

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

FILED-CLERK  
U.S. DISTRICT COURT  
2007 NOV 20 PM 2:04  
EASTERN-MARSHALL

JOHN C. CLOWER, KAY HENDRICKSON §  
CLEVINGER, NANCY HENDRICKSON §  
STALEY, and BILL HENDRICKSON, JR., §  
Individually and on behalf of all other §  
persons similarly situated (THE CLASS) §  
Plaintiffs

NO ~~2-07~~ CV-510

TCW

v.

§ CLASS ACTION COMPLAINT

WELLS FARGO BANK, N.A., a §  
National Banking Association §  
Defendant §

COMPLAINT

I.

NOW COME the Plaintiffs, **John C. Clower, Kay Hendrickson Clevenger, Nancy Hendrickson Staley and Bill Hendrickson, Jr.**, individually and on behalf of all other persons similarly situated, complaining of **Wells Fargo Bank, N.A.**, a national banking association (“**Wells Fargo**”), and for cause of action against said Defendant would respectfully show the Court as follows:

Parties

1 Plaintiff John C. Clower is a resident of Alamogordo, Otero County, New Mexico. Plaintiff John C. Clower (“**Clower**”) is a trust beneficiary of a family trust that is administered by Wells Fargo as Trustee.

2 Plaintiff Kay Hendrickson Clevenger is a resident of Ponder, Denton County, Texas. Plaintiffs Nancy Hendrickson Staley and Bill Hendrickson, Jr. reside in Wichita Falls, Wichita County, Texas. The Hendrickson Plaintiffs (“**Hendricksons**”) are also trust beneficiaries of family

trusts administered by Wells Fargo as trustee.

3. The Defendant, Wells Fargo Bank, N A. (“**Wells Fargo**”) is a national banking association and an interstate bank holding company with principal offices at 420 Montgomery Street, San Francisco, California 94104, and is a foreign corporate fiduciary registered with the Texas Secretary of State as a domesticated foreign corporation. Service upon Defendant Wells Fargo may be had by serving Corporation Service Company, 701 Brazos St., Ste. 1050, Austin, Texas 78701.

## **II.**

### **Introduction**

4. Plaintiffs bring this class action individually and on behalf of all other persons similarly situated having property interests in certain trusts that are currently administered by Wells Fargo Bank, N A., as trustee, that are trusts that were previously trusts administered by First Mercantile Bank of Dallas doing business as MCorp, a Texas Bank Holding Company that is now dissolved and no longer in existence.

5. Plaintiffs allege that Wells Fargo does not have the necessary lawful authority, legal right and standing to serve as the trustee of their respective trusts, and allege common grounds for its removal as trustee. As grounds for Wells Fargo’s removal, Plaintiffs allege that as trustee neither Wells Fargo’s predecessor, MCorp, nor any other subsequent bank purporting to act as the successor trustee of their trusts, including Wells Fargo, ever followed the requisite legal procedures required by the laws of the State of Texas to be named as successor trustee. As a consequence of each bank’s successive and sequential failure to take appropriate legal actions, Plaintiffs contend that as the most recent and the now current bank purporting to act as trustee of their trusts, Wells Fargo does not

have the requisite legal chain of title to administer the equitable title to any of the properties of the trusts, meaning that Wells Fargo does not have the legal authority to administer the trusts themselves.

### **Jurisdiction and Venue**

6. This Court has jurisdiction over this action pursuant to the following:

(a) *Class Action; diversity of citizenship and amount in controversy.* Plaintiffs are citizens of the States of Texas and New Mexico. Defendant Wells Fargo is a national banking association having its designated main office in California, and operates offices in many states and throughout Texas, including banking and trust facilities in the Eastern District of Texas. Wells Fargo is by law considered to be a citizen of California where its main office is located. Diversity jurisdiction is applicable under the provisions of 28 U.S.C.A. Sec. 1332. This action is a class action brought under the Class Action Fairness Act of 2005. The value of the relief sought on behalf of the individual plaintiffs and class members exceeds the sum of \$5,000,000.00 exclusive of interest and costs (Wachovia Bank, N.A. v. Schmidt, 126 S.Ct. 941; 163 L.Ed. 797 (decided January 17, 2006); Class Action Fairness Act of 2005, 28 U.S.C. Sections 1453 and 1711-1715 and 28 U.S.C. Section 1332(d).

(b) *Federal Question.* Plaintiffs allege as additional and alternative jurisdictional grounds that Wells Fargo and its predecessors were all delegated and granted certain state and national banking powers and trust authority by government charter, and in the exercise of those powers have denied due process to Plaintiffs and the class. The denials of due process occurred and were committed by transfer of authority to administer the trusts without providing requisite court proceedings and statutory procedures to the trusts in violation of the Fifth and Fourteenth

Amendments to the U S. Constitution, and the property interests of the Plaintiffs.

(c) *Venue.* Plaintiff Kay Hendrickson Clevenger is a resident of Ponder, Denton County, Texas, and resides within the Eastern District of Texas. The Defendant Wells Fargo operates banking and trust facilities throughout Texas, including the Eastern District of Texas and the Marshall Division. The Marshall Division of the Eastern District of Texas is also the most convenient forum for those persons who are the Plaintiffs.

### III.

#### **Factual Background**

7. The named Plaintiffs and the prospective class members have common and shared claims resulting from their mutual status as being either current beneficiaries or grantors of certain trusts now administered by Wells Fargo as Trustee in which Wells Fargo's claim of authority to act as trustee was acquired through a common sequence of sales, mergers, and other means of trustee transfers between institutions. The Plaintiffs allege that Wells Fargo and its predecessors, while purporting to act in the role of Trustee of the Plaintiffs' trusts, all assumed to administer the Plaintiffs' trusts without legally qualifying to do so in that they did not provide the requisite legal procedures for them to be appointed that are expected and required by the statutory, common law, and constitutional due process that is owed to those persons whose trusts were affected.

It is further alleged that although they had adequate opportunity to do so, Wells Fargo and its predecessors also did not file later court proceedings that could have retrospectively afforded the curative notice and due process that was not previously provided. Plaintiffs allege that Wells Fargo knowingly did not comply with the law because Wells Fargo was not certain that it would be appointed trustee by the Courts, were there opposition to its appointment.

8. The currently named Plaintiffs are the present beneficiaries of Texas testamentary trusts that were created in the late 1960's and early 1970's. The trustee appointed for the Clower and the Hendrickson (Wood) trusts was, for both the Clowers and the Hendricksons, the First Wichita National Bank of Wichita Falls, Texas ("First Wichita"). The trusts of the proposed Class are also trusts currently administered by Wells Fargo, that began as trusts first administered by a group of approximately twenty-six (26) banks, including First Wichita, that began changing trustees upon their merger into the First Mercantile Bank of Dallas (MCorp) all in the manner as hereinafter described.

9. MCorp first acquired the Plaintiffs' trusts in 1983 when First Wichita and the other banks were all in a blanket merger takeover by the First Mercantile Bank of Dallas and its bank holding company, Mercantile Texas Corporation, later renamed MCorp. Prior to the takeover, MCorp had operated the trust business of its own banks under separate corporate charter in the name of another subsidiary, MTrust. In contrast, First Wichita and most of the other banks acquired had previously operated their trust business as simply a department within the same commercial banking operations. As MCorp's first step following the merger, the management of all of the trusts in all of the acquired Texas banks, including First Wichita, were transferred from MCorp to MTrust, and away from MCorp's commercial banking enterprise, MBank. This procedure effectively separated the trust business being managed by the banks as MTrust, from the commercial part of the banking business of the banks that was managed by the banks as MBank. Beginning with that first merger in 1983, there were never any legally required notices or proceedings offered or provided by any of the banks to any of the grantors or beneficiaries named in any of the trusts that were being transferred, nor were any retrospectively provided during any of the subsequent transfers.

10. In March 1989, MCorp failed as a federally insured banking enterprise. At the time of its failure, it was the second largest bank failure in FDIC history. When MCorp's subsidiaries were taken over by the FDIC, MCorp's commercial banking institutions (known as MBanks) and their separate trust institutions (known as MTrusts) all became the subjects of FDIC receivership.

11. In liquidating MCorp's assets to pay the MBank depositors, the FDIC sold substantially all of the former MTrust institutions (meaning all of the trust operations) to Ameritrust, a subsidiary of Bank One of Ohio. In contrast, the commercial side of the banks (MBank) were sold directly to Bank One to do business in its own name as Bank One.

12. In those FDIC transactions, it was not necessary for the FDIC to provide contractual or statutory procedures for trustee changes to the trust customers because of the extraordinary financial exigency statutory powers that the FDIC has in such circumstances.

13. The subsequent failure to provide due process occurred during each of the other six (6) trustee changes as is more particularly hereinafter alleged, i.e., from First Wichita to First Mercantile, from First Mercantile to MTrust, from MTrust to Ameritrust, from Ameritrust to Texas Commerce Trust, from Texas Commerce Trust to Norwest Trust, and from Norwest Trust to Wells Fargo. Each time that contractual procedures or statutory due process was required for the changeover of trustees, no due process was ever provided. Further, each and every change of trustees then became a critical link in Wells Fargo's chain of title to now serve as trustee, and to administer and hold the legal title to the Plaintiffs' trust properties.

14. Each transfer of trustee appointments was void because each did not provide the requisite statutory, common law, and contractual due process required by law. In Texas, as in other jurisdictions, the person or entity claiming to be the trustee of a trust cannot acquire that authority

by prescription, laches, acquiescence, or de facto forbearance. Either legal proceedings or the contractual instructions of the trust instrument must be followed. Further, each successor to the role of claiming to be the trustee was contingent and conditioned upon the validity of the legal title to the trustee property that was claimed by its predecessor in title.

15 There was, upon Plaintiffs' knowledge and belief, and with Plaintiffs' having exercised due diligence, and having made reasonable inquiry, not anything ever done in this regard by any of the banks or trust institutions in Wells Fargo's chain of title, and more importantly, nor was anything ever done by Wells Fargo, itself as a trustee

16. More specifically, the subsequent transactions and violations of due process continued as Ameritrust then sold the bank trust entities that it had acquired in Texas from the FDIC and MTrust to the Texas Commerce Bank of Houston. The Texas Commerce Bank of Houston was a subsidiary of the Chemical Bank of New York. Each of the trust accounts that were then formerly administered state-wide in Texas by Ameritrust, and before that state-wide in Texas by MTrust, and before that, in Plaintiffs' case, by First Wichita, then became administered by Texas Commerce Trust Company. Again, no notices, court filings or other legal proceedings related to any of those transactions were ever provided by any of those trustees to any of the grantors and beneficiaries of the trusts that were being transferred.

17 Continuing that pattern, Texas Commerce Bank next sold the trustee appointments to Norwest Bank, an interstate bank holding company based in Minneapolis, Minnesota. Norwest Bank then undertook to administer the trusts in the name of Norwest Trust, Texas, N.A. Again, no notices, court proceedings or other legal proceedings related to that transaction were ever provided to any of the grantors and beneficiaries named in the trusts that were being transferred.

18. Norwest Bank then subsequently sold the purported right to administer the trusts, including the ones to administer the Plaintiffs' trusts, and all the other trust accounts that it had similarly acquired, to the Defendant Wells Fargo, which now administers them. Again, no notices, court filings or other legal proceedings related to the transaction were ever provided by Norwest or Wells Fargo to any of the grantors and beneficiaries named in the trusts that were being transferred.

19. Interspersed among each of the above recited transfers between interstate bank holding companies, there were also transfers within them between subsidiary trust institutions of the same holding companies. A different form of statutory due process was also required for those subsidiary inter-company transfers by another statute, the Texas Substitute Fiduciary Act, Tex. Fin. Code, § 274.001 *et seq*. This was not done either. Continuing the practice followed during the major transfers between the bank holding companies, no contractual or statutory process nor due process was ever provided as required by that statute for subsidiary transfers.

20. At all material times applicable to each of the transactions and transfers recited above, both the common law, the Texas Finance Code, and several specific Texas Probate Code statutes all required either contractual notices, court proceedings, or statutory succession practices of procedural and substantive due process to be provided to the grantors and beneficiaries of the respective trusts being transferred. These requirements applied whether the trustees were entities being merged, or sold outright and traded. By seeking and being granted their licenses and charters from the appropriate governmental authorities to engage in and to seek appointments as corporate trustees, the trustees became responsible for those requirements. Contrary to meeting and complying with those requirements, due process was never afforded to the Plaintiffs nor to any other trust customers in any of the transactions or transfers above described. Accordingly, and although



Defendant Wells Fargo is now currently and presumptively acting as the *de facto* trustee of such trusts, Defendant Wells Fargo is not at all the *de jure* legal trustee of the Plaintiffs' trusts nor of any of the other trusts similarly situated and similarly acquired that Wells Fargo is presently administering. Defendant Wells Fargo can therefore have no better title to administer the trusts as trustee than it could have acquired from any of its predecessors in its chain of title.

21. Defendant Wells Fargo has asserted to Plaintiffs that Wells Fargo is now shielded from its having previously failed to provide due process, because it now claims a retrospective effect of subsequently enacted amendments to Texas statutes. Those statutes at all material times only applied to state banks, not national banks, and never, by reason of their own express statutory exclusions, applied at any time to trust companies. Wells Fargo has also asserted that the subsequent amendments to the statutes have also retrospectively cured any substantive or procedural acts or omissions that Wells Fargo or its predecessors may have committed in not having later provided curative due process opportunities to the grantors and beneficiaries of the trusts. In so responding, Wells Fargo has not only wrongfully interpreted the Texas statutes, but has by reason of governmental delegated banking and trust authority, acted under color of state law in its denial of due process, and in its not offering to cure such denials and those deficiencies in court.

22. By also not extending any subsequent remedial or curative opportunities for due process proceedings, the defendant Wells Fargo has further withheld due process to the Plaintiffs and the proposed class. Such conduct is prohibited by expressly stated Texas substantive and procedural law, to-wit: Tex. Prop. Code §112.009(c) and §113.083(a), and Tex. Fin. Code §274.001 et seq. Those Texas statutes and applicable case law require that if a trust successor is not named in the trust instrument, or if the power to appoint the successor is not expressly granted by the trust

document itself, then notice and court proceedings are required to accomplish the appointment of the successor trustee(s)

23 The named Plaintiffs and the prospective members of the Class all have common circumstances of fact. They are all beneficiaries in trusts that Wells Fargo acquired in like factual sequences. Each of the prospective members also have the same statutory and other legal rights of due process that have been denied.

24 A multiplicity of actions can only be avoided if these prospective claims are consolidated and presented as a Class.

#### IV.

##### Allegations of Class Certification

25 Plaintiffs allege that either the Plaintiff John C. Clower or any one of the other named Plaintiffs are all qualified and willing to serve as a Class representative pursuant to Fed R. Civ. P. Rule 23 and all request that this litigation proceed as a class action.

26 Plaintiffs would further show that the requested Class should be and include all persons similarly situated to the Plaintiffs. It should include all persons who are either grantors or beneficiaries that have property interests in trusts presently administered by Defendant Wells Fargo that were previously administered by First Mercantile Bank of Dallas as MTrust, and then thereafter in sequence and chain of title by Ameritrust, Texas Commerce Trust, Norwest and Wells Fargo.

27 This action satisfies the numerosity, commonality, typicality and adequacy of representation requirements of Fed R. Civ. P. Rule 23 in that: (1) the proposed Class is so numerous that joinder of all members is impracticable; (2) there are common questions of law and fact common to the Class; (3) the claims of the named Plaintiffs are typical of the claims of the Class;

and (4) the representative parties will fairly and adequately protect the interests of the Class.

28. Inconsistent or varying adjudications with respect to individual members of the Class would establish incompatible standards for the party opposing the Class

29. Adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members of the Class not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

30. The party opposing the Class has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate either final injunctive relief or corresponding declaratory relief with respect to the Class as a whole

31. The questions of law and fact that are common to members of the Class predominate over any questions affecting only individual members and a class action is superior to any other available methods for the fair and efficient adjudication of the controversy.

32. The claims of the named Plaintiffs are typical of the claims of the rest of the Class.

33. Either John C. Clower or any of the other named Plaintiffs will fairly and adequately represent the interests of the Class, have retained competent counsel to do so, are willing to pay the costs of notice and litigation through counsel selected, and have no interests adverse to other members of the Class, having suffered the same harm as the Class.

V.

**No Privity of Contract/Trespass to Title**

Plaintiffs allege that there is no privity of contract between Defendant Wells Fargo and the Plaintiffs' trusts, and that there is ongoing trespass to title to all realty that may be included in Plaintiffs's trusts, for which Plaintiffs are entitled to injunctive and other relief.

## VI.

### Conversion

The Defendant Wells Fargo has therefore unlawfully taken possession of the funds, money, and properties to which these Plaintiffs hold equitable title under terms of express written trust agreements. In spite of lawful demand, Defendant Wells Fargo remains in possession, dominion and control of those properties, and refuses to turn over and submit those properties to the courts for selection and determination of a proper and lawful trustee. Such conduct constitutes an unlawful taking of those properties and Plaintiffs did not consent to the Defendant's taking of the converted properties

Plaintiffs would further show that the Defendant Wells Fargo is an experienced and well-informed corporate trustee, and has great expertise, knowledge and resources in the areas of trust and banking law, as did each of its predecessors in the chain of title to the trusts that are the subject of this action

Plaintiffs allege that the Defendant and each one of its predecessors are presumed under the law to have had both actual and constructive knowledge of all Texas laws that were applicable to each one of the changes of trustees that occurred, and are presumed to have acted willfully in the manner that each did, including Wells Fargo, notwithstanding that knowledge.

Plaintiffs here allege that the Defendant has acted willfully to avoid the likelihood that a large number of the trusts would have preferred not to allow Wells Fargo to serve as trustee, and would have asked the court to select another trustee, and that would have resulted in a trustee other than Wells Fargo now serving as such. In so acting, the Defendant Wells Fargo has committed acts of conversion that are wilful, malicious and oppressive.

Wherefore, the conduct of Wells Fargo for not having provided the contractual steps, the court proceedings or the other due process required or even a tender of curative due process to its trust customers, is willful, intentional and in reckless disregard for the rights of the beneficiaries and grantors of the trusts, and has resulted in acts of unlawful conversions by Defendant Wells Fargo.

## VII.

### Actual Damages

As a direct or proximate result of the failure of the Defendant Wells Fargo and its predecessors to offer or provide the required procedures to make a selection of a successor trustee during any of the trustee changes, or for Wells Fargo to later cure and remedy those failures, Plaintiffs and each member of the proposed Class are entitled to recover as actual damages all of the trustee fees, commissions and other charges ever collected by Defendant Wells Fargo from the trusts of the named Plaintiffs and from the trusts of each of the members of the proposed Class back at least to the expiration of the period of applicable statutes of limitations.

## VIII.

### Injunctive Relief

Plaintiffs and the members of the prospective Class have no adequate remedy at law that is otherwise available to prevent further damages, and request that a mandatory injunction be entered declaring that Wells Fargo is not the *de jure* trustee for any of the trusts within the class, and ordering the removal of Wells Fargo as trustee, and that upon a petition being filed by any member of the Class in a court of competent jurisdiction, that in any such proceedings Wells Fargo be enjoined from asserting in those courts and in those proceedings that it is entitled to serve as trustee.

During the pendency of this cause, Plaintiffs have no adequate remedy at law to prevent

Defendant Wells Fargo from seeking in other courts an order granting the approval of Wells Fargo as a trustee without adequate proof or contest of that status being made by opposing parties in those individual court proceedings. Plaintiffs accordingly pray that a temporary injunction to be entered staying all such proceedings until the class certification issues of this cause may be heard and considered.

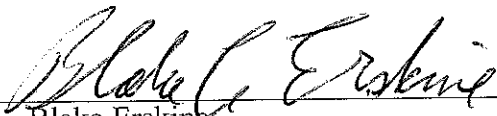
### PRAYER

**WHEREFORE, PREMISES CONSIDERED**, the named Plaintiffs, individually and on behalf of all other persons similarly situated, pray for the following relief:

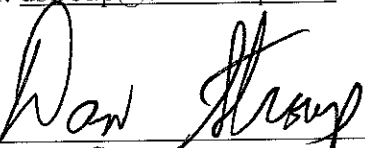
- a. certification of this action as a Class and the appointment of Plaintiff John C. Clower and the undersigned counsel to represent the Class;
- b. Specific discovery orders directed toward Defendant Wells Fargo to disclose all information necessary to provide the requisite Class notices to all prospective members of the Class;
- c. entry of judgment that Defendant Wells Fargo is not the *de jure* trustee of the named Plaintiffs' trusts or of the trusts of any members of the Class;
- d. entry of judgment removing Wells Fargo as *de jure* trustee, and enjoining Wells Fargo from opposing any petition filed by any member of the Class seeking removal of Wells Fargo as corporate fiduciary and requiring Wells Fargo to pay for all legal fees and expenses incident thereto;
- e. other injunctive relief as herein prayed, including but not limited to immediate temporary injunctions prohibiting Wells Fargo from either seeking or proceeding further during the pendency of this cause, in any other court or case, to establish its right to claim or defend its status as trustee of any of the trusts herein affected;
- f. repayment of trustee fees charged, and award of other losses to the Plaintiffs and the Class of the actual damages caused to them by Wells Fargo's actions as described herein;
- g. pre-judgment and post-judgment interest at the maximum rate allowable by law;
- h. reasonable attorneys' fees, court costs and reimbursement for expert witness fees and other reasonable costs and expenses of prosecuting this litigation; and
- i. such other and further general and additional relief as this Court deems appropriate.

Respectfully submitted,


ERSKINE & McMAHON, L.L.P.  
521 N 2nd St  
Longview, Texas 75601  
(903) 757-8435  
(903) 757-9429  
email [blakee@erskine-mcmahon.com](mailto:blakee@erskine-mcmahon.com)

BY:   
Blake Erskine  
State Bar # 06649000

DAN STROUP, P.C.  
3400 W Marshall Ave., Ste. 307  
Longview, Texas 75604  
(903) 295-2200  
(903) 295-2171 fax  
email: [dstroup@danstroup.com](mailto:dstroup@danstroup.com)

BY:   
Dan Stroup  
State Bar # 19425200

FEAZELL & TIGHE, LLP  
6300 Bridgepoint Parkway  
Bridgepoint 2, Ste. 220  
Austin, Texas 78730  
(512) 372-8100 (phone)  
(512) 372-8140 (fax)  
(512) 297-6985 (cell)  
email: [austin@feazell-tighe.com](mailto:austin@feazell-tighe.com)

By:   
Austin Tighe

OF COUNSEL:

ROGER LEE  
State Bar # 12135000  
[rl@ghrdlaw.com](mailto:rl@ghrdlaw.com)

MATTHEW D ANDERSON  
State Bar #24012216  
[mda@ghrdlaw.com](mailto:mda@ghrdlaw.com)

GIBSON, HOTCHKISS, ROACH & DAVENPORT  
807 8th St., 8th Floor  
Wichita Falls, Texas 76301-3368  
(940) 322-7856  
(940) 322-1204 fax