

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

CAROLINE AUSTIN, on Behalf of herself and  
All Others Similarly Situated,

Plaintiff,

vs.

TD BANK, N.A.,

Defendant.

CIVIL ACTION. NO. 3:15-cv-0088

CLASS ACTION COMPLAINT

**CLASS ACTION COMPLAINT**

1. Plaintiff Caroline Austin (“Plaintiff”), on behalf of herself and all others similarly situated, by and through her attorneys, alleges as follows.

**INTRODUCTION**

2. Plaintiff brings this action on behalf of herself and a class of all similarly situated Connecticut residents against Defendant TD Bank, N.A., arising out of TD’s improper, unfair, deceptive, unconscionable and bad faith “double counting” of debit card transactions, which has the effect of increasing the number of overdraft fees charged to consumers.

3. Pursuant to its standard account agreement, TD charges fees (currently in the amount of \$35) for debit card transactions that exceeds a customer’s available balance. Plaintiff does not challenge TD’s contractual right to charge overdraft fees based on an insufficient available balance. However, TD engages in a “double counting” policy, contrary to its account agreement, which improperly multiplies the number of transactions which generate overdraft fees.

4. When a customer makes a purchase with a debit card, TD immediately sequesters the funds needed to pay the transaction with a “hold,” subtracting them from a customer’s so-

called “available” balance. But, TD may not in fact pay the merchant for the purchase for several days (“settlement”). The entire purpose of the debit hold is to ensure there are sufficient funds in the account to pay the transaction when it settles.

5. Consistent with its contract, TD charges an overdraft fee on any subsequent transactions that are paid from the account after the “hold” is placed if the available balance is or becomes negative, on the grounds that the money being “held” has been allocated for payment of the first transaction and is not available for payment of subsequent transactions.

6. However, even after TD specifically puts a “hold” and sequesters those funds immediately following the transaction (but before payment to the merchant), TD charges an **additional** overdraft fee when it actually pays the merchant for that same transaction with the funds it had previously placed on “hold,” when intervening transactions have changed the account balance.

7. In other words, TD places funds on hold for an initial transaction (“A Transaction”). This reduces account’s available balance, which may cause transactions which settle while the initial transaction is pending (“B Transactions”) to incur overdraft fees. Then it **also** charges overdraft fees on the “A Transaction” when **it** settles, even though it had sequestered the funds needed to pay the “A Transaction” at the time it was authorized, and even though this sequestration of funds was the only reason why settlement of the “B Transactions” triggered overdraft fees. In violation of the plain terms of the bank’s standard account agreement with consumers, a debit is used twice to cause consumers to incur overdraft fees they would otherwise not incur. Plaintiff refers to this practice throughout as “double counting.”

8. Plaintiff and other TD customers who reside or resided in Connecticut during the Class Period have been injured by TD’s improper and unlawful practices. On behalf of herself

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called “available” balance. But, TD may not in fact pay the merchant for the purchase for several days (“settlement”). The entire purpose of the debit hold is to ensure there are sufficient funds in the account to pay the transaction when it settles.

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8. Plaintiff and other TD customers who reside or resided in Connecticut during the Class Period have been injured by TD’s improper and unlawful practices. On behalf of herself

and the class, Plaintiff seeks damages, restitution and injunctive relief for TD's violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a *et seq.*, ("CUTPA") (Count I), breaches of both the express terms of the Agreement and the covenant of good faith and fair dealing implied therein (Count II), unjust enrichment (Count III), conversion (Count IV) and statutory theft pursuant to Conn. Gen. Stat. § 52-564 (Count V).

### **PARTIES**

9. Plaintiff Caroline Austin is a resident of Hartford, Connecticut.

10. Defendant TD Bank, N.A., is a national bank with its headquarters in Wilmington, Delaware. It conducts business throughout Connecticut.

### **JURISDICTION AND VENUE**

11. This Court has original jurisdiction of this action under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has original jurisdiction because the aggregate claims of the putative class members exceed \$5 million, exclusive of interest and costs, and at least one of the members of the proposed classes is a citizen of a different state than TD.

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because TD is subject to personal jurisdiction here and regularly conducts business in Connecticut, and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this district.

### **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

13. Plaintiff had checking accounts with TD in 2012 and 2013.



***The Mechanics of Debit Card Purchases***

14. A debit card can be used to make a purchase in two ways: an “ACH” transaction in which a customer enters his or her PIN number at the point of sale, or an “offline signature” transaction. In the former, the money is debited from the account nearly instantaneously.

15. In the latter, the “offline signature” transaction occurs in two parts. First, authorization for the purchase amount is obtained by the merchant. When a merchant swipes a customer’s debit card, the credit card terminal connects, via an intermediary, to the customer’s bank, which verifies that the customer’s account is valid and that sufficient funds are available to cover the transaction’s cost. At this step, the bank sequesters the funds in the customer’s account and reduces the customer’s available balance by a corresponding amount.

16. Thereafter, the merchant submits documentation to obtain payment and the Bank “settles” the transaction, at which time the funds are actually transferred from the customer’s account to the merchant’s account. This process does not occur instantly; it may take place several days after the transaction was first authorized. When the bank transfers the funds to the merchant, the customer’s account is debited, the customer’s ledger balance is reduced by the amount of the payment, and the “hold” is released. However, the payment of the transaction and the release of the “hold” have no impact on the customer’s *available* balance, since the available balance had already been reduced by the amount of the transaction at the time of the transaction and the imposition of the hold.

***A. TD’s Account Agreement***

17. Plaintiff’s checking account with TD is, at all relevant times, governed by TD’s standardized contract for deposit accounts (the “Personal Deposit Account Agreement” or “Agreement”). The material terms of the Agreement reflect the foregoing processes for debit

purchases, and were drafted by TD, amended by TD from time to time at its convenience and complete discretion, and, on information and belief, imposed by TD on all of its customers. TD is the party of vastly superior bargaining strength, and the Agreement constitutes a contract of adhesion.

18. The Agreement makes clear that double-counting is prohibited. Rather, an account's available balance is to be reduced by the amount of a pending debit transaction only once.

19. Specifically, the Agreement states in relevant part:

**PROCESSING ORDER FOR PAYMENT OF CHECKS AND OTHER ITEMS.** The following describes how we pay or charge to your Account checks and other items presented for payment. An "item" includes a ... debit card point-of-sale transaction.... *[T]he total amount of any "pending" debit card, ATM and electronic transactions that have been authorized but not yet paid is deducted from your available Account balance.* When you use a debit card, ATM card, or other electronic means to make withdrawals, we may receive notice of the transaction before it is actually presented to us for payment.... Upon receipt of such notice, we treat the transaction as "pending" at the time we receive notice, and subject to certain exceptions, *we deduct the amount of the pending transactions from your available Account balance to determine the amount available to pay other items presented against your Account....*

20. Thus, pursuant to the Agreement, TD sequesters and "deduct[s] from [the] available Account balance" the "total amount of any 'pending' debit card" purchases from a customer's account as soon as a purchase is made. That amount is sequestered for the purpose of covering the transaction, and those funds are not available to the customer for any other purpose.

21. The terms of the Agreement also provide that TD may assess overdraft fees only for debit card transactions that "bring" the Account into a negative available balance at the time of settlement:

*Overdraft fees may be assessed on items presented for payment that bring your Account into a negative balance, as well as any subsequent transactions presented for payment while the Account has a negative*

*balance....* Overdraft fees are not charged on “pending” authorizations, although they reduce your available balance.

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**OVERDRAFTS.** *An overdraft is an advance of funds greater than the amount that has become available in accordance with the Bank’s Funds Availability Policy*, made by us to you, at our sole discretion.... You may overdraw a Checking account, or Money Market account with check access, by up to \$5 per Business Day without being charged a fee.... If your negative available balance exceeds \$5 at the end of the Business Day, *we will charge you for each transaction that overdraws your account.*

Personal Deposit Account Agreement (emphases added).

22. Pursuant to these provisions, TD may not “double count.” Rather, it may assess overdraft fees only (1) “on items presented for payment that bring your Account into a negative [available] balance” and (2) on “any subsequent transactions presented for payment while the Account has a negative [available] balance.”

23. Because TD places funds on “hold” to cover the purchase immediately upon a transaction, the eventual payment of those funds to the merchant upon posting of the transaction cannot “*bring* your account into a negative [available] balance” – those funds were *already* removed from the available balance as soon as the transaction was made and the funds sequestered. In other words,

24. Similarly, if TD places a hold on a debit card transaction at the time it is initiated, that particular transaction by definition cannot also be a “*subsequent* transaction presented for payment while the Account has a negative [available] balance.”

25. Moreover, because the Agreement states that TD will only charge an overdraft fee “for each transaction that overdraws [the available balance in] your account,” TD cannot charge an overdraft on a purchase where the funds to pay for that purchase have already been placed on “hold.” Once TD sequesters sufficient funds to cover a particular transaction at the time of



initiation, actual *payment* of those already-sequestered funds by TD cannot “overdraw” an available balance—indeed, actual payment does not change the available balance in any way.

***B. TD’s Actual Practice Violates the Account Agreement***

26. Notwithstanding the fact that TD sequesters funds for each transaction as soon as a purchase takes place, TD double-counts debit card transactions to manufacture overdraft fees by reducing the available balance at the time that the transaction occurs, and then re-debiting the account’s available balance when the Bank subsequently pays the transaction from the funds it already sequestered—causing an additional overdraft fee.

27. On information and belief, Plaintiff began the weekend on November 3, 2012, with a \$115.65 available balance in her account, and made four purchases over that weekend totaling \$90.39 (the “A Transactions”), leaving her with an available balance of \$25.26. On information and belief, TD immediately sequestered this \$90.39 and prevented its use to pay any subsequent transactions.

28. Subsequent to the four A Transactions described in the previous paragraph, but before those transactions finally settled, Plaintiff initiated two more transactions in the amounts of \$174 and \$63.19 (the “B Transactions”).

29. Then, on November 6, 2012, TD charged Plaintiff four overdraft fees of \$35 each (totaling \$140) on the A Transactions when those transactions posted on November 5, 2012, even though it had already sequestered the funds to pay those transactions at the time they were initiated, and even though the settlement of those transactions in no way changed the available balance.

30. Upon information and belief, TD assessed these four overdraft fees only because Plaintiff subsequently initiated the B Transactions, which reduced Plaintiff’s available balance while the A Transactions were still pending.

31. Then, on November 7, 2012, TD charged Plaintiff overdraft fees on *both* of the B Transactions as well—even though the pendency of those transactions was the only reason the A Transactions incurred any overdraft fees in the first place.

32. Similarly, on information and belief, on September 4, 2012, Plaintiff had a \$81.97 available balance in her account, and made one purchase that day totaling \$4.44 (the “A Transaction”), leaving her with an available balance of \$77.53. On information and belief, TD immediately sequestered this \$4.44 and prevented its use to pay any subsequent transactions.

33. Subsequent to the A Transaction described in the previous paragraph, but before that transaction finally settled, Plaintiff initiated two more transactions in the amounts of \$70 and \$30.33 (the “B Transactions”).

34. Then, on September 6, 2012, TD charged Plaintiff an overdraft fee of \$35 on the A Transaction when that transactions posted on September 5, 2012, even though it had already sequestered the funds to pay that transaction at the time it was initiated, and even though the settlement of that transaction in no way changed the available balance.

35. Upon information and belief, TD assessed this overdraft fee only because Plaintiff subsequently initiated the B Transactions, which reduced Plaintiff’s available balance while the A Transaction was still pending.

36. Then, on September 7, 2012, TD charged Plaintiff overdraft fees on *both* of the B Transactions as well—even though the pendency of those transactions was the only reason the A Transactions incurred any overdraft fees in the first place, and even though TD would have sequestered sufficient amounts through its “hold” process to pay the first of the two B Transactions. As a result, Plaintiff paid three overdraft fees, even though only one of her transactions caused her account to have a negative available balance.

37. Plaintiff refers to this practice as double-counting because TD debits the A Transactions from the balance twice (both at the time of initiation and settlement). Debiting the A Transactions at the time of authorization creates the hold that causes the B Transactions to incur and overdraft fee. But debiting the A Transactions a second time, at settlement, allows TD to charge overdraft fees on the A Transactions as well, in violation of the account agreement.

### **CLASS ACTION ALLEGATIONS**

38. Plaintiff brings this class action pursuant to Fed. R. Civ. P. 23 on behalf of herself and the following class (the “Class”) of similarly situated persons:

All U.S. residents who, at any time within the applicable statutes of limitations, maintained a personal checking account with TD bank that were subject to double counting of debit card transactions, where such double counting increased the number of overdraft fees assessed.

39. Plaintiff also brings this class action pursuant Fed. R. Civ. P. 23 on behalf of herself and the following subclass (the “Subclass”) of similarly situated persons:

All Connecticut residents who, at any time within the applicable statutes of limitations, maintained a personal checking account with TD that were subject to double counting of debit card transactions, where such double counting increased the number of overdraft fees assessed.

40. Plaintiff reserves the right to modify or amend the definition of the proposed Class and/or Subclass.

41. Excluded from the Class and Subclass are Defendant, including any parent, subsidiary, affiliate or controlled person of Defendant; Defendant’s officers, directors, agents or employees; the judicial officers assigned to this litigation; and members of their staffs and immediate families.

42. The proposed Class and Subclass meet all requirements for class certification. The Class and Subclass satisfy the numerosity standards. The Subclass is believed to number in the thousands of persons in the state of Connecticut, and the Class is much larger. As a result, joinder

of all class members in a single action is impracticable. On information and belief, Class and Subclass members can be identified by TD's banking records. Class and Subclass members may be informed of the pendency of this action by published notice.

43. There are questions of fact and law common to the Class that predominate over any questions affecting only individual members. The questions of law and fact common to the Class arising from TD's actions include, without limitation, whether TD:

- a. improperly double counts debit card transactions;
- b. breaches its contract with the Plaintiff and the other members of the putative Class by improperly double counting debit card transactions;
- c. breaches its covenant of good faith and fair dealing with Plaintiff and the other members of the putative Class by improperly double counting debit card transactions;

44. In addition to the common questions of fact or law described with respect to the Class, there are additional questions of fact and law common to the Subclass that also predominate over any questions affecting only individual members, including, without limitation, whether TD:

- a. is unjustly enriched;
- b. violates CUTPA;
- c. commits conversion; and
- d. commits statutory theft.

45. The questions set forth above predominate over any questions affecting only individual persons, and a class action is superior with respect to considerations of consistency, economy, efficiency, fairness and equity to other available methods for the fair and efficient adjudication of this controversy.

46. Plaintiff is an adequate representative of the Class and Subclass because she is a member of both the Class and the Subclass and her interests do not conflict with the interests of the members of the Class or Subclass she seeks to represent. The interests of the members of the Class and the Subclass will be fairly and adequately protected by Plaintiff and her undersigned counsel, who have extensive experience prosecuting complex class action litigation.

47. Plaintiff's claims are typical of the claims of the Class and Subclass because they arise out of the same conduct, policies, and practices of TD with respect to overdraft fees, and the same or substantially similar provisions of TD's account agreements and other related documents. Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other putative class member.

48. Maintenance of this action as a class action is a fair and efficient method for the adjudication of this controversy. It would be impracticable and undesirable for each class member who suffered harm to bring a separate action. In addition, the maintenance of separate actions would place a substantial and unnecessary burden on the courts and could result in inconsistent adjudications, while a single class action can determine, with judicial economy, the rights of all class members.

49. Notice can be provided to Class and Subclass members by using techniques and forms of notice similar to those customarily used in other class actions.

### **CLAIMS FOR RELIEF**

#### **COUNT I**

#### **BREACH OF CONTRACT, INCLUDING BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (On behalf of the Class and the Subclass)**

50. Plaintiff repeats and realleges the preceding and subsequent paragraphs as though set forth herein.



51. TD breached the express provisions of the contract as to calculation of the account balance for the purpose of assessing overdraft charges. As discussed above, TD immediately places a hold on funds at the time a transaction occurs, thus lowering a customer's "available balance." Nonetheless, TD charges overdraft fees when those transactions are posted if the customer's available balance (which already has deducted sufficient funds to pay for the transactions) has *subsequently* become negative, even though funds were sequestered by TD for those transactions.

52. TD violated express provisions of the Agreement when it double counted debit card transactions.

53. In addition, a covenant of good faith and fair dealing is implied in all contracts, including Plaintiff's and Class and Subclass members' Account Agreements with TD.

54. The Agreement gives TD discretion to determine whether and when an account is overdrawn, whether to pay the transaction that causes the account to be overdrawn, and whether to charge an overdraft fee for the transaction that caused the account to be overdrawn.

55. As alleged herein, TD has abused its discretion to generate multiple overdraft fees from a single transaction.

56. No lay person could possibly read the Account Agreement to permit the imposition of overdraft fees in the manner employed by TD, as alleged herein.

57. TD's performance of its discretionary functions under the Account Agreements as alleged herein to maximize its revenue from overdraft fees impedes the right of Plaintiff and other Class Members to receive benefits that they reasonably expected to receive under the contract, as the money that they have entrusted to TD for their banking activities is reduced.

58. On information and belief, TD's actions as alleged herein were performed in bad faith, in that the purpose behind the practices and policies alleged herein was to maximize the bank's revenue from overdraft fees at the expense of its customers and in contravention of their reasonable expectations as customers of the bank.

59. TD has breached the express terms of the Account Agreement and the covenant of good faith and fair dealing to generate multiple overdrafts as alleged herein.

60. Plaintiff and members of the putative Class and Subclass have sustained damages as a result of TD's breaches as alleged herein.

## **COUNT II**

### **UNJUST ENRICHMENT (Pled in the Alternative to Count I) (On behalf of the Subclass)**

61. Plaintiff repeats and realleges the preceding and subsequent paragraphs as though set forth herein.

62. TD has been, and continues to be, unjustly enriched as a result of its wrongful conduct alleged herein to the detriment of Plaintiff and the Subclass.

63. TD has been enriched by a benefit in the form of overdraft fees charged as a result of double counting debit card transactions.

64. TD's enrichment was at the expense of Plaintiff and the Class.

65. It would be unjust to allow TD to retain the benefit.

66. Plaintiff and the Subclass are entitled to disgorgement and restitution of all wrongfully-obtained gains received by TD as a result of its wrongful conduct alleged herein.

67. Plaintiff and members of the Subclass have no adequate remedy at law.

**COUNT III**

**CONVERSION (On behalf of the Subclass)**

68. Plaintiff repeats and realleges the preceding and subsequent paragraphs as though set forth herein.

69. Plaintiff and members of the Subclass have property interests in the funds that they deposited in accounts maintained at TD.

70. By automatically debiting improper overdraft fees from the accounts of Plaintiff and Subclass Members, TD has permanently deprived Plaintiff and Subclass Members of their property.

71. TD's debiting of improper overdraft fees from the accounts of Plaintiff and Subclass Members was not authorized by the contract nor was it otherwise authorized by law and was an improper conversion of property held in the accounts of Plaintiff and Subclass Members to TD's own use.

72. Plaintiff and the members of the Subclass are entitled to disgorgement and restitution of all funds improperly debited from their accounts by TD in the form of improper overdraft fees and damages.

**COUNT IV**

**STATUTORY THEFT: CONN. GEN. STAT. § 52-564 (on behalf of the Subclass)**

73. Plaintiff repeats and realleges the preceding and subsequent paragraphs as though set forth herein.

74. Plaintiff and members of the Subclass have property interests in the funds that they deposited in accounts maintained at TD.

75. By automatically debiting improper overdraft fees from the accounts of Plaintiff and Subclass Members, TD has permanently deprived Plaintiff and Subclass Members of their property.

76. TD's debiting of improper overdraft fees from the accounts of Plaintiff and Subclass Members was not authorized by the contract nor was it otherwise authorized by law.

77. TD's overdraft policy detailed above is designed and intended to improperly maximize the number of overdraft fees charged to Plaintiff and the members of the Subclass.

78. TD intended to permanently deprive Plaintiff and the Subclass of the funds that it debited from their accounts for improper overdraft fees.

79. Plaintiff and the members of the Subclass have been damaged by TD's acts in violation of Conn. Gen. Stat. § 52-564.

#### **COUNT V**

#### **CUTPA VIOLATION (on behalf of the Subclass)**

80. Plaintiff repeats and realleges the preceding and subsequent paragraphs as though set forth herein.

81. Plaintiff and Subclass members are persons who banked with TD primarily for personal, family or household purposes.

82. TD is a corporation, and thus a "person" for purposes of CUTPA. Conn. Gen. Stat. § 42-110a(3).

83. TD's provision of banking services to its customers in Connecticut constitutes "trade or commerce" within the meaning of Conn. Gen. Stat. § 42-110a(4).

84. The acts and practices engaged in by TD, and described herein, constitute “deceptive acts or practices in the conduct of [a] trade or commerce” in violation of CUTPA, Conn. Gen. Stat. § 42-110b(a).

85. TD’s challenged act or practice is its unauthorized practice of improperly charging overdraft fees as set forth above and TD’s deception in failing to adequately inform consumers thereof.

86. TD’s policies and practices as alleged herein constitute “deceptive trade practices” under CUTPA because the policies and practices have a tendency and capacity to deceive consumers.

87. As a result of TD’s employment of these deceptive acts and practices, Plaintiff and putative Subclass members suffered an ascertainable loss of money or property in the form of unlawful overdraft fees assessed by TD.

88. Plaintiff and putative Subclass members are thus entitled to all relief available under CUTPA.



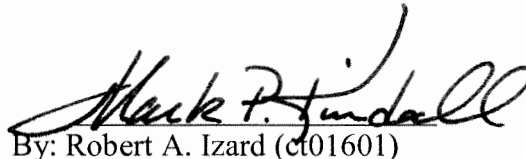
**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of herself and the putative Class and Subclass, requests that this Court enter judgment against Defendant and in favor of Plaintiff and award the following relief:

- (a) Certification of the proposed Class and Subclass;
- (b) Injunctive relief enjoining TD from the improper practices alleged herein;
- (c) Damages in an amount to be determined at trial, including actual and punitive damages;
- (d) Disgorgement and restitution of all overdraft fees paid to TD by Plaintiff and the putative Class and Subclass as a result of the wrongs alleged herein;
- (f) Treble damages pursuant to Conn. Gen. Stat. § 52-54 on behalf of the Subclass;
- (g) Pre- and post- judgment interest at the maximum rate permitted by applicable law; and
- (h) Attorneys' fees, costs, and expenses as available under the law.

DATED: January 21, 2015

**PLAINTIFF**

A handwritten signature in black ink, appearing to read "Mark P. Kindall", is written over a horizontal line.

By: Robert A. Izard (ct01601)

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