asserted herein occurred in this district in Orange
9 County, California. Wells Fargo conducts its automobile lending business through its
10 division, Wells Fargo Dealer Services, Inc., whose corporate headquarters is in Irvine,
11 California. On information and belief, the executives and managers who oversaw Wells
12 Fargo’s GAP Waiver refund policies and procedures were primarily based in this venue.
13 Further, venue is appropriate in the Southern Division of the Central District because
14 50% or more of the defendants residing in the Central District reside in Orange County,
15 California.

16 **THE PLAINTIFFS**

17 28. Plaintiffs are individuals (a) who entered into finance agreements with GAP
18 Waiver addendums that were assigned to Wells Fargo, (b) who paid off their finance
19 agreements to Wells Fargo before the end of the loan term, and (c) who did not receive a
20 refund of the unearned GAP fees collected by Wells Fargo and/or the accrued interest on
21 those unpaid amounts.

22 29. Below is a chart setting forth: (a) the name of each named plaintiff
23 (“Plaintiff”); (b) their current state of residence (“Residence State”); (c) the state where
24 they purchased their car and entered the finance agreement and GAP Waiver addendum
25 (“Transaction State”); (d) the date they entered the finance agreement and GAP Waiver
26 addendum (“Contract Start Date”); (e) the length of the loan term in years (“Loan Term
27 (Years)”), (f) the date their finance agreement was paid off (“Early Payoff Date”), (g) the
28 total GAP fees collected by Wells Fargo (“Total GAP Fees Collected”) and the estimated

1 amount of unearned GAP fees that Wells Fargo failed to refund based on the pro rata
 2 method (“Unearned GAP Fees Collected”).

3	4	5	6	7	8	9	10	11
Plaintiff	Residence State	Transaction State	Contract Start Date	Loan Term (Years)	Early Payoff Date	Total GAP Fees Collected	Unearned GAP Fees Collected (Estimated)	
Armando Herrera	CA	CA	7/19/14	5 years	2/2/17	\$800.00	\$460.95	
Eduardo Salcedo	CA	CA	2/12/11	3 years	5/13/13	\$595.00	\$149.29	
Dena Lucero	CO	CO	12/31/14	5 years	8/11/17	\$300.00	\$147.03	
Frederick Brown	MD	DE	9/13/11	5 years	7/22/16	\$895.00	\$33.04	
Vanity Arrington	IL	IL	6/1/13	4.5 years	3/13/17	\$760.00	\$127.35	
Kashif Awan	IL	IL	3/24/16	6 years	10/4/18	\$649.00	\$375.30	
Gretta Carter	WI	IL	5/13/15	3 years	1/4/17	\$895.00	\$412.65	
James Atkins	WV	KY	5/1/15	2.5 years	2/28/17	\$895.00	\$239.91	
Ilka Robinson-Eaton	MD	MD	1/27/15	6 years	5/5/17	\$895.00	\$556.52	
Janet Corpes	NJ	NJ	4/21/12	6 years	2/28/17	\$650.00	\$134.30	
Terri Jones	OH	OH	11/27/13	4 years	7/13/16	\$895.00	\$307.52	
Heidi Humphreys	PA	PA	3/19/16	6.25 years	8/1/18	\$449.00	\$278.88	
Ria Marteins	PA	PA	5/12/16	4 years	1/23/18	\$635.00	\$458.64	
Brian T. Sweeney	TX	TX	4/19/16	6 years	5/6/17	\$595.00	\$491.26	
NaKecia Dean	WI	WI	11/10/12	6 years	1/13/17	\$795.00	\$241.66	
Von Griffin	TN	WI	9/7/15	5 years	10/10/16	\$895.00	\$732.09	

26 **THE DEFENDANTS**

27 30. Defendant Wells Fargo Bank, N.A. is a national association bank chartered
 28 in South Dakota. It conducts its automobile lending business under the name “Wells

1 Fargo Dealer Services, Inc.” (“WFDS”), whose corporate headquarters is in Irvine,
2 California. It directly acquired and owned the finance agreements belonging to Plaintiffs
3 and the Class, which such loans were secured by Plaintiffs’ and the Class’s automobiles
4 located throughout the United States. Upon information and belief, executives and/or
5 employees within WFDS implemented, oversaw and/or approved the strategy and
6 operations relating to the company’s GAP policies and procedures, including its refund
7 policies.

8 31. Defendant Wells Fargo & Company (“WF”) is, and at all relevant times was,
9 a corporation organized and existing under the laws of the State of Delaware and a bank
10 holding company with its principal place of business in San Francisco, California. WF
11 is a financial services company with \$1.9 trillion in assets, and provides banking,
12 insurance, investments, mortgage and consumer and commercial financing through more
13 than 8,300 locations, 13,000 ATMs, and the internet. It has over 263,000 full-time
14 employees and is ranked No. 25 on Fortune Magazine’s 2017 rankings of America’s 500
15 largest corporations. Upon information and belief, WF participated in the strategy and
16 operations relating to Wells Fargo’s failure to refund unearned GAP Fees.

17 32. The above-listed defendants, and each of them, are referred to collectively
18 herein as “Wells Fargo” or the “Defendants.”

19 33. If necessary, Plaintiffs will seek to amend this Complaint to reflect
20 Defendants’ true names and capacities when they have been ascertained if not correctly
21 named or yet named. Plaintiffs are informed and believe, and thus allege, that each
22 defendant is responsible, jointly and severally, for the events and injuries described
23 herein that caused damage to Plaintiffs and the Class.

24 34. On information and belief, Plaintiffs allege that Defendants were, at all
25 relevant times, the alter egos of each other such that to affirm the legal separateness of
26 the Defendants for the purposes of the claims presented here would lead to an injustice
27 and/or inequitable result. There is a unity of interest and ownership between the
28 defendant companies and their equitable owner(s) such that the separate personalities of

1 the companies and their shareholders do not in reality exist.

2 35. On information and belief, Plaintiffs allege that, at all relevant times, each
3 Defendant was acting as a partner, agent, servant and/or employee of the remaining
4 Defendants, within the course and scope of such agency and with the knowledge and/or
5 understanding of the remaining Defendants.

6 **CLASS ACTION ALLEGATIONS**

7 36. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil
8 Procedure on behalf of the following Class and Subclasses:

9 **a. Nationwide Class:** Plaintiffs seek to represent a nationwide class
10 including all persons: (1) who entered into finance agreements with GAP Waivers that
11 were assigned to Wells Fargo, (2) who paid off their finance agreements before the end
12 of the loan term,⁷ and (3) who did not receive a refund of the unearned GAP fees collected
13 by Wells Fargo and/or the accrued interest on those unpaid amounts (the “Nationwide
14 Class”). On behalf of the Nationwide Class, Plaintiffs are asserting claims against Wells
15 Fargo for breach of contract, violations of the Truth-In-Lending Act (“TILA”), money
16 had and received and declaratory relief. The class period is based on the applicable
17 statutes of limitations.

18 **b. State Subclasses for the States of California, Colorado, Delaware,**
19 **Illinois, Kentucky, Maryland, New Jersey, Ohio, Pennsylvania, Texas and**
20 **Wisconsin:** Plaintiffs also seek to represent state subclasses of consumers who fit the
21 definition of the Nationwide Class, but which are limited to the states where each named
22 Plaintiff and subclass member entered their applicable GAP Waiver addendum (the
23 “State Subclasses”). The following is a list of each named Plaintiff with the specific State
24 Subclass they seek to represent: Armando Herrera (California), Eduardo Salcedo
25 (California), Dena Lucero (Colorado), Frederick Brown (Delaware), Vanity Arrington
26

27 ⁷ As used herein, the terms “early payoff” or “paid off early,” or any derivative thereof,
28 include a customer paying off their loan balance or refinancing the loan before the end of
the loan term.

1 (Illinois), Kashif Z. Awan (Illinois), Gretta Carter (Illinois), James Atkins (Kentucky),
2 Ilka Robinson-Eaton (Maryland), Janet Corpes (New Jersey), Terri Jones (Ohio), Heidi
3 Humphreys (Pennsylvania), Ria Marteins (Pennsylvania), Brian T. Sweeney (Texas),
4 NaKecia M. Dean (Wisconsin), and Von Griffin (Wisconsin). To fall under a specific
5 State Subclass definition, a class member must have entered a GAP Waiver addendum
6 in the same state as the representative Plaintiff. On behalf of the State Subclasses,
7 Plaintiffs are asserting claims against Wells Fargo for breach of contract, violations of
8 TILA, money had and received and declaratory relief. The class period is based on the
9 applicable statutes of limitations.

10 **c. Statutory Refund Subclass.** Plaintiffs Dena Lucero (Colorado),
11 Brian T. Sweeney (Texas), NaKecia M. Dean (Wisconsin) and Von Griffin (Wisconsin)
12 are seeking to represent a subclass of consumers who fit the definition of the Nationwide
13 Class, but which is limited to those customers who entered GAP Waiver addendums in
14 states which have specific statutes or regulations requiring the assignee and holder of the
15 finance agreement (Wells Fargo) to directly refund the unearned GAP fees upon the early
16 payoff of the finance agreement (the “Statutory Refund Subclass”). This subclass
17 includes consumers who entered into GAP Waivers in the states of Alabama, Colorado,
18 Indiana, Iowa, Massachusetts, Oregon, Texas, Vermont and Wisconsin. On behalf of the
19 Statutory Refund Subclass, Plaintiffs are asserting claims against Wells Fargo for breach
20 of contract, violations of TILA, money had and received and declaratory relief. The class
21 period is based on the applicable statutes of limitations.

22 **d. The California Unfair Business Practices Subclass:** Plaintiffs
23 Armando Herrera and Eduardo Salcedo are seeking to represent a subclass of consumers
24 who fit the definition of the Nationwide Class, but which is limited to consumers who
25 entered GAP Waiver addendums in the state of California (the “California Unfair
26 Business Practices Subclass”). On behalf of the California Unfair Business Practices
27 Subclass, Plaintiffs Armando Herrera and Eduardo Salcedo are seeking damages,
28 restitution and injunctive relief under the California Business & Professions Code section

1 17200 *et seq.* (the “UCL”) and the Consumer Legal Remedies Act (the “CLRA”). The
2 class period is based on the applicable statutes of limitations.

3 **e. Alternative Nationwide Subclasses Limited to Specific GAP**
4 **Waiver forms.** As an alternative to the Nationwide Class, each named Plaintiff seeks to
5 represent a subclass of consumers who fit the definition of the Nationwide Class, but
6 each subclass will be limited to only those individuals who entered the identical GAP
7 Waiver forms as the representative Plaintiff (the “Alternative Nationwide Subclasses”).
8 Each representative Plaintiff will represent a separate “Alternative Nationwide Subclass”
9 limited to consumers who entered their identical GAP Waiver form. The applicable GAP
10 Waiver forms are attached hereto as Exhibits 1 through 16. The Parties will be able to
11 identify which customers entered the same GAP Waiver forms as each representative
12 Plaintiff by referencing the “form identification numbers” located on the first page of the
13 GAP Waiver addendums. On behalf of the Alternative Nationwide Subclasses, Plaintiffs
14 are asserting claims against Wells Fargo for breach of contract, violations of TILA,
15 money had and received and declaratory relief. The class period is based on the
16 applicable statutes of limitations.

17 **f. Alternative State Subclasses Limited to Specific GAP Waiver**
18 **forms.** As an alternative to the State Subclasses, each named Plaintiff seeks to represent
19 a subclass of consumers who fit the definition of the Nationwide Class, but the subclass
20 will be limited to only those individuals who entered the same GAP Waiver form as the
21 representative Plaintiff in the same state as the Representative Plaintiff (the “Alternative
22 State Subclasses”). Each representative Plaintiff will represent a separate “Alternative
23 State Subclass” limited to consumers who entered the same GAP Waiver form in the
24 same state as the representative Plaintiff. The applicable GAP Waiver forms are attached
25 hereto as Exhibits 1 through 16. The Parties will be able to identify which customers
26 entered the same GAP Waiver forms as each representative Plaintiff by referencing the
27 “form identification numbers” located on the first page of the GAP Waiver addendums.
28 On behalf of the Alternative State Subclasses, Plaintiffs are asserting claims against

1 Wells Fargo for breach of contract, violations of TILA, money had and received and
2 declaratory relief. The class period is based on the applicable statutes of limitations.

3 **g. Bellwether Subclasses.** Pursuant to the process approved by this
4 Court on February 24, 2020, Plaintiffs Armando Herrera (California), Frederick Brown
5 (Delaware), Gretta Carter (Illinois), James Atkins (Kentucky), and Janet Corpes (New
6 Jersey) seek to represent bellwether subclasses consisting of consumers who meet the
7 same definition as the Nationwide Class, but the bellwether subclasses will be limited to
8 only those consumers who entered the identical GAP Waiver form as the bellwether
9 Plaintiff in the same state as the bellwether Plaintiff (the “Bellwether Subclasses”). The
10 applicable GAP Waiver forms are attached hereto as Exhibits 1, 4, 7, 8 and 10. The
11 Parties will be able to identify which customers entered the same GAP Waiver forms as
12 the bellwether Plaintiffs by referencing the “form identification numbers” located on the
13 first page of the GAP Waiver addendums. On behalf of the Bellwether Subclasses,
14 Plaintiffs are asserting claims against Wells Fargo for breach of contract, violations of
15 TILA, money had and received and declaratory relief. The class period is based on the
16 applicable statutes of limitations. Plaintiffs reserve the right to select different bellwether
17 Plaintiffs in conformance with the process approved by the Court.

18 37. The aforementioned Classes and Subclasses are referred to collectively as
19 the “Class.”

20 38. Excluded from the proposed Class and Subclasses are: (a) Defendants and
21 their agents, officers, directors, parent companies, subsidiaries, and affiliates; (b) counsel
22 representing Plaintiffs and any person employed by counsel; and (c) any judicial officers
23 assigned to this case and their staff.

24 39. Plaintiffs reserve the right to revise the definition of the Class and
25 Subclasses based upon subsequently discovered information.

26 40. **Numerosity:** While the exact numbers of the members of the Class and
27 Subclasses are unknown to Plaintiffs at this time, membership in the Class and Subclasses
28 may be ascertained from the records maintained by Wells Fargo. At this time, Plaintiffs

1 are informed and believe that the Nationwide Class includes over two million members
2 and each of the Subclasses includes tens of thousands, if not hundreds of thousands, of
3 members. Therefore, the Class and Subclasses are sufficiently numerous that joinder of
4 all members of the Class and Subclasses in a single action is impracticable under Rule
5 23(a)(1) of the Federal Rules of Civil Procedure, and the resolution of their claims
6 through a class action will be of benefit to the parties and the Court.

7 41. **Ascertainability:** The names and addresses of the members of the Class and
8 Subclasses are contained in Wells Fargo's records. The members of the Alternative
9 Nationwide Subclasses, the Alternative State Subclasses, and the Bellwether Subclasses
10 -- which are limited to specific GAP Waiver forms -- can be identified from the "form
11 identification numbers" located on the first page of the GAP Waiver addendums. Wells
12 Fargo maintains a copy of each customer's GAP Waiver addendum in its loan files.
13 Notice can be provided to the members of the Class and Subclasses through direct
14 mailing, publication, or otherwise using techniques and a form of notice similar to those
15 customarily used in consumer class actions arising under state and federal law.

16 42. **Common Facts:** Common facts exists as to all members of the Class and
17 Subclasses and predominate over any issues affecting individual members of the Class
18 and Subclasses. The common facts include the following:

19 a. Plaintiffs and the members of the Class and Subclasses entered into
20 finance agreements with GAP Waivers to finance the purchase of their cars.

21 b. The finance agreements and GAP Waivers were initially executed by
22 Plaintiffs and the members of the Class and Subclasses, on the one hand, and
23 representatives from the dealers, on the other hand.

24 c. The finance agreements and GAP Waivers were form contracts.

25 d. The GAP Administrators did not execute the GAP Waivers, and are
26 not parties to the contracts with the customers.

27 e. The dealers sold and assigned the finance agreements and GAP
28 Waivers to Wells Fargo.

1 f. Wells Fargo is the assignee and “holder” of every finance agreement
2 and GAP Waiver entered by Plaintiffs and the members of the Class and Subclasses.

3 g. Every finance agreement entered by Plaintiffs and the members of the
4 Class and Subclasses contains a provision stating that: “Any holder of this consumer
5 credit contract is subject to all claims and defenses which the debtor could assert against
6 the seller of goods or services obtained pursuant hereto or with the proceeds hereof.”

7 h. The finance agreements and GAP Waivers are “consumer credit
8 contracts.”

9 i. Every GAP Waiver was “obtained pursuant” to and “with the
10 proceeds” of the finance agreement.

11 j. The full cost of every GAP Waiver was listed as a separate line item
12 on the first page of the finance agreement and included in the “total amount financed.”

13 k. After the assignment to Wells Fargo, Plaintiffs and the members of
14 the Class and Subclasses were required to make all payments under the finance
15 agreements to Wells Fargo with interest, including, but not limited to, the amount
16 financed for the cost of the GAP Waivers (the “GAP fees”).

17 l. Wells Fargo’s common business practice is to preapprove the
18 language in every finance agreement and GAP Waiver form before agreeing to accept the
19 assignment of such agreements.

20 m. Wells Fargo’s common business practice is to maintain a copy of
21 every finance agreement and GAP Waiver addendum it acquires in its loan files.

22 n. Every GAP Waiver acquired by Wells Fargo provides that the creditor
23 on the finance agreement is required to waive the GAP in the event of a “total loss” of
24 the vehicle.

25 o. Every GAP Waiver acquired by Wells Fargo provides that customers
26 are eligible for a refund of a portion of the total GAP fees if the GAP Waiver is cancelled
27 before the end of the loan term.

28

1 p. Every GAP Waiver is automatically cancelled and terminated when
2 the finance agreement is paid off before the end of the loan term.

3 q. When a GAP Waiver is cancelled before the end of the loan term,
4 Wells Fargo refers to the unused portion of the GAP fees as “unearned fees” or “unearned
5 GAP fees.”

6 r. Plaintiffs and the members of the Class and Subclasses paid off the
7 balances on their finance agreements before the end of the loan term.

8 s. Wells Fargo received written notice that Plaintiffs and the members
9 of the Class and Subclasses paid off their finance agreements before the end of the loan
10 term, because (1) these customers paid off their balances through checks, wires or
11 electronic payments, (2) Wells Fargo recorded the pay-off date, in writing, in Wells
12 Fargo’s computer records and (3) Wells Fargo issued written confirmation letters
13 confirming the finance agreements were paid off before the end of the loan term.

14 t. Every GAP Waiver acquired by Wells Fargo sets forth the method for
15 calculating the “unearned GAP fees” that need to be refunded when the finance agreement
16 is paid off early (e.g., the pro rata method, Rule of 78, etc.).

17 u. Wells Fargo possesses all of the information necessary to calculate
18 the unearned GAP fees when a customer pays off their finance agreement early, including
19 (1) the method for calculating the refund (e.g., the pro rata method, Rule of 78, etc.), (2)
20 the total GAP fees financed, (3) the date of the early payoff, (4) the amount of time
21 remaining under the original loan term, and (5) any applicable cancellation fees.

22 v. Rather than deduct the unearned GAP fees from the total payoff
23 amount, Wells Fargo’s common policy and practice throughout the United States is to
24 include the unearned GAP fees in the total payoff amount when customers seek to pay
25 off their finance agreements early.

26 w. In conformance with its common policy and practice, Wells Fargo
27 collected unearned GAP fees from Plaintiffs and the members of the Class and Subclasses
28 when they paid off their finance agreements early.

1 x. Prior to the filing of this lawsuit, Wells Fargo’s common policy and
2 practice throughout the United States was to refuse to refund the unearned GAP fees it
3 collected when customers paid off their finance agreements early, and to instead direct
4 customers to contact the dealer or GAP Administrator to inquire about a “possible
5 refund.”

6 y. In conformance with its common policy and practice, Wells Fargo did
7 not refund the unearned GAP fees it collected from Plaintiffs and the members of the
8 Class and Subclasses when they paid off their finance agreements early.

9 z. After the filing of this lawsuit, starting in approximately December
10 2018, Wells Fargo publicly announced it would begin refunding unearned GAP fees to
11 customers who pay off their finance agreements early in Alabama, Colorado, Indiana,
12 Iowa, Massachusetts, Nevada, Oregon, Texas, Vermont and Wisconsin. Wells Fargo also
13 represented it would pay back the unearned GAP fees it collected from customers in those
14 states going back to 2008. However, Wells Fargo is not paying the accrued interest on
15 those amounts to every affected customer in those states. Further, there is evidence Wells
16 Fargo is not refunding past customers in those states, despite its public promises to do so.

17 aa. For the rest of the country, Wells Fargo’s common policy and practice
18 continues to be that it will collect unearned GAP fees from customers when they pay off
19 their finance agreements early and refuse to directly refund such amounts to its customers.

20 bb. Wells Fargo’s common policies and practices with respect to GAP
21 Waivers are the same regardless of the language in the GAP Waiver forms. In other
22 words, Wells Fargo treats all GAP Waiver forms as uniform in its business operations.

23 cc. Wells Fargo does not require customers to strictly comply with any
24 notice provisions in the GAP Waivers as a precondition to a waive a GAP in the event of
25 a “total loss” of the vehicle.

26 dd. Wells Fargo does not require customers to strictly comply with any
27 notice provisions in the GAP Waivers as a precondition to a refund when Wells Fargo
28 repossess its customers’ vehicles.

1 ee. Wells Fargo does not require customers to strictly comply with any
2 notice provisions in the GAP Waivers as a precondition to a refund when Wells Fargo
3 agrees to a “hardship refinance” of the loan.

4 ff. The only time Wells Fargo has suggested strict compliance with a
5 notice provision in a GAP Waiver is required is when Wells Fargo would be obligated to
6 pay money back to its customers.

7 43. **Common Questions of Law:** Common questions of law exist as to all
8 members of the Class and Subclasses and predominate over any issues solely affecting
9 individual members of the Class and Subclasses. The common questions of law include
10 but are not limited to:

11 a. Whether Wells Fargo, as the assignee, “steps into the shoes” of the
12 dealer and assumes all contractual obligations under the GAP Waiver as a matter of law.

13 b. Whether Wells Fargo, as the assignee, owes a contractual obligation
14 to the customer to issue the refund of unearned GAP fees when required under the GAP
15 Waiver.

16 c. Whether Wells Fargo, as the “holder” of the consumer credit contract,
17 is responsible for issuing the refund of the unearned GAP fees to the customer pursuant
18 to the “holder rule” mandated by 16 C.F.R. § 433.2.

19 d. Whether the early payoff of the finance agreement terminates the
20 GAP Waiver addendum to the agreement.

21 e. Whether Wells Fargo was required to directly refund the unearned
22 GAP fees after the early payoff of the finance agreement pursuant to the following state
23 statutes and regulations: Alabama (Ala. Admin. Code r. 155-2-2-.13), Colorado (4 CCR
24 902-1), Indiana (Ind. D.F.I., GAP Program Approval, Standardized GAP Agmts., No.
25 14), Iowa (Ia. St. § 537.2510), Massachusetts (Ma. St. 140D § 22), Oregon (Or. St. T. 50,
26 Ch. 646A), Texas (Tex. Admin. Cod § 83.812), Vermont (Vt. St., T. 8 § 10405) and
27 Wisconsin (WSA § 218.0148).

28

1 f. Whether Wells Fargo owes the interest that accrued on the unpaid
2 refund amounts.

3 g. Whether providing written notice to Wells Fargo of the early payoff
4 of the finance agreement is a condition precedent to the refund.

5 h. Whether providing written notice to the dealer or GAP Administrator
6 of the early payoff of the finance agreement is a condition precedent to the refund.

7 i. Whether Wells Fargo's actual notice that the finance agreements have
8 been paid off early is sufficient to trigger Wells Fargo's refund obligations under the
9 GAP Waivers.

10 j. Whether the payment of the final payoff amount constitutes written
11 notice to Wells Fargo that the finance agreement has been paid off early thereby entitling
12 Plaintiffs and the members of the Class and Subclasses to a refund of their unearned GAP
13 fees.

14 k. Whether Wells Fargo's written records of the final payoff date and
15 Wells Fargo's payoff confirmation letters constitute sufficient written notice to Wells
16 Fargo that the finance agreements have been paid off early thereby entitling Plaintiffs
17 and the members of the Class and Subclasses to a refund of their unearned GAP fees.

18 l. Whether Plaintiffs and the members of the Class and Subclasses
19 "substantially complied" with any purported notice requirements in the GAP Waivers by
20 providing notice to the party with the refund obligation (Wells Fargo) that the finance
21 agreements have been paid off early.

22 m. Whether it would be unjust to conclude that Plaintiffs and the
23 members of the Class and Subclasses forfeited their right to a refund of the unearned
24 GAP fees as a result of technical deviations from the GAP Waivers' notice provisions,
25 especially where, as here, the party with the refund obligation (Wells Fargo) received
26 actual notice.

27 n. Whether the GAP Administrator is a party to the GAP Waiver
28 addendums.

1 o. Whether the dealer remains a party to GAP Waiver addendums after
2 the assignment to Wells Fargo.

3 p. Whether the GAP Administrator is the agent of Wells Fargo after the
4 assignment of the GAP Waivers.

5 q. Whether the dealer is the agent of Wells Fargo after the assignment
6 of the GAP Waivers to the extent Wells Fargo claims the dealer still owes obligations to
7 Wells Fargo after the assignment.

8 r. Whether the knowledge of Wells Fargo's agents is imputed to Wells
9 Fargo, and vice-versa.

10 s. Whether the collection of the unearned GAP fees created a "credit
11 balance" that Wells Fargo was required to refund after 6 months pursuant to 15 U.S.C. §
12 1666d and 12 C.F.R. § 226.21.

13 t. Whether Wells Fargo has received money which belongs to Plaintiffs
14 and the members of the Class and Subclasses and which in equity and good conscience
15 should be paid over to Plaintiffs and the members of the Class and Subclasses.

16 u. Whether a contractual provision requiring Plaintiffs and the members
17 of the Class and Subclasses to send a subsequent written notice that the finance agreement
18 has been paid off early as a condition precedent to the refund is enforceable, when the
19 party with the refund obligation (Wells Fargo) already knows the finance agreement has
20 been paid off early.

21 v. Whether Wells Fargo's practice of collecting unearned GAP fees after
22 the early payoff of the finance agreement is an unfair, fraudulent or unlawful business
23 practice under the UCL.

24 w. Whether Wells Fargo's practice of denying its refund obligations is
25 an unfair, fraudulent or unlawful business practice under the UCL.

26 x. Whether a contractual provision providing that Plaintiffs and the
27 members of the Class and Subclasses forfeited their rights to a refund by failing to send
28 a subsequent written notice that the finance agreement has been paid off early is

1 unconscionable, when the party with the refund obligation (Wells Fargo) already knows
2 the finance agreement has been paid off early.

3 y. Whether Plaintiffs and the members of the Class and Subclasses are
4 entitled to damages and restitution in the amount of the unearned GAP fees, as well as
5 the accrued interest on those unpaid amounts.

6 z. Whether Plaintiffs and the members of the Class and Subclasses are
7 entitled to an award of reasonable attorneys' fees and costs.

8 aa. Whether the Court should issue an injunction requiring Wells Fargo
9 to either: (1) refrain from collecting unearned GAP fees upon an early payoff of the
10 finance agreement; or (2) automatically refund those unearned fees back to the customer
11 promptly after the termination of the finance agreement.

12 44. **The GAP Waiver Addendums Are Sufficiently Uniform.** As noted
13 above, the GAP Waiver addendums are form contracts that are preapproved by Wells
14 Fargo. While the GAP Waiver forms may vary in their formatting and language, Wells
15 Fargo treats the GAP Waiver forms as being uniform in practice. This is because the
16 GAP Waiver forms are substantively and materially the same with respect to the refund
17 issues in this case. For example, all GAP Waiver forms provide they may be assigned to
18 a financial institution and that if the GAP Waiver is cancelled before the end of loan term,
19 the customer may receive a refund of the unearned GAP fees. With respect to notice, the
20 GAP Waiver forms fall into four buckets:

21 a. **No Notice:** The first bucket includes GAP Waiver forms that do not
22 require the customer to send written notice that finance agreement has been terminated
23 early.

24 b. **Notice to Wells Fargo.** The second bucket includes GAP Waiver
25 forms that direct the customer to send written notice that the finance agreement has been
26 paid off early but indicate this notice may be sent to the assigned financial institution or
27 lienholder (i.e., Wells Fargo).

28

1 c. **Notice to the Dealer.** The third bucket includes GAP Waiver forms
2 that direct the customer to send written notice that the finance agreement has been paid
3 off early to the dealer.

4 d. **Notice to the GAP Administrator.** The fourth bucket includes GAP
5 Waiver forms that direct the customer to send written notice that the finance agreement
6 has been paid off early to the GAP Administrator.

7 45. **The Arguments are the Same for each Bucket.** Plaintiffs contend that
8 regardless of which bucket the GAP Waivers fall into, Wells Fargo’s refund obligation
9 is triggered by its “actual notice” of the early termination of the finance agreement. This
10 is because Plaintiffs and the members of the Class and Subclasses have either actually
11 and/or “substantially complied” with any notice provisions since the party with the refund
12 obligation (Wells Fargo) always receives written notice that the finance agreement has
13 been paid off early. There is no reason Plaintiffs and the members of the Class and
14 Subclasses should be found to have forfeited their refunds by failing to provide further
15 notice to Wells Fargo, the dealer or the GAP Administrator that the finance agreement
16 has been paid off early, when the party with the refund obligation (Wells Fargo) actually
17 received notice of the early termination. Otherwise, requiring strict compliance with such
18 provisions as a mandatory condition precedent for the refund would simply serve as a
19 trap for unwary consumers and allow Wells Fargo to keep hundreds of millions of fees it
20 did not earn and will never earn at the expense of its customers.

21 46. **Typicality:** Plaintiffs’ claims are typical of the claims of the members of
22 the Class and Subclasses. Plaintiffs have been subjected to the same wrongful business
23 practices and have been damaged in the same manner. Specifically, Wells Fargo
24 collected unearned GAP fees upon the early payoff of their finance agreements and then
25 failed to promptly refund such amounts to the Plaintiffs and the members of the Class
26 and Subclasses.

27 47. **Adequacy:** Plaintiffs will fairly and adequately represent and protect the
28 interests of the Class and Subclasses as required by Federal Rule of Civil Procedure Rule

1 23(a)(4) of the Federal Rules of Civil Procedure. Plaintiffs are adequate representatives
2 of the Class and Subclasses, because they do not have any interests which are adverse to
3 the interests of the members of the Class or Subclasses. Plaintiffs are committed to the
4 vigorous prosecution of this action and, to that end, Plaintiffs have retained counsel who
5 are competent and experienced in handling class action litigation on behalf of consumers.

6 48. Plaintiffs' interests are co-extensive with, and not antagonistic to, those of
7 the absent members of the Class and Subclasses. Plaintiffs will undertake to represent
8 and protect the interests of the absent members of the Class and Subclasses.

9 49. Plaintiffs have engaged the services of the undersigned counsel. Counsel is
10 experienced in complex consumer class action litigation, will adequately prosecute this
11 action, and will assert and protect the rights of, and otherwise represent, Plaintiffs and
12 the absent members of the Class and Subclasses.

13 50. **Superiority:** Pursuant to Rule 23(b)(3) of the Federal Rules of Civil
14 Procedure, a class action is superior to all other available methods for the fair and efficient
15 adjudication of the claims asserted in this action because: (a) the expense and burden of
16 individual litigation make it economically unfeasible for members of the Class and
17 Subclasses to seek redress of their claims other than through the procedure of a class
18 action; (b) if separate actions were brought by individual members of the Class and
19 Subclasses, the resulting duplicity of lawsuits would risk inconsistent results; and (c)
20 absent a class action, Wells Fargo will likely retain the benefits of its wrongdoing,
21 resulting in a failure of justice.

22 51. **Predominance:** Class action status is warranted under Rule 23(b)(3) of the
23 Federal Rules of Civil Procedure because questions of law or fact common to the
24 members of the Class and Subclasses predominate over any questions affecting only
25 individual members. The interests of the members of the Class and Subclasses in
26 individually controlling the prosecution of separate actions are theoretical and not
27 practical. Prosecution of this action through multiple Class Representatives would be
28 superior to individual lawsuits. Plaintiffs are not aware of any difficulty which will be

1 encountered in the management of this litigation which should preclude its maintenance
2 as a class action.

3 **FIRST CLAIM**
4 **BREACH OF CONTRACT**
5 **(On Behalf of All Plaintiffs and the Class and Subclasses)**

6 52. Plaintiffs hereby repeat, reallege and incorporate by reference each and
7 every allegation contained above as though the same were fully set forth herein.

8 53. Plaintiffs bring this claim on behalf of themselves and the members of the
9 Class and Subclasses.

10 54. Plaintiffs and the members of the Class and Subclasses entered into finance
11 agreements with GAP Waiver addendums that were assigned to Wells Fargo.

12 55. A true and correct copy of each Plaintiff's finance agreement and GAP
13 Waiver addendum is attached as Exhibits 1 through 16, as set forth in the chart below
14 (which also lists the states where the contracts were entered):

15	1.	Armando Herrera	CA	Exhibit 1
16	2.	Eduardo Salcedo ⁸	CA	Exhibit 2
17	3.	Dena Lucero	CO	Exhibit 3
18	4.	Frederick Brown	DE	Exhibit 4
19	5.	Vanity Arrington	IL	Exhibit 5
20	6.	Kashif Awan	IL	Exhibit 6
21	7.	Gretta Carter	IL	Exhibit 7
22	8.	James Atkins	KY	Exhibit 8
23	9.	Ilka Robinson-Eaton	MD	Exhibit 9
24	10.	Janet Corpes	NJ	Exhibit 10
25	11.	Terri Jones	OH	Exhibit 11

26
27 ⁸ Plaintiff Eduardo Salcedo was unable to locate a complete copy of his finance agreement
28 and GAP Waiver addendum. However, the front page of his finance agreement indicates
he had a "Spectrum Plans" GAP Waiver form. Accordingly, Plaintiffs are attaching the
standard "Spectrum Plans" GAP Waiver form with Exhibit 2.

12.	Heidi Humphreys	PA	Exhibit 12
13.	Ria Marteins	PA	Exhibit 13
14.	Brian T. Sweeney	TX	Exhibit 14
15.	NaKecia Dean	WI	Exhibit 15
16.	Von Griffin	WI	Exhibit 16

56. The terms of the finance agreements and GAP Waiver addendums were presented to Plaintiffs and the members of the Class and Subclasses on a non-negotiable “take-it or leave-it” basis and are therefore contracts of adhesion.

57. Plaintiffs and the members of the Class and Subclasses financed the cost of the GAP Waivers as part of their finance agreements and were charged for GAP protection for the full term of the loan. These amounts were paid directly to Wells Fargo.

58. All of the GAP Waivers provide that if the GAP Waiver is cancelled before the end of the loan term, then the customer is eligible for a refund of the unused portion of the GAP fees (the “unearned GAP fees”).

59. Wells Fargo, as the assignee and holder of the finance agreements and GAP Waiver addendums, legally owed this contractual refund obligation to Plaintiffs and the members of the Class and Subclasses.

60. Plaintiffs and the members of the Class and Subclasses paid off the balance on their finance agreements to Wells Fargo prior to end of the loan term. As a result, the GAP Waivers were automatically cancelled with the termination of the finance agreements, thereby triggering Wells Fargo’s refund obligations.

61. In breach of the finance agreements and GAP Waivers, Wells Fargo wrongfully collected the unearned GAP fees upon the early payoff of the finance agreements and failed to refund those amounts to Plaintiffs and the members of the Class and Subclasses as required under the GAP Waivers.

62. Plaintiffs and the members of the Class and Subclasses actually and/or substantially complied with all of their obligations under the finance agreements and GAP Waivers.

1 63. Wells Fargo received written notice that Plaintiffs and the members of the
2 Class and Subclasses paid off their finance agreements early, thereby entitling them to a
3 refund of any unearned GAP fees.

4 64. Plaintiffs and the members of the Class and Subclasses actually and/or
5 substantially complied with any notice provisions in the GAP Waivers, because the party
6 with the refund obligation (Wells Fargo) always received written notice that the loans
7 had been paid off early. It would be unjust to find that Plaintiffs and the members of the
8 Classes and Subclasses forfeited the right to their money back by failing to strictly
9 comply with any other notice conditions.

10 65. In the alternative, assuming arguendo Plaintiffs and the members of the
11 Class and Subclasses did not actually and/or substantially comply with the notice
12 provisions, then such provisions are procedurally and substantively unconscionable and
13 unenforceable given that the party with the refund obligation (Wells Fargo) already
14 knows all the information it needs to determine the customers' right to the refund. As
15 such, requiring Plaintiffs and the members of the Class and Subclasses to provide further
16 notice to Wells Fargo, the dealer or the GAP Administrator of the early termination of
17 the finance agreement as a condition precedent to the refund is unnecessary, overly harsh
18 and unreasonably favors Wells Fargo in that it allows Wells Fargo to keep hundreds of
19 millions of dollars of fees that were not earned and will never be earned at the expense
20 of its customers.

21 66. Wells Fargo breached its contractual obligations under the GAP Waivers by
22 failing to promptly refund the unearned GAP fees to Plaintiffs and the members of the
23 Class and Subclasses after the early payoff of the finance agreement.

24 67. Wells Fargo further breached its legal obligations to refund the unearned
25 GAP fees pursuant to the laws and regulations of the States of Alabama, Colorado,
26 Indiana, Iowa, Massachusetts, Oregon, Texas, Vermont and Wisconsin, among other
27 laws.

28

1 months.”

2 73. Wells Fargo’s collection of unearned GAP fees from Plaintiffs and the
3 members of the Class and Subclasses upon the early payoff of their finance agreements
4 created a credit balance in excess of \$1 that Wells Fargo was required refund to Plaintiffs
5 and the members of the Class and Subclasses after six months.

6 74. Wells Fargo has not refunded such amounts to Plaintiffs and the members
7 of the Class and Subclasses even though their current locations are known to Wells Fargo
8 and can be traced through these consumers’ last known addresses or telephone numbers.

9 75. Wells Fargo’s actions constitute a violation of 15 U.S.C. § 1666d and 12
10 C.F.R. § 226.21.

11 76. Wells Fargo recognizes these TILA provisions require the refund of
12 unearned GAP fees, but it is nevertheless failing to comply with these provisions.

13 77. Specifically, the state of Massachusetts has an identical statute (M.G.L.A.
14 140D § 22) which provides, in relevant part, as follows: “Whenever a credit balance in
15 excess of \$1 is created in connection with a consumer credit transaction through (1)
16 transmittal of funds to a creditor in excess of the total balance due on an account, (2)
17 rebates of unearned finance charges or insurance premiums, or (3) amounts otherwise
18 owed to or held for the benefit of an obligor, the creditor shall . . . (c) make a good faith
19 effort to refund to the consumer by cash, check or money order, any part of the amount
20 of the credit balance remaining in the account for more than six months, within thirty
21 days after the expiration of the six month period.”

22 78. Based on M.G.L.A. 140D § 22, Wells Fargo’s compliance department
23 determined Wells Fargo was required to directly refund the unearned GAP fees it collects
24 from consumers who entered GAP Waivers in the state of Massachusetts. In December
25 2018, after the filing of this lawsuit, Wells Fargo publicly announced it would issue
26 refunds to customers in the state of Massachusetts. However, Wells Fargo is continuing
27 to refuse to issue refunds to customers in the majority of the States in this country, even
28 though the identical TILA regulations apply on a nationwide basis.

1 79. On behalf of themselves and the members of the Class and Subclass,
2 Plaintiffs seek damages in the amount of the unearned GAP fees and accrued interest on
3 those unpaid amounts.

4 **THIRD CLAIM**
5 **MONEY HAD AND RECEIVED**
6 **(On Behalf of all Plaintiffs and the Class and Subclasses)**

7 80. Plaintiffs hereby repeat, reallege and incorporate by reference each and
8 every allegation contained above as though the same were fully set forth herein.

9 81. A claim for “money had and received” may be asserted any time a defendant
10 holds money in its possession which in equity and good conscience belongs to the
11 plaintiff.

12 82. After the early termination of the finance agreement, Plaintiffs and the
13 members of the Class and Subclasses did not receive any consideration for the unearned
14 GAP fees collected by Wells Fargo.

15 83. Wells Fargo maintains possession of the unearned GAP fees belonging to
16 Plaintiffs and the members of the Class and Subclasses. This money in equity and good
17 conscience rightfully belongs to Plaintiffs and the members of the Class and Subclasses.

18 84. Plaintiffs and the members of the Class and Subclasses seek restitution of
19 the unearned GAP fees collected and retained by Wells Fargo, as well as the interest that
20 accrued on those unpaid amounts.

21 **FOURTH CLAIM**
22 **VIOLATION OF CALIFORNIA’S UNFAIR COMPETITION LAW**
23 **(On Behalf of Plaintiffs Armando Herrera and Eduardo Salcedo and the**
24 **California Unfair Business Practices Subclass Only)**

25 85. Plaintiffs hereby repeat, reallege and incorporate by reference each and
26 every allegation contained above as though the same were fully set forth herein.

27 86. Plaintiffs Armando Herrera and Eduardo Salcedo bring this claim for
28 violation of California Business and Professions Code section 17200 *et seq.* (the “UCL”) on behalf of themselves and the members of the California Unfair Business Practices

1 Subclass.

2 87. The UCL prohibits acts of “unfair competition” including any unfair,
3 fraudulent or unlawful business practice.

4 88. Wells Fargo’s practice of collecting and failing to refund unearned GAP fees
5 after the early payoff of the finance agreement is an “unfair” business practice proscribed
6 by the UCL. There is no reasonable basis for Wells Fargo to collect and fail to refund
7 fees that Wells Fargo knows are not earned and will never be earned. Further, there is
8 no legitimate basis to require customers to send a subsequent written notice to Wells
9 Fargo or its agents that the finance agreement has been paid off early as a condition
10 precedent for the refund, when the party with the refund obligation (Wells Fargo) already
11 knows the finance agreement has been paid off early. This practice is substantially
12 injurious to consumers and has allowed Wells Fargo to be unjustly enriched at the
13 consumers’ expense. This substantial injury is not outweighed by any countervailing
14 benefits to consumers or competition.

15 89. Wells Fargo’s refusal to acknowledge its obligation to refund the unearned
16 GAP fees in its payoff letters, and its liability under the “holder rule” for such amounts,
17 is a “fraudulent” business practice under the UCL in that it is tantamount to an incorrect
18 and misleading assertion that no claims for refunds may be brought against Wells Fargo.
19 Likewise, Wells Fargo’s practice of misdirecting customers to contact the dealer about a
20 “possible refund,” when Wells Fargo knows customers are, in fact, entitled to a refund
21 of the unearned GAP fees from Wells Fargo when the finance agreement has been paid
22 off early, is a “fraudulent” business practice under the UCL, because it is likely to deceive
23 and deter a reasonable consumer from seeking such refunds from Wells Fargo.

24 90. Wells Fargo’s practices described above are unlawful and, at a minimum,
25 violate the California Consumer Legal Remedies Act (the “CLRA”) which prohibits the
26 inclusion of unconscionable terms in a consumer contract.

27 91. As a direct and proximate result of Wells Fargo’s violations of the UCL,
28 Plaintiffs Armando Herrera and Eduardo Salcedo and each of the members of the

1 California Unfair Business Practices Subclass have been injured in fact and suffered lost
2 money or property in that Wells Fargo collected and failed to refund unearned GAP fees
3 after the early payoff of their finance agreements.

4 92. Pursuant to section 17203 of the UCL, Plaintiffs Armando Herrera and
5 Eduardo Salcedo, on behalf of themselves and the members of California Unfair Business
6 Practices Subclass, are seeking restitution of all unearned GAP fees that Wells Fargo
7 collected and failed to refund after the early payoff of customers' finance agreements,
8 with the accrued interest on those unpaid amounts.

9 93. Plaintiffs Armando Herrera and Eduardo Salcedo, on behalf of themselves
10 and the members of California Unfair Business Practices Subclass, are further seeking an
11 order enjoining Wells Fargo from collecting and failing to promptly refund unearned
12 GAP fees after the early payoff of the finance agreement. Without such an order, there
13 is a continuing threat to Plaintiffs and the members of the California Unfair Business
14 Practices Subclass, as well as to members of the general public, that Wells Fargo will
15 continue to improperly keep possession of unearned GAP fees and fail to refund such
16 fees to California consumers.

17 **FIFTH CLAIM**
18 **VIOLATION OF CALIFORNIA'S CONSUMER LEGAL REMEDIES ACT**
19 **(On Behalf of Plaintiffs Armando Herrera and Eduardo Salcedo and the**
20 **California Unfair Business Practices Subclass Only)**

21 94. Plaintiffs hereby repeat, reallege and incorporate by reference each and
22 every allegation contained above as though the same were fully set forth herein.

23 95. Plaintiffs Armando Herrera and Eduardo Salcedo bring this claim for
24 violations of California's Consumer Legal Remedies Act, California Civil Code section
25 1750 *et seq.* (the "CLRA"). This claim is brought on behalf of themselves and the
26 members of the California Unfair Business Practices Subclass.

27 96. The finance agreements and GAP Waivers are consumer service contracts
28 covered by the CLRA.

1 97. California Civil Code section 1770(a), subdivision (19), prohibits a seller of
2 consumer goods or services from inserting an unconscionable provision in a contract.

3 98. The finance agreements and GAP Waiver addendums are adhesion
4 contracts.

5 99. Any provision in the GAP Waivers that purports to require customers to
6 send a subsequent written notice to Wells Fargo, the dealer or the GAP Administrator
7 that the finance agreement has been paid off early as a condition precedent to the refund
8 is unfair, unconscionable and unenforceable, because the party with the refund obligation
9 (Wells Fargo) already knows the finance agreement has been paid off early.
10 Consequently, any provision that would result in a customer forfeiting the refund of
11 unearned GAP fees in these circumstances, would be overly harsh, would unreasonably
12 favor Wells Fargo and is unconscionable as a matter of fact and law.

13 100. In light of this violation of the CLRA, Plaintiffs Armando Herrera and
14 Eduardo Salcedo, on behalf of themselves and the members of California Unfair Business
15 Practices Subclass, hereby seek an order enjoining Wells Fargo from collecting and
16 failing to promptly refund unearned GAP fees after the early payoff of the finance
17 agreement. Without such an order, there is a continuing threat to Plaintiffs and the
18 members of the California Unfair Business Practices Subclass, as well as to members of
19 the general public, that Wells Fargo will continue to improperly keep possession of
20 unearned GAP Fees and fail to refund such fees to California consumers.

21 101. Pursuant to California Civil Code section 1782, in or around February 2018,
22 Plaintiff Armando Herrera sent a CLRA Demand Letter via certified registered mail to
23 Wells Fargo demanding, *inter alia*, that Wells Fargo refund all unearned GAP Fees and
24 no longer require consumers to send a written notice of cancellation as a prerequisite for
25 a refund when there is an early payoff of the finance agreement. Wells Fargo failed to
26 implement the corrective measures in the CLRA Demand Letter, within 30 days or a
27 reasonable time thereafter. Accordingly, Plaintiffs Armando Herrera and Eduardo
28 Salcedo, on behalf of themselves and the members of California Unfair Business

1 Practices Subclass, are seeking damages in the amount of the unearned GAP fees and the
2 accrued interest on those unpaid amounts.

3
4 **SIXTH CLAIM**
5 **DECLARATORY RELIEF**
6 **(On Behalf of all Plaintiffs and the Class and Subclasses)**

7 102. Plaintiffs hereby repeat, reallege and incorporate by reference each and
8 every allegation contained above as though the same were fully set forth herein.

9 103. There exists a present controversy between the parties as to the following
10 issues:

11 a. Whether Wells Fargo, as the assignee, owes a contractual obligation
12 to the customer under the GAP Waiver to refund unearned GAP fees when the finance
13 agreement has been paid off early.

14 b. Whether Wells Fargo is required to pay interest on any unearned GAP
15 fees that it collects when the finance agreement has been paid off early and which it
16 subsequently fails to promptly refund.

17 c. Whether Wells Fargo is legally required to refund the unearned GAP
18 fees it collects from customers who pay of their finance agreements early under the
19 following State statutes and regulations: Alabama (Ala. Admin. Code r. 155-2-2-.13),
20 Colorado (4 CCR 902-1), Indiana (Ind. D.F.I., GAP Program Approval, Standardized
21 GAP Agmts., No. 14), Iowa (Ia. St. § 537.2510), Massachusetts (Ma. St. 140D § 22),
22 Oregon (Or. St. T. 50, Ch. 646A), Texas (Tex. Admin. Cod § 83.812), Vermont (Vt. St.,
23 T. 8 § 10405) and Wisconsin (WSA § 218.0148).

24 d. Whether Wells Fargo is legally required to pay interest on the unpaid
25 refund amounts under the following State statutes and regulations: Alabama (Ala. Admin.
26 Code r. 155-2-2-.13), Colorado (4 CCR 902-1), Indiana (Ind. D.F.I., GAP Program
27 Approval, Standardized GAP Agmts., No. 14), Iowa (Ia. St. § 537.2510), Massachusetts
28 (Ma. St. 140D § 22), Oregon (Or. St. T. 50, Ch. 646A), Texas (Tex. Admin. Cod §
83.812), Vermont (Vt. St., T. 8 § 10405) and Wisconsin (WSA § 218.0148).

1 104. Plaintiffs and the members of the Class and Subclasses contend Wells Fargo
2 owes these obligations. Wells Fargo denies it owes these obligations.

3 105. Accordingly, Plaintiffs and the members of the Class and Subclasses hereby
4 request the Court issue an order declaring that:

5 a. Wells Fargo, as the assignee, owes a contractual obligation to the
6 customer under the GAP Waiver to refund unearned GAP fees when the finance
7 agreement has been paid off early.

8 b. Wells Fargo is required to pay interest on any unearned GAP fees that
9 it collects when the finance agreement has been paid off early and which it subsequently
10 fails to promptly refund.

11 c. Wells Fargo is legally required to refund the unearned GAP fees it
12 collects from customers who pay of their finance agreements early under the following
13 State statutes and regulations: Alabama (Ala. Admin. Code r. 155-2-2-.13), Colorado (4
14 CCR 902-1), Indiana (Ind. D.F.I., GAP Program Approval, Standardized GAP Agmts.,
15 No. 14), Iowa (Ia. St. § 537.2510), Massachusetts (Ma. St. 140D § 22), Oregon (Or. St.
16 T. 50, Ch. 646A), Texas (Tex. Admin. Cod § 83.812), Vermont (Vt. St., T. 8 § 10405)
17 and Wisconsin (WSA § 218.0148).

18 d. Wells Fargo is legally required to pay interest on the unpaid refund
19 amounts under the following State statutes and regulations: Alabama (Ala. Admin. Code
20 r. 155-2-2-.13), Colorado (4 CCR 902-1), Indiana (Ind. D.F.I., GAP Program Approval,
21 Standardized GAP Agmts., No. 14), Iowa (Ia. St. § 537.2510), Massachusetts (Ma. St.
22 140D § 22), Oregon (Or. St. T. 50, Ch. 646A), Texas (Tex. Admin. Cod § 83.812),
23 Vermont (Vt. St., T. 8 § 10405) and Wisconsin (WSA § 218.0148).

24
25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs request that this Court enter a judgment against Wells
27 Fargo in favor of Plaintiffs and the members of the Class and Subclasses and award the
28 following relief:

- 1 1. An order certifying this lawsuit as a class action pursuant to Rule 23 of the
2 Federal Rules of Civil Procedure, appointing Plaintiffs as the representatives of
3 the Class and their respective Subclasses, and appointing Plaintiffs' counsel as
4 Class Counsel for the Class and Subclasses;
- 5 2. An order declaring the following:
 - 6 a. Wells Fargo, as the assignee, owes a contractual obligation to the
7 customer under the GAP Waiver to refund unearned GAP fees when the
8 finance agreement has been paid off early.
 - 9 b. Wells Fargo is required to pay interest on any unearned GAP fees that it
10 collects when the finance agreement has been paid off early and which it
11 subsequently fails to promptly refund.
 - 12 c. Wells Fargo is legally required to refund the unearned GAP fees it
13 collects from customers who pay of their finance agreements early under
14 the following State statutes and regulations: Alabama (Ala. Admin. Code
15 r. 155-2-2-.13), Colorado (4 CCR 902-1), Indiana (Ind. D.F.I., GAP
16 Program Approval, Standardized GAP Agmts., No. 14), Iowa (Ia. St. §
17 537.2510), Massachusetts (Ma. St. 140D § 22), Oregon (Or. St. T. 50,
18 Ch. 646A), Texas (Tex. Admin. Cod § 83.812), Vermont (Vt. St., T. 8 §
19 10405) and Wisconsin (WSA § 218.0148).
 - 20 d. Wells Fargo is legally required to pay interest on the unpaid refund
21 amounts under the following State statutes and regulations: Alabama
22 (Ala. Admin. Code r. 155-2-2-.13, Colorado (4 CCR 902-1), Indiana
23 (Ind. D.F.I., GAP Program Approval, Standardized GAP Agmts., No.
24 14), Iowa (Ia. St. § 537.2510), Massachusetts (Ma. St. 140D § 22),
25 Oregon (Or. St. T. 50, Ch. 646A), Texas (Tex. Admin. Cod § 83.812),
26 Vermont (Vt. St., T. 8 § 10405) and Wisconsin (WSA § 218.0148).

- 3. An award to Plaintiffs and the members of the Class and Subclasses of all appropriate relief, including actual damages, restitution and disgorgement of the unearned GAP fees;
- 4. An award of all costs for prosecuting the litigation, including expert fees;
- 5. An award of pre- and post-judgment interest;
- 6. An award of attorneys' fees; and
- 7. An order granting any such additional relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b) of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a trial by jury as to all claims in this action.

Dated: April 1, 2020

FRANK SIMS & STOLPER LLP

/s/ Jason M. Frank
JASON M. FRANK, ESQ.
ANDREW STOLPER, ESQ
SCOTT H. SIMS, ESQ.

Attorneys for Plaintiffs

Dated: April 1, 2020

FRANKLIN D. AZAR & ASSOCIATES, P.C.

/s/ Franklin D. Azar
FRANKLIN D. AZAR (*pro hac vice*)

Attorneys for Plaintiffs

Dated: April 1, 2020

LEVIN SEDRAN & BERMAN

/s/ Charles E. Schaffer
CHARLES E. SCHAFFER (*pro hac vice*)
Attorneys for Plaintiffs