

2020-25807 / Court: 055

Cause No. _____

DNM CONTRACTING, INC.
On behalf of itself and
all others similarly situated

Plaintiff,

vs.

WELLS FARGO BANK, N.A.

Defendant.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

Plaintiff DNM Contracting, Inc. (“DNM”) on behalf of itself and all others similarly situated, files this Original Petition, complaining of Defendant Wells Fargo Bank, N.A. (“Wells Fargo”). In support, DNM states the following:

I. NATURE OF THE CASE

1. This is a class action against Defendant Wells Fargo Bank for deceiving and defrauding small business owners in connection with the Paycheck Protection Program (“PPP”) administered by the Small Business Administration (“SBA”). Defendant made misrepresentations to many small business owners that they would assist them with their PPP loan applications and submit them for approval. Unbeknownst to Class Members, Defendant chose to prioritize select customers and “bigger businesses” for approval to the detriment of Class Members. Defendant knowingly and negligently chose to accept federal money to process PPP loans while knowing it would not do so or did not have sufficient infrastructure in place to handle the applications submitted, to the detriment of Plaintiff and Class Members.

2. Plaintiff, on behalf of itself and Class Members, asserts causes of action for fraud, fraud in the inducement, breach of fiduciary duty, breach of contract, negligence, and violations of the Deceptive Trade Practices Act, and seeks to recover actual and consequential damages of no less than \$10,000,000, exemplary damages, treble damages, attorneys' fees and costs.

**II.
PARTIES AND PROCESS**

3. Plaintiff DNM is a limited liability company organized under the laws of the State of Texas with its principal place of business in Houston, Harris County, Texas.

4. Defendant Wells Fargo Bank is a corporation organized under the laws of the State of Delaware and conducts business in Houston, Harris County, Texas. Wells Fargo Bank may be served with process by serving its registered agent, Corporation Service Company, at 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

**III.
JURISDICTION AND VENUE**

5. The Court has jurisdiction over the parties and subject matter in this suit. The amount in controversy is within the jurisdictional limits of the Court.

6. Venue is proper in Harris County, Texas, pursuant to the Texas Civil Practice and Remedies Code Section 15.002(a)(1) because it is the county in which a substantial part of the events or omissions giving rise to the claims herein occurred.

**IV.
DISCOVERY CONTROL PLAN**

7. Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, Plaintiff intends to conduct discovery under Level 3.

**V.
FACTS**

8. Plaintiff is a small business incorporated in the State of Texas.

9. Plaintiff began inquiring about obtaining a loan through the PPP program administered by the SBA in or around the first week of April 2020. Plaintiff received emails from Defendant informing Plaintiff that Defendant was not yet accepting loans for the PPP program. \

10. Plaintiff inquired about the program with other financial institutions but was informed that those institutions would only accept PPP loans from their established customers. Plaintiff decided to wait for Wells Fargo to begin accepting applications. In the interim, Plaintiff began compiling documents and information necessary to complete an application based on research and media reports about the PPP program.

11. On or about April 14, Plaintiff received an e-mail from Defendant stating that Defendant was now accepting PPP applications. Approximately twenty minutes after receiving the e-mail notification, Plaintiff submitted its PPP loan application to Defendant. Loans for the PPP program were supposed to be approved on a first-come, first-serve basis.

12. Plaintiff never received any further communications about the status of its application or whether the loan had been approved. Plaintiff soon learned that funding for the PPP program had been exhausted.

13. Upon information and belief, Defendant did not actually submit Plaintiff's application for approval by the SBA.

14. Upon information and belief, Wells Fargo Bank never processed or properly submitted to the SBA the loan applications of many other small businesses that were provided to Wells Fargo when Defendant began accepting PPP loan applications. Wells Fargo Bank prioritized its

bigger “small businesses” for loan processing and submission to the SBA to the detriment of its other small business customers. Wells Fargo financially benefited from servicing its bigger customers that applied for larger loans through the PPP program.

**VI.
CLASS ACTION ALLEGATIONS**

15. Pursuant to TEX. R. CIV. P. 42, Plaintiff brings this action as a class action on behalf of itself and all members of the following Class of similarly situated persons and entities:

All Wells Fargo Bank small business customers who utilized Wells Fargo Bank for assistance with and processing of their PPP loans administered by the SBA.

Excluded from the Class are (i) Wells Fargo Bank senior executives and their immediate family members, and (ii) the Court, Court personnel, and their immediate family members.

16. On information and belief, the proposed Class consists of hundreds of entities, the joinder of which in one action is impracticable. The precise number and identities of the Class Members are currently unknown to Plaintiff but can easily be derived from Defendant’s records.

17. Defendant violated the rights and interests of each Class Member in the same manner by their above-described uniform wrongful actions—to wit, wrongfully and knowingly misrepresenting to Plaintiff and Class Members that they could and would process their PPP loans in a timely, fair and impartial fashion and/or misrepresenting their ability to provide PPP loan services to Class Members.

18. Common questions of law and fact predominate over any questions affecting individual Class Members including, *inter alia*:

- (i) whether Defendant’s above-described wrongful actions constitute fraud;
- (ii) whether Defendant’s above-described wrongful actions constitute fraudulent inducement;

- (iii) whether Defendant's above-described wrongful actions constitute breach of fiduciary duty;
- (iv) whether Defendant's above-described wrongful actions constitute breach of contract;
- (v) whether Defendant's above-described wrongful actions constitute breach of an implied contract;
- (vi) whether Defendant's above-described wrongful actions constitute negligence;
- (vii) whether Defendant's above-described wrongful actions constitute breach of the Texas Deceptive Trade Practices-Consumer Protection Act;
- (viii) whether Defendant processed PPP loan applications on a first-come, first-serve basis;
- (ix) whether Defendant had a duty to disclose material information to the Plaintiff and Class Members;
- (x) whether Defendant concealed information from Plaintiff and Class Members;
- (xi) whether Defendant prioritized its bigger banking customers and larger loan applications to the detriment of Plaintiff and Class Members;
- (xii) whether Defendant's above-described wrongful actions directly or proximately caused Plaintiff and Class Members to suffer damages;
- (xiii) whether Defendant's conduct was intentional and/or willful; and
- (xiv) whether Plaintiff and Class Members are entitled to recover actual damages, consequential damages, punitive damages, treble damages, pre- and post- judgment interest, attorneys' fees, litigation expenses, and court costs and, if so, the amount of the recovery.

19. Plaintiff's claims are typical of Class Members' claims because Plaintiff and Class Members are all victims of Defendant's above-described wrongful actions.

20. Plaintiff and its counsel will fairly and adequately represent the interests of Class Members. Plaintiff has no interests antagonistic to, or in conflict with, those of any of the Class Members. Plaintiff's counsel is experienced in leading and prosecuting class actions and complex commercial litigation.

21. A class action is superior to all other available methods for fairly and efficiently adjudicating Plaintiff's and Class Members' claims. Plaintiff and Class Members have been harmed as a direct and proximate result of Defendant's above-described wrongful actions. Litigating this case as a class action is appropriate because (i) it will avoid a multiplicity of suits and the corresponding burden on the courts and Parties, (ii) it would be virtually impossible for all Class Members to intervene as parties in this action, (iii) it will allow numerous persons with claims too small to adjudicate on an individual basis because of prohibitive litigation costs to obtain redress for their injuries, and (iv) it will provide court oversight of the claims process once Defendant's liability is adjudicated.

22. Certification, therefore, is appropriate under TEX. R. CIV. P. 42(b)(3) because the above-described common questions of law or fact predominate over any questions affecting individual Class Members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

23. Alternatively, certification is appropriated under TEX. R. CIV. P. 42(b)(1) because the prosecution of separate actions by individual Class Members would create a risk of either (1) inconsistent or varying adjudications with respect to individual Class Members that would establish incompatible standards of conduct for the Defendant, or (2) adjudications with respect to individual

Class Members that would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

24. Absent a class action, Defendant will retain the benefits of its wrongdoing despite violating the law and inflicting substantial damages on Plaintiff and Class Members.

VII. CAUSES OF ACTION

Count One – Fraud and Fraudulent Inducement

25. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Plaintiff reasserts and incorporates all allegations set forth herein.

26. Defendant led Plaintiff and Class Members to believe they had the capability to help them, when they could not. Defendant knowingly made false representations to Plaintiff and Class Members as to material facts. Defendant knew at the onset that they could not handle or process the PPP loans on Plaintiff's and Class Members' behalf.

27. Defendant failed to represent the interests of Plaintiff and Class Members. Defendant led Plaintiff and Class Members to believe it had the capability to help them, when it could not. Plaintiff and Class Members could have explored their options elsewhere, but for representations from Defendant. Plaintiff and Class Members did not—only to find out later that they would not receive funding and their loans were never actually processed.

28. Defendant also engaged in fraud by selectively excluding Plaintiff and Class Members from the application process. Defendant chose select customers among “bigger businesses” and processed those applications over those of Plaintiff and Class Members. Wells Fargo Bank and its agents had no intention or ability it seems to help smaller businesses—despite representing

they would and could. This clearly proved to be a false assertion—a false assertion Defendant knew from the onset.

29. As a result of relying on Defendant’s representations, Plaintiff and Class Members have been damaged in an amount within the jurisdictional limits of the Court.

Count Two – Breach of Fiduciary Duty

30. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Plaintiff reasserts and incorporates all allegations set forth herein.

31. Defendant had a fiduciary relationship with Plaintiff and Class Members as its banking customers—owing Plaintiff and Class Members advice and proper representations. Defendant failed to do so.

32. Defendant breached its fiduciary duty by making false representations of fact and by intentionally failing to process Plaintiff’s and Class Members’ applications. Defendant chose favorites and “bigger businesses” to receive funding and *actually* process their applications—to the detriment of Plaintiff and Class Members.

33. Defendant failed to adequately and properly submit Plaintiff’s and Class Members’ applications, without notifying Plaintiff and Class Members of its intention not to do so and/or failed to inform Plaintiff and Class Members of their inability to process their applications.

34. As a result of Defendant’s breaches of its fiduciary duties, Plaintiff and Class Members have been damaged in an amount within the jurisdictional limits of the Court.

Count Three – Breach of Contract

35. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Plaintiff reasserts and incorporates all allegations set forth herein.

36. Plaintiff and Class Members entered into valid, enforceable agreements with Wells Fargo Bank for Plaintiff and Class Members to submit their applications to Wells Fargo Bank and for Wells Fargo Bank to process and submit Plaintiff's and Class Members' applications. Plaintiff and Class Members are in privity with Wells Fargo Bank as parties to valid, enforceable contracts or implied contracts. Plaintiff and Class Members have standing to sue Wells Fargo Bank for breach of those agreements.

37. Despite Plaintiff and Class Members fulfilling their obligations under the agreements, Wells Fargo Bank breached the agreements when it failed to process and submit Plaintiff's and Class Members applications after agreeing to do so. Indeed, Plaintiff was told by Defendant that it would process its loan application before the loan process even began. Defendant did not.

38. As a result of Defendant's breach, Plaintiff and Class Members have been injured. Plaintiff's and Class Members damages are within the jurisdictional limits of the Court.

Count Four – Negligence

39. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Plaintiff reasserts and incorporates all allegations set forth herein.

40. In the alternative, Defendant was negligent in affirmatively stating that it could properly handle the loan process—that the federal government is paying them to do with taxpayer dollars—when it could not do so for Plaintiff and Class Members.

41. Defendant owed a duty of care to Plaintiff and Class Members but breached that duty and made negligent misrepresentations.

42. Defendant's breaches of their duties owed to Plaintiff and Class Members proximately caused their damages, which are within the jurisdictional limits of the Court.

Count Five – Violation of the Deceptive Trade Practices Act

43. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Plaintiff reasserts and incorporates all allegations set forth herein.

44. Plaintiff and Class Members were consumers as defined in the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”), embodied in the Texas Business & Commerce Code §17.46 *et seq.* Defendant are persons who can be sued for DTPA violations.

45. Defendant knowingly and/or intentionally committed false, misleading, and deceptive acts and, in doing so, violated provisions of the DTPA. In promising to (1) assist Plaintiff and Class Members in the PPP loan application process, and (2) timely process and submit Plaintiff’s and Class Members’ loan applications, but failing to do so as promised, Defendant knowingly and/or intentionally violated the DTPA in the following, but not so limited, ways:

- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has sponsorship, approval, status, affiliation, or connection which he does not;
- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; and
- Failing to disclose information about goods or services that was known at the time of the transaction with the intent to induce the consumer into a transaction that that the consumer would not have entered into the information been disclosed. TEX. BUS. & COM. CODE §17.46.

46. Defendant did not provide the services as promised and engaged in an unconscionable course of action to defraud Plaintiff and Class Members.

47. Because Defendant acted knowingly and/ or intentionally, Plaintiff and Class Members are entitled to and seek to recover treble damages under the Texas Deceptive Trade Practices Act. TEX. BUS. & COM. CODE §17.50 (b)(1).

**VIII.
CONDITIONS PRECEDENT**

48. All conditions precedent to Plaintiff's and Class Members' recovery and the claims made the subject of this suit have been performed or have occurred.

**IX.
EXEMPLARY DAMAGES**

49. Plaintiff and Class Members seek exemplary damages against Defendant pursuant to Chapter 41 of the Texas Civil Practice and Remedies Code. Exemplary damages are justified by Defendant's malice and ill will demonstrated by their knowledge and assistance in the fraud committed against Plaintiff and Class Members.

**X.
ATTORNEYS FEES**

50. Pursuant to Rule 58 of the Texas Rules of Civil Procedure, Plaintiff reasserts and incorporates all allegations set forth herein.

51. Pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code, Plaintiff and Class Members are entitled to recover reasonable attorney's fees and costs in the prosecution of this action.

**XI.
PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff and Class Members respectfully pray that Defendant be cited to answer herein and that upon final trial of this case, the following relief be awarded:

1. Plaintiff and Class Members be granted judgment against Defendant in the amount of actual and other damages of no less than \$10,000,000;
2. Plaintiff and Class Members be granted judgment against Defendant for exemplary damages in a sum determined by the trier of fact;
3. Plaintiff and Class Members be granted judgment against Defendant for treble damages as authorized by TEX. BUS. & COM. CODE §17.50 (b)(1) for knowing and/ or intentional conduct;
4. Plaintiff and Class Members be granted judgment against Defendant in the amount of reasonable, necessary, and customary legal fees and expenses incurred in this lawsuit;
5. Plaintiff and Class Members be granted judgment against Defendant for pre-judgment interest as provided by §302.002 of the Texas Finance Code, and post-judgment interest on the total amount of the judgment until paid at the maximum rate allowed by law, which is the interest rate published by the Consumer Credit Commissioner;
6. Plaintiff and Class Members be granted judgment against Defendant for all costs of court; and Plaintiff be granted such other and further relief, special or general, legal or equitable, to which Plaintiff may show itself to be justly entitled to receive.

Respectfully submitted,



A handwritten signature in black ink, appearing to read "A. Kennard, Jr.", written over a horizontal line.

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ATTORNEYS FOR PLAINTIFF



I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this May 22, 2020

Certified Document Number: 90359805 Total Pages: 13

Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

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