

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EVERY PENNY COUNTS, INC.,
a Delaware corporation,

Plaintiff,

v.

CASE NO. 8:11-cv-02826-SDM-TBM

WELLS FARGO BANK, N.A.,
f/k/a Wachovia Bank, N.A.

Defendant.

AMENDED COMPLAINT FOR PATENT INFRINGEMENT AND JURY DEMAND

Plaintiff EVERY PENNY COUNTS, INC. ("EPC"), by and through its undersigned counsel, states for its Complaint against Defendant WELLS FARGO BANK, N.A. formerly known as WACHOVIA BANK, N.A. ("Wells Fargo"), as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement.
2. Wells Fargo has infringed, and actively induced others to infringe, U.S. Patent No. 7,571,849 ("the '849 Patent," copy attached as Exhibit A) and U.S. Patent No. 8,025,217 ("the '217 Patent," copy attached as Exhibit B), both entitled "Method and System to Create and Distribute Excess Funds from Consumer Spending Transactions," and both of which are assigned to EPC. Wells Fargo continues to infringe, and actively induce others to infringe, the '849 and '217 Patents.

JURISDICTION

3. This action arises under the Patent laws of the United States, 35 U.S.C. §§1 *et seq.* This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1338(a).

PERSONAL JURISDICTION AND VENUE

4. The Court has personal jurisdiction over Wells Fargo because Wells Fargo has committed acts in violation of the Patent Laws of the United States, namely 35 U.S.C. §§271 *et seq.* within this District.

5. More specifically, Wells Fargo has infringed the '849 and '217 Patents within this District.

6. The Court also has personal jurisdiction over Wells Fargo because Wells Fargo maintains continuous and systematic contacts with this District.

7. For example, on information and belief, Wells Fargo has offered its "Way2Save[®]" and "Save As You GoSM" bank savings account programs to residents of this District for many years.

8. Venue is proper in this Court under 28 U.S.C. §§1391(b), (c) and (d) and/or 1400(a) because Wells Fargo is a corporation, limited liability company, or entity subject to personal jurisdiction in the Middle District of Florida.

9. Yet further, the inventor named in the '849 and '217 Patents, Bertram V. Burke, is a resident of this District.

FACTUAL BACKGROUND

10. EPC is the market leader in the development of world class products that (a) technologically "extend and expand" financial transactions and (b) allow people "to take better care of themselves and others – using one penny at a time!" At the core of EPC's products is its method and system to permit banking institutions (among others) to offer programs to their customers that automatically cause the transfer of specified amounts into their savings accounts based upon transactions in their checking accounts. (EPC's "Bank Rounder program").

11. EPC currently offers and licenses to other financial institutions its Bank Rounder program which incorporates features claimed under the '849 and '217 Patents to significant commercial success.

12. Wells Fargo and others have attempted to take advantage of the popularity of EPC' commercially successful Bank Rounder program using, offering for sale and/or selling and/or inducing others to use, offer for sale and/or sell distribute banking programs such as its "Way2Save[®]" and "Save As You GoSM" bank savings account programs that infringe the '849 and '217 Patents.

13. On information and belief, Wells Fargo has offered banking programs such as its "Way2Save[®]" and "Save As You GoSM" bank savings account programs for sale or use through its web sites, retail bank locations and/or other marketing channels.

STANDING

14. The '849 Patent was duly and legally issued by the U.S. Patent and Trademark Office on August 11, 2009, after a full and fair examination.

15. The '217 Patent was duly and legally issued by the U.S. Patent and Trademark Office on September 27, 2011, after a full and fair examination.

16. EPC is the assignee of all rights, title and interest in and to the '849 and '217 Patents and possesses all rights of recovery under the '849 and '217 Patents, including the right to sue for infringement and recover past damages.

COUNT I:

**INFRINGEMENT OF U.S. PATENT
NO. 7,571,849 BY WELLS FARGO**

17. EPC refers to and incorporates herein the allegations of paragraphs 1 through 16 above.

18. On information and belief, the Wells Fargo Party “Way2Save[®]” and “Save As You GoSM” bank savings account programs infringe one or more claims of the ‘849 Patent.

19. On information and belief, Wells Fargo knows, or should have known, its “Way2Save[®]” and “Save As You GoSM” bank savings account programs infringe one or more claims of the ‘849 Patent.

20. On information and belief, Wells Fargo was aware of the existence of the ‘849 Patent and knew or should have known that at least one claim of the ‘849 Patent was infringed by its “Way2Save[®]” and “Save As You GoSM” bank savings account programs.

21. On information and belief, Wells Fargo’s use of its “Way2Save[®]” and “Save As You GoSM” bank savings account programs constitutes an act of direct infringement of the ‘849 Patent.

22. On information and belief, Wells Fargo’s sale of its “Way2Save[®]” and “Save As You GoSM” bank savings account programs constitutes an act of direct infringement of the ‘849 Patent.

23. On information and belief, Wells Fargo’s intentional, knowing and deliberate acts have had the effect of generating revenues from its “Way2Save[®]” and “Save As You GoSM” bank savings account programs that Wells Fargo knew, or should have known, infringed at least one claim of the ‘849 Patent to the commercial detriment of EPC.

24. On information and belief, Wells Fargo's marketing, sale and/or use of its "Way2Save[®]" and "Save As You GoSM," bank savings account programs similar to EPC's Bank Rounder program constitutes an act of direct infringement of the '849 Patent.

25. EPC is entitled to recover from Wells Fargo the damages sustained by EPC as a result of Wells Fargo's wrongful acts in an amount subject to proof at trial, including, but not limited to, an amount that takes into consideration the gross sales and revenue related to the use and sale of its "Way2Save[®]" and "Save As You GoSM," bank savings account programs.

26. Upon information and belief, Wells Fargo had prior knowledge of EPC's patents rendering Wells Fargo's infringement of the '849 Patent willful and deliberate, and entitling EPC to increased damages and to attorney's fees, including those governed by 35 U.S.C. §§284 and 285 of the Patent Statutes of the United States.

27. Wells Fargo's infringement of EPC' rights under the '849 Patent will continue to damage EPC, causing irreparable harm for which there is no adequate remedy at law, unless it is enjoined by this Court

PRAYER FOR RELIEF FOR COUNT I

28. WHEREFORE, EPC asks this Court to enter judgment in its favor against Wells Fargo and grant the following relief:

- A. An adjudication that Wells Fargo has infringed the '849 Patent;
- B. An accounting of all damages sustained by EPC as a result of Wells Fargo's acts of infringement, including, but not limited to, an accounting of an amount that takes into consideration the gross sales and revenue related to the "Way2Save[®]" and "Save As You GoSM," bank savings account programs by Wells Fargo or any licensee of Wells Fargo.
- C. An award to EPC of actual damages adequate to compensate EPC for Wells

Fargo's infringing acts together with prejudgment post-judgment interest, including an award that takes into consideration the entire market value of the '849 Patent for other products and services that are normally used, provided, sold or distributed at the same time as EPC's Bank Rounder programs;

D. An award to EPC of enhanced damages, up to and including trebling of EPC's damages for Wells Fargo's willful infringement, including damages in accordance with 35 U.S.C. §284;

E. An award of EPC's costs of suit and reasonable attorneys' fees due to the exceptional nature of this case, or as otherwise permitted by law, including those in accordance with 35 U.S.C. §285;

F. A grant of permanent injunction enjoining Wells Fargo, and its agents, servants, employees, principals, officers, attorneys, successors, assignees, and all those in active concert or participation with them, including related individuals and entities, customers, representatives, OEMS, licensees, dealers, and distributors from further acts of infringement of the '849 Patent, and

G. Any further relief that this Court deems just and proper.

COUNT II:

**INFRINGEMENT OF U.S. PATENT
NO. 8,025,217 BY WELLS FARGO**

29. EPC refers to and incorporates herein the allegations of paragraphs 1 through 16 above.

30. On information and belief, the Wells Fargo "Way2Save[®]" and "Save As You GoSM" bank savings account programs infringe one or more claims of the '217 Patent.

31. On information and belief, Wells Fargo knows, or should have known, that its “Way2Save[®]” and “Save As You GoSM” bank savings account programs infringe one or more claims of the ‘217 Patent.

32. On information and belief, Wells Fargo was aware of the existence of the ‘217 Patent and knew or should have known that at least one claim of the ‘217 Patent was infringed by its “Way2Save[®]” and “Save As You GoSM” bank savings account programs.

33. On information and belief, Wells Fargo’s use of its “Way2Save[®]” and “Save As You GoSM” bank savings account programs constitutes an act of direct infringement of the ‘217 Patent.

34. On information and belief, Wells Fargo’s sale of its “Way2Save[®]” and “Save As You GoSM” bank savings account programs constitutes an act of direct infringement of the ‘217 Patent.

35. On information and belief, Wells Fargo’s intentional, knowing and deliberate acts have had the effect of generating revenues from its “Way2Save[®]” and “Save As You GoSM” bank savings account programs that Wells Fargo knew, or should have known, infringed at least one claim of the ‘217 Patent to the commercial detriment of EPC.

36. On information and belief, Wells Fargo’s marketing, sale and/or use of its “Way2Save[®]” and “Save As You GoSM” bank savings account programs similar to EPC’s Bank Rounder program constitutes an act of direct infringement of the ‘217 Patent.

37. EPC is entitled to recover from Wells Fargo the damages sustained by EPC as a result of Wells Fargo’s wrongful acts in an amount subject to proof at trial, including, but not limited to, an amount that takes into consideration the gross sales and revenue related to the use and sale of its “Way2Save[®]” and “Save As You GoSM” bank savings account programs.

38. Upon information and belief, Wells Fargo had prior knowledge of EPC's patents rendering Wells Fargo's infringement of the '217 Patent willful and deliberate, and entitling EPC to increased damages and to attorney's fees, including those governed by 35 U.S.C. §§284 and 285 of the Patent Statutes of the United States.

39. Wells Fargo's infringement of EPC' rights under the '217 Patent will continue to damage EPC, causing irreparable harm for which there is no adequate remedy at law, unless it is enjoined by this Court.

PRAYER FOR RELIEF FOR COUNT II

40. WHEREFORE, EPC asks this Court to enter judgment in its favor against Wells Fargo and grant the following relief:

- A. An adjudication that Wells Fargo has infringed the '217 Patent;
- B. An accounting of all damages sustained by EPC as a result of Wells Fargo's acts of infringement, including, but not limited to, an accounting of an amount that takes into consideration the gross sales and revenue related to the "Way2Save[®]" and "Save As You GoSM" bank savings account programs by Wells Fargo or any licensee of Wells Fargo.
- C. An award to EPC of actual damages adequate to compensate EPC for Wells Fargo's infringing acts together with prejudgment post-judgment interest, including an award that takes into consideration the entire market value of the '217 Patent for other products and services that are normally used, provided, sold or distributed at the same time as EPC's Bank Rounder programs;
- D. An award to EPC of enhanced damages, up to and including trebling of EPC's damages for Wells Fargo's willful infringement, including damages in accordance with 35 U.S.C. §284;

E. An award of EPC's costs of suit and reasonable attorneys' fees due to the exceptional nature of this case, or as otherwise permitted by law, including those in accordance with 35 U.S.C. §285;

F. A grant of permanent injunction enjoining Wells Fargo, and its agents, servants, employees, principals, officers, attorneys, successors, assignees, and all those in active concert or participation with them, including related individuals and entities, customers, representatives, OEMS, licensees, dealers, and distributors from further acts of infringement of the '217 Patent as provided for in 35 U.S.C. §283 or other authority; and

G. Any further relief that this Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to the provisions of Rule 38(b) of the Federal Rules of Civil Procedure and in accordance with Civil Local Rule 1.06, EPC demands a trial by jury on all issues so triable in this matter.

/s/ FRANK R. JAKES
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 23, 2012, the undersigned filed the foregoing using the CM/ECF system, which will send a notice of electronic filing to the following counsel of

record: Abby Dritz Salzer, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, 101 E. Kennedy Boulevard, Suite 2700, Tampa, Florida 33602.

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