

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT COURT OF NEW YORK**

**JOHN KOSHGARIAN, Individually and
On Behalf of All Others Similarly Situated,**

Plaintiffs,

v.

**TD BANK, N.A. and THE TORONTO-
DOMINION BANK,**

Defendants.

JURY TRIAL DEMAND

Case No. _____

CLASS ACTION COMPLAINT

Plaintiff, John Koshgarian, individually and on behalf of all others similarly situated, alleges for his Class Action Complaint against Defendant TD Bank, N.A. (“TD Bank”) and Defendant The Toronto-Dominion Bank (“Toronto-Dominion Bank”) (collectively referred to herein as “Defendants”), as follows:

PRELIMINARY STATEMENT

1. This is a class action seeking monetary damages, restitution, and declaratory relief from Defendant TD Bank, N.A. and Defendant The Toronto-Dominion Bank, notably arising from its practice of engaging in unfair and deceptive trade practices in connection with Defendants’ assessment and collection of improper and excessive overdraft fees.

2. Plaintiff John Koshgarian, at all relevant times, has been a customer of TD Bank, N.A., which has 1300 branches in the United States, including branches in New York, New York.

3. TD Bank has already been sued regarding its overdraft practices. The several cases filed against TD Bank were settled as part of a multidistrict litigation proceeding known as In re Checking Account Overdraft Litigation in the United States District Court for the Southern District of Florida. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting

Application for Attorneys' Fees, and Final Judgment, combined and attached hereto as Exhibit A.

4. The cases alleged that TD Bank improperly assessed excessive overdraft fees by reordering debit card transactions from highest dollar amount to lowest dollar amount and then charging fees even when accounts were not actually overdrawn in violation of the bank's account agreements. *Id.* at 8-9. Claims were raised for breach of contract, including violations of good faith and fair dealing, unconscionability, unjust enrichment, and conversion. *Id.* at 5.

5. TD Bank settled the case for \$62,000,000, an amount paid to victims of the bank's practices during the accepted class period, from December 1, 2003 to August 15, 2010. *Id.* at 9.

6. Nevertheless, Defendants continued many of the challenged practices, even after the class action settlement. Significantly, Defendants continue to assess overdraft fees based on the improper reordering of debit card transactions from highest to lowest amount and to assess fees even at times when customers would, but for the reordering, have sufficient funds in their account to cover all merchant requests for payment.

7. Unlike nearly all other banks sued in MDL, *In re Checking Account Overdraft Litigation*, Defendants have continued these practices even after it settled claims of wrongdoing based on these very same practices. *See* Final Approval Order (failing to include non-monetary relief, such as practice change); also *id.* at 9-11 (establishing that only monetary relief would be afforded as class-wide relief).

8. Defendants' overdraft fees on debit card transactions that were assessed after August 16, 2010 also violated federal law. Starting in August of that year, the Federal Reserve implemented Regulation E (12 C.F.R. § 205.17) ("Reg E") under the Electronic Funds Transfer Act, and banks were obligated to obtain customers' affirmative consent before assessing overdraft fees on debit card transactions.

9. Accordingly, Defendants did not comply with Reg E and has continued to overdraft fees on debit card transactions in violation of federal law.

10. In the era of electronic banking and the ubiquitous use of debit cards, the assessment of overdraft fees has become a major profit center for United States banks, including Defendants. For years, banks covered customers who occasionally bounced checks and even did so for a time for customers using debit cards, without charging their accounts. Since the early 1990's, however, banks have devised methods to provide overdraft "protection" for customers and charge them in each instance.

11. In 2007, banks collected more than \$17 billion in overdraft fees. The number nearly doubled in 2008, as more and more consumers struggled to maintain positive checking account balances. In 2009, banks brought in \$37.1 billion in overdraft charges alone. TD Bank has over \$200 billion in assets and over 1300 branches, and has been a notable beneficiary of these staggering overdraft charges.

12. Almost by definition, these fees disproportionately affect the poor, who are most likely to maintain low balances. Moebs Services, a research company that has conducted studies for the government as well as banks, estimates that 90 percent of overdraft fees are paid by the poorest 10 percent of banks' customer base. Moreover, these fees have the tendency to create a domino effect, because the imposition of a fee on an account with a negative balance will make it less likely that the account holder's balance will reach positive territory, resulting in more fees. Before debit cards existed, banks occasionally extended the courtesy of honoring paper checks written on overdrawn or otherwise deficient accounts for customers who were typically in good standing. Banks extended this courtesy largely because third parties involved in the sales transactions allowed the customer to pay by check, expecting funds to be available and the check

to clear. For example, if a customer wrote a check to purchase groceries, the grocery store would only know whether the check cleared after the groceries had been purchased. The same considerations are not present when customers use debit cards.

13. Banks can simply decline or honor debit or point of sale transactions where accounts lack sufficient funds to execute the transactions. Retail and service transactions could still be executed if consumers presented an alternative form of payment. Automated teller machine (“ATM”) transactions could still proceed if banks provided a warning that an overdraft fee would be assessed, and customers nevertheless chose to proceed with the withdrawal. In fact, until a few years ago, most banks simply declined debit transactions that would overdraw an account.

14. Instead of declining debit transactions when there are insufficient funds, or warning customers that an overdraft fee will be assessed if they proceed with the transaction, Defendants have routinely processed such transactions and then charged customers an overdraft fee. Thus, Defendants’ automatic, fee-based overdraft scheme was and is intentionally designed to maximize overdraft fee revenue.

15. In many instances, these overdraft fees cost Defendants’ account holders hundreds of dollars in a matter of days, or even hours. Even more egregious, customer accounts may not actually be overdrawn at the time the overdraft fees are charged, or at the time of the debit transaction. In these instances, Defendants manipulate and alters the timing of the customer’s transactions, in a manner inconsistent with Defendants’ contractual obligations, in order to maximize overdraft fees imposed on the customer. Thus, it is through manipulation and alteration of customers’ transaction records in a manner inconsistent with Defendants’ contractual obligations that Defendants maximizes overdraft fees imposed on customers.

16. In response to the rampant abuse of overdraft charges by banks, the Board of

Governors of the Federal Reserve System updated and implemented Regulation E (12 C.F.R. § 205.17) (“Reg E”) to amend the Electronic Funds Transfer Act to include notice requirements for banks concerning overdraft charges.

17. Under Reg E, a financial institution may not assess a fee or charge on a consumer’s account for paying an ATM or one-time debit card transaction pursuant to the financial institution’s overdraft program unless the financial institution provides the customer with written notice, separate from all other information, that describes the institution overdraft program and obtain the customer’s affirmative consent to the institution’s payment of ATM or one-time debit card transactions that would incur an overdraft fee, and provides written confirmation of the consumer’s consent along with a statement of informing the consumer of the right to revoke this consent. 12 C.F.R. § 205.17(b)(1).

18. For consumers with an account at a financial institution prior to July 1, 2010, the institution could not assess any fees on a consumer’s account on or after August 15, 2010, for paying an ATM or one-time debit card transaction pursuant to the overdraft service unless the institution has complied with 12 C.F.R. § 205.17(b)(1). 12 C.F.R. § 205.17(c)(1).

19. For accounts opened on or after July 1, 2010, the financial institution could not assess any fees on a consumer’s account for paying an ATM or one-time debit card transaction pursuant to the overdraft service unless the institution has complied with 12 C.F.R. § 205.17(b)(1). 12 C.F.R. § 205.17(c)(2).

20. The debit card transaction and point of sale transactions described herein qualify as an “electronic funds transfer” under the Electronic Funds Transfer Act. Defendants qualify as a financial institution that provides an overdraft service as contemplated by the Electronic Funds Transfer Act.

PARTIES

21. Plaintiff John Koshgarian is a resident and citizen of the State of New York.

22. TD Bank, N.A. is a citizen of New Jersey because it is a national bank with its designated main office in the State of New Jersey. TD Bank regularly and systematically conducts business throughout the New York, including in this district. TD Bank, N.A. is a subsidiary of The Toronto-Dominion Bank, a Canadian chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol “TD.” TD Bank, N.A. can be served at 6000 Atrium Way Mount Laurel, New Jersey 08054.

23. Defendant The Toronto-Dominion Bank is a Canadian-chartered bank subject to the provisions of the Bank Act (Canada). The Toronto-Dominion Bank’s stock is traded on the Toronto and New York Stock Exchanges under the symbol “TD.” According to Defendant The Toronto-Dominion Bank, “The Toronto-Dominion Bank and its subsidiaries are collectively known as TD Bank Group (TD).¹” Furthermore, Defendant states “TD offers a full range of financial products and services to approximately 22 million customers worldwide through three key business lines:

- **Canadian Retail** including TD Canada Trust, TD Commercial Banking, TD Auto Finance (Canada), TD Wealth (Canada) and TD Insurance
- **U.S. Retail** including TD Bank, America’s Most Convenient Bank, TD Auto Finance (U.S.), TD Wealth (U.S.) and TD’s investment in TD Ameritrade
- **Wholesale Banking** including TD Securities²

24. Defendant Toronto-Dominion Bank is responsible for Plaintiff’s damages and the damages of the putative class because: (1) it was responsible for the violations described herein by

¹ See <http://www.td.com/about-tdbfg/corporate-information/corporate-profile/profile.jsp>. Last visited on December 2, 2014.

² *Id.*

its own actions; (2) its agents committed these violations within the scope of their authority; (3) it is a co-conspirator or co-participant in the deceptive scheme complained of herein; and/or (4) it or its agents actively participated in such scheme. Toronto-Dominion Bank maintained control over its subsidiaries and agents and had knowledge of the violations alleged herein and TD Bank, N.A.'s direct involvement or complicity in these violations. In particular, The Toronto-Dominion Bank maintained such control over the actions of its subsidiary that it should be considered as an alter ego, joint enterprise, and/or as jointly controlled, and it would be unfair to recognize their separate corporate existence vis-à-vis the claims made by Plaintiff and the putative class in this complaint. The Toronto-Dominion Bank has transacted business and engaged in tortious and fraudulent conduct, by affirmative act or omission, in this state such that it reasonably anticipated being subject to personal jurisdiction before the courts of this State. The Toronto-Dominion Bank has also transacted business and engaged in tortious and fraudulent conduct, by affirmative act or omission, outside of this State whereby it reasonable anticipated that injury would result and has, in fact, resulted upon persons within this State. As such, this Court has personal jurisdiction over The Toronto-Dominion Bank.

25. According to Defendants, TD Bank Group is a marketing term used to describe the Toronto-Dominion Bank and its affiliates, including T.D. Bank, N.A. *See* Dkt 17 *Global Sessions LP, et al. v. TD Bank Group, et al.* Case No. 1:13-cv-00692-SS. According to Defendants, The Toronto-Dominion Bank, "TD Bank Group offers a full range of financial products and services through the following business: [...] TD Bank, America's Most Convenient Bank."³

JURISDICTION AND VENUE

³ Welcome to TD. Available online at <http://www.td.com/about-tdbfg/our-business/index.jsp>. Last visited on December 2, 2014.

26. This Court has jurisdiction over this matter pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d) in that:

- (a) this is a nationwide class action involving 100 or more class members;
- (b) at least one member of the class of Plaintiffs is a citizen of a State different from any Defendant; and
- (c) the amount in controversy exceeds five million dollars (\$5,000,000.00), exclusive of interest and costs.

27. This Court also has original jurisdiction of this action under 28 U.S.C. §§ 1331 and 1337 because the claims arise under the laws of the United States, including the Electronic Funds Transfer Act, 15 U.S.C. § 1693, *et seq.*

28. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because (a) Defendants are subject to personal jurisdiction here, (b) regularly conducts substantial business in this District, and/or (c) a substantial part of the events or omissions giving rise to the claims asserted herein occurred and continue to occur in this district.

CLASS ACTION ALLEGATIONS

29. Plaintiff brings this action individually and on behalf of all other similarly situated (“the Classes”) pursuant to Rule 23 of the Federal Rules of Civil Procedure.

30. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Federal Rules of Civil Procedure Rule 23(a) and (b).

Plaintiff proposes the following classes:

All TD Bank, N.A. customers in the United States, from August 16, 2010, who incurred an overdraft fee as a result of Defendants’ practices of re-sequencing debit card transactions from highest to lowest, debiting items for which no time-stamp exists before debit card transactions for which a time-stamp exists, or assessing overdraft fees even when a customer has sufficient funds in their account to cover all merchant requests for payment (hereinafter referred to as “the Breach Class”).

All TD Bank, N.A. customers in the United States who were assessed an overdraft fee for an ATM or debit card transaction after July 1, 2010, if the account was opened on or after July 1, 2010, or August 15, 2010, if the account was opened prior to July 1, 2010, even though Defendants failed to comply with the Electronic Funds Transfer Act (hereinafter referred to as “the EFTA Class”).

31. Plaintiff reserves the right to modify or amend the definitions of the proposed Classes before the Court determines whether certification is appropriate and as the Court may otherwise allow.

32. Excluded from the Classes are:

- a. Defendants and any entities in which Defendants have a controlling interest;
- b. Any entities in which Defendants’ officers, directors, or employees are employed and any of the legal representatives, heirs, successors, or assigns of Defendants;
- c. The Judge(s) to whom this case or any transferred case is assigned and any member of the Judges’ immediate family and any other judicial officer assigned to this case or any transferred case;
- d. Persons or entities with claims for personal injury, wrongful death, and/or emotional distress;
- e. All persons or entities that properly execute and timely file a request for exclusion from the Class;
- f. Any attorneys representing the Plaintiff or the Class; and
- g. All governmental entities.

33. Numerosity - Fed. R. Civ. P. 23(a)(1). The members of the Classes are so numerous that joinder of all members would be impracticable. The Classes each consist of thousands of members and the identity of those persons is within the knowledge of and can be ascertained by resorting to Defendants’ records.

34. Commonality - Fed. R. Civ. P. 23(a)(2) and (b)(3). There are questions of law and fact common to the Class, which predominate over any questions affecting only individual Class

members.

35. Among the questions of law and fact common to the Breach Class are whether Defendants:

- a. Approved debit card transactions, including cash transactions at ATMs owned by Defendants, which were going to trigger an overdraft fee;
- b. Failed to inform customers that a transaction would trigger an overdraft fee or provide customers with an opportunity to cancel such transactions;
- c. Reordered transactions causing an increase in the number of overdraft fees imposed on customers;
- d. Reordered debit transactions from the highest monetary value to lowest monetary value in order to maximize the number of overdrafts and, consequently, the amount of overdraft fees charged to customers;
- e. Charged overdrafts and overdraft fees even when there were sufficient funds in customer accounts;
- f. Failed to provide customers with accurate balance information which encouraged debit card transactions even when Defendants knew an overdraft would occur based on the bank's calculation of "available balance";
- g. Breached its contract with its customers and/or the covenant of good faith and fair dealing through its overdraft policies and practices;
- h. Failed to obtain affirmative consent from customers prior to processing transactions that would result in overdraft fees;
- i. Required customers to enter into standardized account agreements which

included unconscionable provisions;

- j. Converted money belonging to Plaintiff and other members of the Classes through its overdraft policies and practices; and
- k. Were unjustly enriched through its overdraft policies and practices.

36. Among the questions of law and fact common to the to the EFTA Class are whether

Defendants:

- a. Provided customers with a notice describing its overdraft services that complied with 12 C.F.R. §§ 205.17(b)(1)(i), (d);
- b. Provided customers with a reasonable opportunity to affirmatively consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(ii);
- c. Obtained customers' affirmative consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(iii);
- d. Provided customers with confirmation of their consent in accordance with 12 C.F.R. § 205.17(b)(1)(iv); and
- e. Assessed overdraft fees in violation of EFTA.

37. Typicality – Fed. R. Civ. P. 23(a)(3). Plaintiff asserts claims that are typical of the entire Class, having all been targeted by Defendants as consumers who were improperly assessed one or more overdraft charges and overdraft fees whether by reordering transactions, by failing to notify consumers that approving a debit would result in an overdraft charge, or failing to comply with the Electronic Funds Transfer Act. Plaintiff and the Class members have similarly suffered harm arising from Defendants' violations of the law as alleged in this Complaint.

38. Adequacy of Representation - Fed. R. Civ. P. 23(a)(4); 23(g)(1). Plaintiff is an adequate representative of the Classes because Plaintiff fits within the class definition and

Plaintiff's interests do not conflict with the interests of the Members of the Classes Plaintiff seeks to represent. Plaintiff is passionate about this litigation personally and will prosecute this action vigorously for the benefit of the entire Class. Plaintiff is represented by experienced and able attorneys from coordinated law firms that will collectively and jointly serve as class counsel. Class counsel has litigated numerous class actions, and Plaintiff's counsel intends to prosecute this action vigorously for the benefit of the entire Class. Plaintiff and class counsel can fairly and adequately protect the interests of all of the Members of the Class.

39. Superiority of Class Action - Fed. R. Civ. P. 23(b)(3). The class action is the best available method for the efficient adjudication of this litigation because individual litigation of Class Members' claims would be impracticable and individual litigation would be unduly burdensome to the courts. Plaintiff and members of the Class have suffered irreparable harm as a result of Defendants' fraudulent, deceitful, unlawful, and unfair conduct. Because of the size of the individual Class members' claims, no Class members could afford to seek legal redress for the wrongs identified in this Complaint. Without the class action vehicle, the Class members would have no reasonable remedy and would continue to suffer losses, as Defendants' continue to engage in the unlawful, unfair, and unconscionable conduct that is the subject of this Complaint, and Defendants would be permitted to retain the proceeds from their continued violations of law. Further, individual litigation has the potential to result in inconsistent or contradictory judgments. A class action in this case presents fewer management problems and provides the benefits of single adjudication, economies of scale, and comprehensive supervision by a single court. There will be no difficulty in the management of this action as a class action.

40. Injunctive and Declaratory Relief - Fed. R. Civ. P. 23(b)(2). Defendants' omissions are uniform as to all members of the Class. Defendants have refused to act on grounds that apply

generally to the Class, so that final injunctive relief or declaratory relief is appropriate with respect to the Class as a whole.

COMMON FACTUAL ALLEGATIONS

41. Defendants are in the business of providing customers with a variety of banking products and services. Customers who open a checking account are provided with a debit card, also known as a check card or ATM card. Through such debit cards, customers can engage in transactions using funds which are withdrawn from their accounts by engaging in “debit” or “point of sale” (“POS”) transactions, or may withdraw money from their accounts at ATMs. Whether the card is used to execute POS transactions or to withdraw cash from ATMs, the transaction is processed electronically. As a result, Defendants are notified instantaneously when the card is swiped, and has the option to accept or decline transactions at such time. A time-stamp is retained by Defendants which records the exact time of the vast majority of debit card transactions.

42. Defendants employ sophisticated software to automate its overdraft systems. These programs maximize the number of overdrafts, and thus, the amount of overdraft fees charged per customer. Defendants utilize this sophisticated software to generate overdraft fees. As a result of Defendants’ manipulation and alteration of customers’ transaction records, funds in a customer’s account are depleted more rapidly and more overdraft fees are likely to be charged. Indeed, overdraft charges are likely to occur at times, when but for the manipulation and alteration, there would be funds in the account and no overdraft would occur.

43. Defendants have also utilized its software to set up a hidden arrangement where it intentionally approves debit card transactions even though it knows full well that such transactions will result in the assessment of an overdraft fee.

44. In addition, Defendants continue to assess overdrafts even at times when customers

have a sufficient balance of actual funds in their account to cover all merchant requests for payment.

45. These and other practices and fees are not contemplated in the parties' agreements nor are they authorized under the plain contractual terms. Thus, Defendants' conduct violates several express contractual provisions, the covenant of good faith and fair dealing, and common law.

46. Defendants' Agreement offers incomplete or unduly ambiguous disclosures as to its actual practices. Defendants may contend that it may assess fees that are not authorized in the Defendants' Agreement based on the provision which states: "You also agree to pay any additional reasonable charges we may impose for services you request which are not contemplated by this Agreement but are disclosed in our Personal Fee Schedule which may be amended from time to time." Defendants' Agreement, p. 2 (using page numbers from original document as shown at the bottom of each page). The evidence will show, however, that Defendants' unanticipated charges are neither "reasonable" nor "requested" by customers.

47. Defendants' Agreement only contemplates the assessment of overdraft fees in the following circumstances: "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." *Id.* at 12-13. Despite this plain language, Defendants assessed overdraft fees in numerous other instances.

48. Nevertheless, instead of assessing fees based on the "balance" as stated, Defendants have programmed its system to base fees on a customer's "available balance," which is a term of art defined by the bank to be equal to or lower than a customer's actual balance of real money. Although Defendants define "available balance" – essentially a customer's actual balance minus

authorized debit card transactions – such calculation is only to be used to “determine the amount available to pay other items presented against your account.” *Id.* at 12. This term of art is not included in the allowance for the bank to assess overdraft fees. The bank is very clear to use the phrase “available balance” when intended, as opposed to the term “balance.” Thus, overdraft fees based on “available balance” violate Defendants’ Agreement. Fees assessed in this manner are neither “reasonable” nor “requested” by customers, and thus are not allowed as “additional reasonable charges” by Defendants’ Agreement.

49. Defendants’ Agreement repeatedly suggests that debit card transactions which would push the account below zero will not be approved. Significantly, Defendants’ Agreement states that the bank uses the “available balance” (which is always equal to or lower than the real balance) to “determine the amount available to pay other items presented against your account.” *Id.* at 12. It also says that “WE MAY REFUSE TO PAY A CHECK OR OTHER ITEM WHICH: . . . b) is drawn in an amount of funds then available for withdrawal in your Account (*see* the Funds Availability Policy) or which would, if paid, create an overdraft” *Id.* at 13. The Funds availability Policy does not vary these terms. *Id.* at 31-33. Although Defendants do ambiguously offer that some transactions may not be rejected, rather the bank may decide to “advance” funds and charge an overdraft fee, this pointedly does not refer to all items, including debit card transactions. *Id.* at 14 (“advances” allowed only for “check, in-person withdrawal, ATM withdrawal, or a withdrawal by other electronic means from your Account”); *id.* at 12 (showing text when all items to be included: “all other items, including checks, ATM transactions, and debit card transactions”).

50. Despite these contractual provisions, Defendants have adopted a hidden practice of intentionally approving debit card transactions that it knows will result in overdraft fees. As a

result of Defendants' improper conduct in direct violation of the parties' agreements and common law, Plaintiff and the proposed Class would not have been assessed improper overdraft fees.

51. Defendants' wrongful overdraft policies and practices described above harmed Plaintiff and the proposed Classes. Plaintiff and the proposed class have had their debit card transactions manipulated and reordered by Defendants. If Defendants had not done so, Plaintiff and the proposed Classes would not have been assessed as many overdraft fees. Plaintiff and the proposed Classes paid multiple overdrafts fees only because of this improper practice.

52. Plaintiff have been assessed overdrafts even when they had sufficient funds in their accounts to cover the request for payment that was the subject of the overdraft. If Defendants had not enforced this improper practice, Plaintiff would not have been assessed as many over draft fees. Plaintiff paid multiple overdraft fees because of this improper practice and others.

53. Plaintiff and the proposed Class have been assessed overdrafts in violation of the plain terms of EFTA. If Defendants had not violated EFTA, Plaintiff and the proposed Class would not have been assessed improper overdraft fees.

54. In this lawsuit, Plaintiff does not challenge all of the overdraft fees assessed. Rather, Plaintiff, individually and on behalf of the proposed Class, challenges only those fees that occurred as a direct result of Defendants' improper practices, such as the practices of:

- a. Approving debit card transactions, including cash transactions at ATMs owned by Defendant, which were going to trigger an overdraft fee;
- b. Failing to inform customers that a transaction would trigger an overdraft fee or provide customers with an opportunity to cancel such transactions;
- c. Reordering transactions causing an increase in the number of overdraft fees imposed on customers;

- d. Reordering debit transactions from the highest monetary value to lowest monetary value in order to maximize the number of overdrafts and, consequently, the amount of overdraft fees charged to customers;
- e. Charging overdrafts and overdraft fees even when there were sufficient funds in customer accounts;
- f. Failing to provide customers with accurate balance information which encouraged debit card transactions even when Defendant knew an overdraft would occur based on the bank's calculation of "available balance";
- g. Breaching its contract with its customers and/or the covenant of good faith and fair dealing through its overdraft policies and practices;
- h. Failing to obtain affirmative consent from customers prior to processing transactions that would result in overdraft fees;
- i. Requiring customers to enter into standardized account agreements which included unconscionable provisions;
- j. Converting money belonging to Plaintiff and other members of the Classes through its overdraft policies and practices; and
- k. Failing to provide customers with a notice describing its overdraft services that complied with 12 C.F.R. §§ 205.17(b)(1)(i), (d);
- l. Failing to provide customers with a reasonable opportunity to affirmatively consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(ii);
- m. Failing to obtain customers' affirmative consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(iii);

n. Failing to provide customers with confirmation of their consent in accordance with 12 C.F.R. § 205.17(b)(1)(iv); and

o. Assessing overdraft fees in violation of EFTA.

55. Defendants never notified Plaintiff at the time it executed the purported insufficient funds transactions that their checking account was overdrawn or that they would be charged an overdraft fee as a result of the transactions. Furthermore, Defendants paid, rather than returned, all of the debit card transactions described above, even though Plaintiff's account purportedly lacked sufficient funds to cover the transactions.

56. The overdraft fees assessed upon Plaintiff are representative of millions of dollars of overdraft fees that Defendants wrongfully assessed and deducted from customer accounts. These wrongful takings are especially egregious considering the fact that Defendants approved each transaction and knew at the time of approval whether there were sufficient funds in the account to cover the transaction.

57. Because of Defendants' overdraft policies and practices, Plaintiff and the proposed Class have been wrongfully forced to pay overdraft fees. Defendants have improperly deprived Plaintiff and the Class of significant funds, causing ascertainable monetary losses and damages.

58. Plaintiff had sufficient funds to cover at least some of the transactions for which Plaintiff and the Class were charged overdraft fees. Plaintiff and the Class either had adequate funds to cover transactions posted to their accounts, or the accounts were allowed to become overdrawn exclusively so that Defendants could impose these wrongful charges. In many instances, Defendants' manipulation of the process for imposing overdraft fees triggered a cascade of charges that exponentially added to the charges collected from Plaintiff and the members of the Class.

59. Under EFTA, financial institutions such as Defendants – as of July 1, 2010, if an account was opened on or after July 1, 2010, or August 15, 2010 if an account was opened prior to July 1, 2010 – may not assess an overdraft fee to a consumer customer for paying an ATM or one-time debit card transaction unless the institution first (i) provided the customer with notice of the overdraft “services,” (ii) provided the customer with an opportunity to opt-in to such service, (iii) obtained the customer’s affirmative consent to opt-in, and (iv) provided confirmation of the customer’s consent and a statement informing the customer of the right to revoke such consent. E.g., 12 C.F.R. § 205.17(b)(1)(i)-(iv).

60. Defendants failed to comply with these and other EFTA requirements. *See* 15 U.S.C. §§ 1693b, 1693c; 12 C.F.R. § 205.17. Nonetheless, after the Effective Dates, Defendants, in direct violation of EFTA, and to the detriment of Plaintiff and the EFTA Class, continued to assess overdraft fees on ATM and one-time debit card transactions.

61. All conditions precedent to the relief sought herein have either occurred or have been performed or waived.

Defendants’ Failure to Notify Customers of Overdrafts.

62. At the time debit cards are used in POS transactions or at ATMs, Defendants are able to determine instantaneously whether there are sufficient funds in a customer’s account to cover that particular transaction. Defendants have the technological capability to decline transactions (which they do when a pending transaction would exceed a pre-determined, overdraft tolerance limit for the account), or notify customers at that very moment that the particular debit card transaction would result in an overdraft. Prior to the effective date of the opt in/opt out requirements of the EFTA (the “Effective Date”), Defendants could have given customers the option to decline the transaction to avoid incurring overdraft fees, but failed to do so because they

sought to maximize the amount of revenue generated through the assessment of overdraft fees.

63. This violated the terms of the Account Agreement, which only allowed for the imposition of “reasonable charges for services you request” after “reasonable notice in writing.”

64. Notwithstanding their technological capabilities and actual knowledge, Defendants failed to provide notice to Plaintiff and the Class that a particular debit card transaction would result in an overdraft and, hence, an overdraft fee.

Assessment of Overdraft Fees Despite Sufficient Funds.

65. Plaintiff and members of the class have also been assessed overdraft fees for transactions which were posted when there were sufficient funds in their accounts.

66. Defendants established rules of processing within their sophisticated software platforms that disregarded the balance of actual funds in a customer’s account and rather utilized a fictional balance to determine the balance for assessing overdrafts. This resulted in the bizarre circumstance where overdraft fees were assessed even when a customer’s balance never dipped below zero.

67. In doing so, Defendants charged overdraft fees where they faced no risk, because the cash balance in the customer’s account was positive.

68. All such fees violated the terms of the Account Agreement, which only allowed for the imposition of “reasonable charges for services you request” after “reasonable notice in writing.” Such charges are inherently unreasonable, such a “service” was never requested, and there was no notice of Defendants’ policies.

69. The Agreement also does not allow such fees. Though it provides a detailed description of many overdraft practices, it only purports to allow the assessment of fees “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.”

70. Despite this plain language and the common sense meaning of the term “overdraft,” Defendants assess overdraft fees even when customers have real money left in their accounts.

Defendants’ Overdraft Policies and Practices Are Contrary to Best Practices.

71. By engaging in the conduct described herein, Defendants have failed to follow the list of “best practices” for overdraft programs set forth in the “Joint Guidance on Overdraft Protection Programs” (“Joint Guidance”) issued by the United States Department of the Treasury, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the National Credit Union Administration (collectively the “Agencies”). A copy of the Joint Guidance is attached as Exhibit B. These “best practice” recommendations include: “Provide election or opt-out of service. Obtain affirmative consent of consumers to receive overdraft protection. Alternatively, where overdraft protection is automatically provided, permit consumers to ‘opt-out’ of the overdraft program and provide a clear consumer disclosure of this option.” 70 F.R. 9127-01, 9132.

72. According to rules proposed by the Agencies: “Injury [caused by overdraft charges] is not outweighed by countervailing benefits This is particularly the case for ATM withdrawals and POS debit card transactions where, but for the overdraft service, the transaction would typically be denied and the consumer would be given the opportunity to provide other forms of payment without incurring any fee.” 73 F.R. 28904-01, 28929 (May 19, 2008).

73. The Joint Guidance also advises banks to “[a]lert customers before a transaction triggers any fees. When consumers attempt to withdraw or transfer funds made available through an overdraft protection program, provide a specific consumer notice, where feasible, that completing the withdrawal may trigger the overdraft fees.” 70 F.R. 9127, 9132. The Joint Guidance

further advises that “[t]his notice should be presented in a manner that permits consumers to cancel the attempted withdrawal or transfer after receiving the notice.” *Id.*

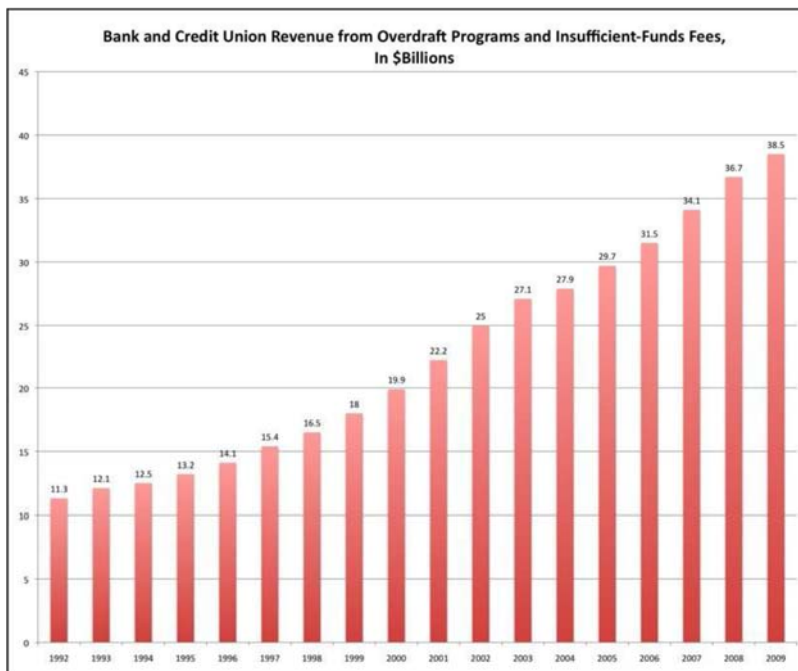
74. Similarly, the list of “best practices” recommended in “Overdraft Protection: A Guide for Bankers,” issued by the American Bankers Association, includes offering customers the option of “opting out” of any overdraft programs, and informing customers, before they access funds, that a particular point of sale or ATM transaction will cause them to incur an overdraft fee. A copy of “Overdraft Protection: A Guide for Bankers” is attached as Exhibit C.

75. Defendants’ overdraft policies make it difficult for customers to avoid injury even if they carefully track the balance in their account. In fact, the Agencies have stated that injury resulting from such policies, “is not reasonably avoidable” by the consumer. 73 F.R. 28904-01, 28929. “It appears that consumers cannot reasonably avoid this injury if they are automatically enrolled in an institution’s overdraft service without having an opportunity to opt out. Although consumers can reduce the risk of overdrawing their accounts by carefully tracking their credits and debits, consumers often lack sufficient information about key aspects of their account. For example, a consumer cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available.”

76. On October 6, 2009, the Center for Responsible Lending issued a report entitled “Overdraft Explosion: Bank Fees for Overdrafts Increase 35% in Two Years.” The report, attached hereto as Exhibit D found that it is now “standard procedure to automatically enroll checking account customers in their most expensive overdraft loan program.” The report finds that debit card transactions account for more overdraft fees than traditional checks or any other type of transaction, even though “debit card transactions and ATM withdrawals . . . could easily be denied for no fee.” The report also finds that overdraft fees increased 35 percent from 2006 to 2008, and

that over 50 million Americans overdrew their accounts in a 12-month period, with 27 million accounts incurring five or more overdraft fees.

77. A chart from the research company Moebs Services shows that, in every year from 1992 to 2009, banks gained increased revenues from overdraft fees:



PLAINTIFF-SPECIFIC FACTS

78. At all relevant times, Plaintiff John Koshgarian has been a TD Bank account holder.

79. In connection with his account, TD Bank issued a debit card or cards to John Koshgarian. A debit card allows customers to access their checking account funds by using the card to execute a transaction. The charge is processed electronically, and the Bank has the option to accept or decline the transaction at the point of sale.

80. Plaintiff Josh Kargarian receives a recurring direct deposit from the military.

81. Defendants wrongfully charged Plaintiff John Koshgarian multiple overdraft fees. In particular, in a span of approximately three (3) months, Plaintiff John Koshgarian was charged at least approximately \$450.00 in wrongful overdraft fees.

82. Defendants failed to notify John Koshgarian that he could incur overdraft fees on transactions even though there were sufficient funds in the checking account to cover the transaction at the time the transaction was executed. In addition, Defendants never notified Plaintiff John Koshgarian, at the time he executed the purported insufficient funds transactions described above, that Plaintiff's checking account was or would be overdrawn or that Plaintiff would be charged an overdraft fee as a result of the transactions. Furthermore, Defendants paid, rather than returned, all the debit card charges described above, even though Plaintiff John Koshgarian's accounts purportedly lacked sufficient funds to cover the transactions.

83. Furthermore, if Defendants had not manipulated and reordered Plaintiff John Koshgarian's transactions from highest to lowest, Plaintiff John Koshgarian would have incurred fewer overdraft fees.

84. Based on information and belief, the overdraft charges incurred by John Koshgarian are representative of hundreds of millions of dollars of overdraft fees that Defendants wrongfully assessed and deducted from its customers' accounts. These wrongful takings are especially egregious considering the fact that Defendants approved each transaction and knew at the time of approval whether there were sufficient funds in the account to cover the transaction. Plaintiff John Koshgarian was charged and paid overdraft fees as a result of Defendants' unfair and/or deceptive practices described herein.

85. Defendants' wrongful overdraft policies and practices described above are illustrative of the harm caused to all Plaintiffs and members of the Classes.

COUNT I
Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing
(On Behalf of Plaintiff and the Breach Class)

86. Plaintiff repeats and realleges each and every allegation contained above as if fully

set forth herein.

87. Plaintiff and Defendants have contracted for banking services, to include checking and ATM and debit card services.

88. Defendants' actions have violated the specific terms of the account agreements with customers, including other documents referenced therein. Defendants are liable for the losses of Plaintiff and the proposed Breach Class that have resulted from Defendants' breaches of the parties' contractual agreements.

89. Defendants violated Defendants' Agreement by instituting a range of overdraft practices that were never requested by customers as would have been required by contract. Several of the express contractual provisions which Defendants' breached from Defendants' Agreement effective as of March of 2011 are included above. These secretive practices included, but are by no means limited to:

- a. The authorization of debit card transactions which Defendants knew would result in an overdraft fee;
- b. The adoption of a line of credit or spending limit up to which Defendants would authorize debit card transactions;
- c. The reordering of debit card transactions by Defendants' posting software to increase overdraft fees; and/or
- d. The decision to assess overdraft fees even when funds remained in customer accounts.

90. Plaintiff and members of the Breach Class have sustained damages as a result of Defendants' breaches of the account agreements.

COUNT II
Breach of the Duty of Good Faith and Fair Dealing

(On Behalf of Plaintiff and the Breach Class)

91. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

92. Plaintiff and Defendants have contracted for banking services, to include checking and ATM and debit card services.

93. Good faith is an element of the contract that Plaintiff and the proposed Breach Class had with Defendants. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

94. Defendants have breached the covenant of good faith and fair dealing through its overdraft policies and practices as alleged herein.

95. Plaintiff and the proposed Breach Class have performed all, or substantially all, of the obligations imposed on them under the account agreements.

96. Plaintiff and members of the proposed Breach Class have sustained damages as a result of Defendants' breaches of the covenant of good faith and fair dealing.

COUNT III
Unconscionability
(On Behalf of Plaintiff and the Breach Class)

97. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

98. Defendants' overdraft policies and practices are substantially and procedurally unconscionable in the following respects, among others:

- a. Defendants do not alert customers that a debit card transaction will trigger an overdraft, and did not provide the customer the opportunity to cancel the transaction, before incurring an overdraft fee. This violates Defendants' Agreement, or is allowed by an unconscionable provision thereof;
- b. The Bank did not obtain affirmative consent from checking account customers prior to processing a transaction that would overdraw the account and result in an overdraft fee;
- c. Defendants use unduly discretionary power to assess fees even when no economic argument could be made for such fees. This violates Defendants' Agreement or is allowed by unconscionable provisions thereof;
- d. Defendants' Agreement and the related documents referenced therein are contracts of adhesion in that they are standardized forms, imposed and drafted by Defendants, which is of vastly superior bargaining strength, and only allows the customer the opportunity to adhere to them or reject them entirely; and
- e. The account agreements provided to customers are ambiguous, deceptive, unfair, and misleading to any extent they allowed Defendants to perpetrate the grossly improper acts described herein.

99. Considering the great business acumen and experience of Defendants in relation to Plaintiff and the members of the Breach Class, the great disparity in the parties' relative bargaining power, the inconspicuousness and incomprehensibility of the contract language at issue, the oppressiveness of the terms, the commercial unreasonableness of the contract terms, the purpose

and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns, these provisions are unconscionable and, therefore, unenforceable as a matter of law.

100. The imposition of overdraft charges which exceed the amount overdrawn (*e.g.*, the imposition of a \$35 charge on an overdraft of less than \$35) is itself unconscionable. Such charges are not reasonably related to the Bank's cost of covering the overdraft and/or its risk of nonpayment (where the Bank pays the overdraft), or to the Bank's cost of returning the item unpaid (where the Bank does not pay the overdraft).

101. Plaintiff and members of the proposed Breach Class have sustained damages as a result of Defendants' unconscionable policies and practices as alleged herein.

Count IV
Violations of N.Y. Gen. Bus. Law § 349
(On Behalf of Plaintiff and the Classes)

102. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

103. New York General Business Law ("G.B.L.") § 349 makes unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state[.]"

104. Plaintiff is a consumer as defined by G.B.L. § 349.

105. Defendants' sale of its product and/or the furnishing of its services to Plaintiff and the Classes as described herein constitute the "conduct of any trade or commerce" or the furnishing of any service" within the meaning of G.B.L. § 349.

106. In the course of Defendants' business selling its products and/or furnishing its services to consumers, among other things:

a. Defendants do not alert its customers that a debit card transaction will trigger an overdraft

fee and does not provide the customer the opportunity to cancel that transaction;

- b. Defendants' Account Agreement provided to Defendants' customers is deceptive and misleading in that it always pays ATM Transactions first and then reorders debits from high to low (even though the Bank always reorders transactions in this way so as to maximize overdrafts and revenue for the Bank), or that it is reordering of debits will necessarily increase the number of overdraft charges; or
- c. Defendants make material omissions and/or deceptive representations regarding its reordering of debit purchases from highest to lowest dollar amount to increase the number of overdrafts incurred by its customers

107. Plaintiff and the Classes reserve the right to allege other violations of law which constitute other unlawful business acts or practices. Such conduct is ongoing and continues to this date.

108. Through Defendants' misconduct described throughout the Complaint, Defendants have engaged in acts and/or practices that are deceptive or misleading in a material way and that resulted in injury to Plaintiff and the Classes.

109. By reason of the foregoing, Defendants have violated New York General Business Law Section 349 and decisional law prohibiting deceptive trade practices and consumer fraud, is liable to Plaintiff and the Classes for the damages that they have suffered as a result of Defendants' actions, the amount of such damages to be determined at trial, plus attorneys' fees.

110. The foregoing acts, omissions, and practices directly, foreseeable, and proximately caused Plaintiff and other members of the Classes to suffer an ascertainable loss in the form of, *inter alia*, monies spent paying for overdrafts that would not otherwise would have occurred but for Defendants' practices, and they are entitled to recover such damages, together with appropriate

penalties, including treble damages, attorney's fees and costs of suit.

**COUNT V: Conversion
(On Behalf of Plaintiff and the Classes)**

111. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

112. Defendants had and continue to have a duty to maintain and preserve customers' checking accounts and prevent their diminishment through its own wrongful acts.

113. Defendants have wrongfully collected overdraft fees from Plaintiff and the members of the Classes, and has taken specific and readily identifiable funds from their accounts in payment of these fees in order to satisfy them.

114. Defendants have, without proper authorization, assumed and exercised the right of ownership over these funds, in hostility to the rights of Plaintiff and the members of the Classes, without legal justification.

115. Defendants continue to retain these funds unlawfully without the consent of Plaintiff or the members of the Classes.

116. Defendants intended to permanently deprive Plaintiff and the members of the Classes of these funds.

117. These funds were properly owned by Plaintiff and the members of the Classes, not Defendants, which now claims that it is entitled to its ownership, contrary to the rights of Plaintiff and the members of the Classes.

118. Plaintiff and the members of the Classes are entitled to the immediate possession or repossession of these funds.

119. Defendants have wrongfully converted these specific and readily identifiable funds.

120. As a direct and proximate result of this wrongful conversion, Plaintiff and the

members of the Classes have suffered and continue to suffer damages.

121. By reason of the foregoing, Plaintiff and the members of the Classes are entitled to recover from the Defendants all damages and costs permitted by law, including all amounts that Defendants had wrongfully converted.

COUNT VI
Unjust Enrichment (in the alternative to Breach of Contract)
(On Behalf of Plaintiff and the Classes)

122. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

123. Should the contract between Plaintiff and the Classes on the one hand, and Defendants on the other, be found void or unenforceable, Plaintiff and members of the Classes will have no adequate remedy at law.

124. By means of Defendants' wrongful conduct alleged herein, Defendants knowingly provided banking services to Plaintiff and members of the Classes that are unfair, unconscionable, and oppressive.

125. Defendants knowingly received and retained wrongful benefits and funds from Plaintiff and members of the Classes. In so doing, Defendants acted with conscious disregard for the rights of Plaintiff and the members of the Classes.

126. As a result of Defendants' wrongful conduct as alleged herein, it has been unjustly enriched at the expense of and to the detriment of, Plaintiff and the members of the Classes.

127. Defendants' unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

128. Under the common law doctrine of unjust enrichment, it is inequitable for Defendants to be permitted to retain the benefits it received, and is still receiving, without

justification, from the imposition of overdraft fees on Plaintiff and members of the Classes in an unfair, unconscionable, and oppressive manner. Defendants' retention of such funds under circumstances making it inequitable to do so constitutes unjust enrichment.

129. The financial benefit derived by Defendants rightfully belongs or belonged to Plaintiff and the members of the Classes. Defendants should be compelled to disgorge in a common fund for the benefit of Plaintiff and the members of the Classes all wrongful or inequitable proceeds received by them. A constructive trust should not be imposed upon wrongful or inequitable sums received by Defendants traceable to Plaintiff and the members of the Classes.

COUNT VII
Violation of the Electronic Funds Transfer Act (15 U.S.C. § 1693) and
Regulations Promulgated Thereunder, e.g., 12 C.F.R. § 205
(On Behalf of Plaintiff and the EFTA Class)

130. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

131. Plaintiff alleges this claim on behalf of himself and the EFTA Class members who have been assessed one or more overdraft fees or charges based on ATM or debit card transactions.

132. Plaintiff, on behalf of himself and the EFTA Class, asserts the Defendants failed to:

- a. Provide customers with a notice describing its overdraft services that complies with 12 C.F.R. §§ 205.17(b)(1)(i), (d);
- b. Provide customers with a reasonable opportunity to affirmatively consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(ii);
- c. Obtain customers' affirmative consent, or opt-in, to overdraft services in accordance with 12 C.F.R. § 205.17(b)(1)(iii); or

- d. Provide customers with confirmation of their consent in accordance with 12 C.F.R. § 205.17(b)(1)(iv).

133. Nevertheless, Defendants imposed overdraft fees on them based on ATM or debit card transactions in violation of 12 C.F.R. §§ 205.17(b), (c).

134. Because of Defendants' violation of EFTA, Defendants are liable to Plaintiff and the EFTA Class for actual statutory damages pursuant to 15 U.S.C. § 1693m and to recover costs of suit and reasonable attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, as to each of the foregoing Counts, Plaintiff, individually and on behalf of all others similarly situated, respectfully seek the following relief against Defendants:

- A. An Order declaring that this action is a proper class action, certifying the Classes as requested herein, designating Plaintiff as Class Representative and appointing the undersigned counsel as Class Counsel;
- B. An Order issuing a preliminary injunction enjoining Defendants and all others, known and unknown, from continuing to take illegal action as set forth in this Complaint;
- C. An Order issuing a permanent injunction enjoining Defendants and all others, known and unknown, from continuing to take illegal action as set forth in this Complaint;
- D. A Judgment awarding Plaintiff and the Classes compensatory, consequential, and statutory damages, including, without limitation, the loss of monies paid to Defendants as overdraft charges and fees related thereto;
- E. A Judgment awarding Plaintiff and the Classes restitution of all fees paid;

- F. A Judgment awarding Plaintiff and the Class Members actual damages and equitable monetary relief from Defendants;
- G. A Judgment awarding Plaintiff and the Classes injunctive relief as permitted by law or equity, including enjoining Defendants from continuing the unlawful practices as set forth herein, and ordering Defendants to engage in a corrective advertising campaign;
- H. A Judgment awarding Plaintiff and the Classes reasonable attorneys' fees and litigation costs;
- I. An Oder that Defendants to pay both pre- and post-judgment interest on any amounts awarded; and
- J. Such other and further relief as may be just and proper under the circumstances.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: 12/31/2014

/s/ James Batson

By their Attorney: James Batson

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PROPOSED CLASSES**