

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SHEILA and EMILIO PADILLA, on behalf of themselves and all others similarly situated,	:	
	:	COMPLAINT – CLASS ACTION
	:	
Plaintiff,	:	CIVIL ACTION NO: _____
	:	
v.	:	JURY TRIAL DEMANDED
	:	
TD BANK, N.A.,	:	
	:	
Defendant.	:	

CLASS ACTION COMPLAINT

Plaintiff Sheila and Emilio Padilla (“the Padillas”), on behalf of themselves and all persons similarly situated, submits this Class Action Complaint and alleges the following based on personal knowledge as to allegations regarding Plaintiffs and based on information and belief as to other allegations.

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution, and declaratory relief as to Plaintiffs’ claims against Defendant, TD Bank, N.A. Plaintiffs’ claims arise from Defendant’s assessment and collection of improper and excessive overdraft fees.

2. Plaintiffs were customers of TD Bank, N.A., which has 1300 branches in the United States, including in Philadelphia, Pennsylvania. Plaintiffs opened an account ending with the four digits “2301” with the Defendant in August of 2012.

3. Mr. Padilla is a legal resident of the United States; Mrs. Padilla is a citizen of the United States. The Padillas are both residents of the Commonwealth of Pennsylvania.

4. TD Bank, N.A. (“TD Bank” or “TD”) is a corporate citizen of Maine for purposes of 28 U.S.C. § 1332 because it is a national bank with its designated main office in the State of Maine. TD Bank regularly and systematically conducts business throughout the Commonwealth of Pennsylvania, including in this district. TD has over \$200 billion in assets and 1300 branches throughout the United States.

5. 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. The cases alleged that TD Bank improperly assessed excessive overdraft fees by, for example, reordering debit card transactions from highest dollar amount to lowest dollar amount and assessing 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. TD 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. However, many of the complained of practices continued as before, even after the class action settlement. For example, TD continues to assess overdraft fees based purely on the improper reordering of debit card transactions from highest to lowest amount and to assess fees even at times when customers have sufficient funds in their account to cover all merchant requests for payment. Shockingly, unlike nearly all other banks sued in the multidistrict litigation *In re Checking Account Overdraft Litigation*, TD has continued these practices even

after is settled claims of wrongdoing based on these very same practices. *See generally* 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).

7. Thus, Plaintiffs seek to represent a class of all TD Bank customers who opened a new account during the period of time after the end of the settlement class period (August 15, 2010) who were assessed improper overdraft fees, and for all TD Bank customers that had an account prior to August 15, 2010 who had never been assessed improper overdraft fees prior to August 15, 2010, but were assessed such fees after August 15, 2010.

8. Defendant's overdraft fees on debit card transactions that were assessed after August of 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. Defendant did not properly comply with Reg E and has continued to assess overdraft fees on debit card transactions in violation of federal law.

9. As such, Plaintiff seeks to represent a class of all TD Bank customers who have been improperly assessed overdraft fees since the end of the class period covered by the TD Bank Settlement in *In re Checking Account Overdraft Litigation*, Exhibit A, pp. 8-9, but such representation will not extend to TD Bank customers who were class members in the MDL Litigation.

OVERDRAFT FEES

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 Defendant. 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. An FDIC report estimated that overdraft fees represent 74 percent of the total service charges that are imposed on deposit accounts in the United States. A 2008 FDIC study reports that overdraft fees for debit cards can carry an effective annualized interest rate that *exceeds 3,500 percent*.

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, estimate 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.

13. 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.

14. The same considerations are not present when customers use debit cards. 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 chose to proceed nevertheless. In fact, until a few years ago, most banks simply declined debit transactions that would overdraw an account.

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

16. In many instances, these overdraft fees cost account holders of Defendant hundred 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.

17. Thus, it is through manipulation and alteration of customers’ transaction records in a manner inconsistent with Defendant’s contractual obligations that Defendant maximizes overdraft fees imposed on customers.

18. 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.

19. 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).

20. 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).

21. For accounts opened on or after July 1, 2010, including the Padillas’ account, 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).

22. The debit card transaction and point of sale transactions described herein qualify as an “electronic funds transfer” under the Electronic Funds Transfer Act.

23. Defendant qualifies as a financial institution that provides an overdraft service as contemplated by the Electronic Funds Transfer Act.

JURISDICTION AND VENUE

24. 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 cost, there are at least 100 members of the punitive class, and at least one of the members of the proposed classes of is a citizen of a different state than Defendant. 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.*

25. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Defendant is subject to personal jurisdiction here, regularly conducts substantial business in Pennsylvania, and because 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

26. Plaintiffs bring this action on behalf of themselves and all other similarly situated pursuant to Federal Rule 23. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23.

27. Plaintiffs propose two classes, as defined as:

All individual TD Bank customers that either opened a checking account after August 15, 2010 or were not included in the settlement class in *In re Checking Account Overdraft Litigation*, who incurred an overdraft fee as a result of TD's practices of (1) assessing overdraft fees even when a customer has sufficient funds in their account to cover all merchant requests for payment or (2) approving debit card transactions without informing customers that

such approval will result in the assessment of an overdraft fee (hereinafter referred to as “the Breach Class”).

All individual TD Bank customers that either opened a checking account after August 15, 2010 or were not included in the settlement class in *In re Checking Account Overdraft Litigation* who were assessed an overdraft fee for an ATM or debit card transaction even though Defendant failed to comply with the Electronic Funds Transfer Act (hereinafter referred to as “the EFTA Class”).

28. Plaintiffs reserve 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. Modifications will almost certainly be needed based on discovery disclosures. Based on the current knowledge of Plaintiffs other elements that may be appropriate to include in the definition of the Classes, the definition of an additional class or classes, or part of individual state subclasses, include Defendant’s violations of state statutory protections. At this time, Plaintiffs do not rely on any state consumer protection or unfair business practices statutes. Rather, their claims are contractual in nature or rely on common law.

29. Excluded for the Classes are Defendant, its parents, subsidiaries, affiliates, officers, and directors, any entity in which Defendant has a controlling interest, all customers who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

30. The members of the Classes are so numerous that joinder is impractical. The Classes each consist of thousands of members and the identity of those persons is within the knowledge of and can be ascertained only by resort to Defendant’s records.

31. The claims of the representative Plaintiffs are typical of the claims of the Classes with respect to the Breach Class and the EFTA Class. Plaintiffs, like all other members, were charged overdraft fees by Defendant as a result of improper practices, to include the assessment

of overdraft fees even when there were no overdraft as that term is universally understood, that is that a merchant request for payment has reduced the balance of actual funds in the customer's account to below zero. With respect to the EFTA Class, Plaintiff and all other members were charged overdraft fees on ATM or debit card transactions in violation of EFTA and the regulations based thereupon. The representative Plaintiffs, like all members of the Classes, have been damaged by Defendant's misconduct. Furthermore, the factual basis of Defendant's misconduct is common to members of the Classes, and represents a common thread of conduct resulting in injury to all members of the Classes.

32. There are numerous questions of law and fact common to the Classes and those common questions predominate over any questions affecting only individual Class members.

33. Among the questions of law and fact common to the Breach Class are whether Defendant:

a. Knowingly approved debit card transactions, including cash transactions at ATMs owned by Defendant, which were going to trigger an overdraft fee, and did not inform customers that the transaction would trigger an overdraft fee or provide customers with an opportunity to cancel such transactions;

b. Manipulated transactions so as to increase the number of overdraft fees imposed;

c. Imposed overdrafts and overdraft fees even when there were sufficient funds in the account;

d. Failed to provide customers with accurate balance information which encouraged debit card transactions even when Defendant knew an overdraft would occur because

the bank's calculation of "available balance" (which is often less than the balance of actual funds) was below zero);

e. Breached contractual provisions and/or the covenant of good faith and fair dealing through its overdraft policies and practices;

f. Required customers to enter into standardized account agreements which included unconscionable provisions;

g. Converted money belonging to Plaintiff and other members of the Classes through its overdraft policies and practices; and

h. Was unjustly enriched through its overdraft policies and practices.

34. Among the questions of law and fact common to the EFTA Class are whether Defendant:

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.

35. Other questions of law and fact in common to the Classes include:

a. The proper method or methods by which to measure damages; and

b. The declaratory relief to which the Classes are entitled.

36. Plaintiffs' claims are typical of the claims of the other members of the Breach Class, in that they arise out of the same wrongful overdraft policies and practices and the same or substantially similar unconscionable provisions of Defendant's account agreements and other related documents. Plaintiffs' claims are typical of the claims of the other members of the EFTA Class, in that they are based on EFTA and arise from the same wrongful policies and practices. Plaintiffs have suffered the harm alleged and have no interest antagonistic to the interests of any other member of the Classes.

37. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers and against financial institutions. Plaintiffs' counsel have handled literally dozens of similar cases, and were on the Plaintiff's Executive Committee in the prior overdraft-related litigation against TD Bank. Accordingly, Plaintiffs are adequate representatives and will fairly and adequately protect the interests of the Classes.

38. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of Defendant, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and Defendant's misconduct will proceed without remedy.

39. Even if Class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings.

By contrast, a class action presents far fewer management difficulties, allows claims to be heard which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economics of scale, and comprehensive supervision by a single court.

COMMON FACTUAL ALLEGATIONS

A. Defendant.

40. TD has over \$220 billion in assets and millions of customers throughout the eastern seaboard.

41. Defendant is 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, Defendant is 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 Defendant which records the exact time of the vast majority of debit card transactions.

42. Defendant employs sophisticated software to automate its overdraft systems. These programs maximize the number of overdrafts, and thus, the amount of overdraft fees charged per customer. Defendant utilizes this sophisticated software to generate overdraft fees.

43. As a result of Defendant’s 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.

44. Defendant has 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.

45. In addition, Defendant continues 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.

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

B. Defendant's Relevant Customer Documents Regarding Overdrafts.

47. Plaintiffs and all members of the Classes maintain or maintained a checking account with Defendant. The terms of the checking accounts are contained in standardized account holder agreements, presented to customers on a "take it or leave it" basis, drafted and imposed by Defendant, which has vastly superior bargaining strength, and thus constitute agreements of adhesion. Defendant's standardized account documents were revised periodically during the relevant time period. Depending on the version of the contracts, a variety of other documents were referenced therein and these documents are purported to also bind customers.

48. A copy of one version of the account agreement, entitled "Personal Deposit Account Agreement," is attached hereto as Exhibit B and will be referred to hereinafter as the TD Agreement. Upon information and belief, it became effective in November 2012 and was in

force as at least through June of 2013. The TD Agreement includes extensive and specific provisions relating to debit card transactions.

49. The TD Agreement offers incomplete or unduly ambiguous disclosures as to its actual practices. Defendant may contend that it may assess fees that are not authorized in the TD 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.” TD Agreement, p. 2 (using page numbers from original document as shown at the bottom of each page). The evidence will show, however, that TD’s unanticipated charges are neither “reasonable” nor “requested” by customers.

50. The TD 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 understanding, TD Bank assessed overdraft fees in numerous other instances. For example, rather than assessing fees based on the “balance” as stated, TD has 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 TD does 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 “available balance” when intended, as opposed to “balance.” Thus, overdraft fees based on “available balance”

violate the TD Agreement. Fees assessed in this manner are neither “reasonable” nor “requested” by customers, and thus are not allowed as “additional reasonable charges” by the TD Agreement.

51. The TD Agreement repeatedly suggests that debit card transactions which would push the account below zero will not be approved. For example, the TD 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 TD does 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”). Despite these contractual provisions, TD has adopted a hidden practice of intentionally approving debit card transactions that it knows will result in overdraft fees. The bank may allege that these practices have been disclosed elsewhere, but such documents are not contractual in nature and cannot vary the parties’ agreement.

52. In sum, TD has adopted practices – which are instituted through the programming of its sophisticated software which is applied equally to all customers – that defy the parties’ agreements. Such changes were neither contemplated nor allowed by the TD Agreement.

C. Defendant's Overdraft Practices Harmed Plaintiff, the Breach Class, and the EFTA Class.

53. Defendant's wrongful overdraft policies and practices described above harmed Plaintiffs and members of the Classes.

54. But for Defendant's improper conduct in violation of the parties' agreements and common law, Plaintiffs would not have been assessed as many overdraft fees.

55. Plaintiffs have been assessed overdrafts in violation of the plain terms of EFTA. If Defendant had not violated EFTA, Plaintiffs would not have been assessed as many overdraft fees.

56. In this lawsuit, Plaintiffs do not challenge all of the overdraft fees assessed. Nor do the Plaintiffs challenge the amount of the fees assessed. Rather, they challenge only those fees that occurred as a direct result of improper practices of Defendant.

57. Defendant never notified Plaintiffs 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, Defendant paid, rather than returned, all of the debit card transactions described above, even though Plaintiffs' account purportedly lacked sufficient funds to cover the transactions.

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

D. The Damage Sustained by Plaintiffs and the Classes.

59. As a consequence of Defendant's overdraft policies and practices, Plaintiffs and the Breach Class have been wrongfully forced to pay overdraft fees. Defendant has improperly deprived Plaintiffs and the Class of significant funds, causing ascertainable monetary losses and damages.

60. As a consequence of Defendant's improper overdraft fees, Plaintiffs and the Classes have been wrongfully deprived of funds to which Defendant had no legitimate claim.

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

E. Defendant Violates EFTA.

62. Under EFTA, financial institutions such as Defendant – 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).

63. Defendant 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, Defendant, 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.

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

FIRST CLAIM FOR RELIEF

Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing¹

65. Plaintiffs repeat paragraphs 1 through 64 above.

66. Plaintiffs and Defendant have contracted for banking services, to include checking and ATM and debit card services. As described in detail above, the actions taken by Defendant have violated the specific terms of the account agreements with customers, including other documents referenced therein. Defendant is liable for the losses of Plaintiffs and the Classes that have resulted from Defendant's breaches of the parties' contractual agreements.

67. Defendant violated the TD 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 TD breached from the TD 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 Defendant knew would result in an overdraft fee;

¹ Certain states recognize a claim for breach of the covenant of good faith and fair dealing as a separate and independent claim for breach of contract. Other states treat breach of the covenant of good faith and fair dealing as a species of breach of contract. Accordingly, these claims are brought in a single count.

b. The adoption of a line of credit or spending limit up to which Defendant would authorize debit card transactions;

c. The manipulation of debit card transactions by Defendant's posting software to increase overdraft fees; and

d. The decision to assess overdraft fees even when funds remained in customer accounts.

68. Under the laws of the states where Defendant does business, good faith is an element of every contract pertaining to the assessment of overdraft fees. 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.

69. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct is justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing are evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

70. Defendant has breached the covenant of good faith and fair dealing through its overdraft policies and practices as alleged herein. For example, to the extent Defendant argues that it was allowed to impose fees based on new overdraft policy language related to debit cards,

it will be shown that such an interpretation of the contract violates good faith and fair dealing. By way of further example, the assessment of overdraft fees based on anything but the customer's balance of actual funds is not permitted in light of good faith and fair dealing. Good faith and fair dealing constrains Defendant's discretion to abuse its self-granted contractual powers.

71. Plaintiffs and the Breach Class have performed all, or substantially all, of the obligations imposed on them under the account agreements.

72. Plaintiffs and members of the Breach Class have sustained damages as a result of Defendant's breaches of the account agreements, as well as the further breaches of the account agreements as modified by the covenant of good faith and fair dealing.

SECOND CLAIM FOR RELIEF
Unconscionability

73. Plaintiffs repeat paragraphs 1 through 64 above.

74. Defendant's overdraft policies and practices are substantially and procedurally unconscionable in the following respects, among others:

a. Defendant does 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 the TD Agreement, or is allowed by an unconscionable provision thereof;

b. Defendant uses unduly discretionary power to assess fees even when no economic argument could be made for such fees. This violates the TD Agreement or is allowed by unconscionable provisions thereof;

c. The TD Agreement and the related documents referenced therein are contracts of adhesion in that they are standardized forms, imposed and drafted by Defendant,

which is of vastly superior bargaining strength, and only allows the customer the opportunity to adhere to them or reject them entirely; and

d. The account agreements provided to customers are ambiguous, deceptive, unfair, and misleading to any extent they allowed Defendant to perpetrate the grossly improper acts described herein.

75. Considering the great business acumen and experience of Defendant in relation to Plaintiffs 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.

76. Plaintiffs and members of the Breach Class have sustained damages as a result of Defendant's unconscionable policies and practices as alleged herein.

THIRD CLAIM FOR RELIEF

Conversion

77. Plaintiffs repeat paragraphs 1 through 64 above.

78. Defendant had and continues to have a duty to maintain and preserve customers' checking accounts and prevent their diminishment through its own wrongful acts.

79. Defendant has wrongfully collected overdraft fees from Plaintiffs 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.

80. Defendant has, without proper authorization, assumed and exercised the right of ownership over these funds, in hostility to the rights of Plaintiffs and the members of the Classes, without legal justification.

81. Defendant continues to retain these funds unlawfully without the consent of Plaintiffs or the members of the Classes.

82. Defendant intended to permanently deprive Plaintiffs and the members of the Classes of these funds.

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

84. Plaintiffs and the members of the Classes are entitled to the immediate possession or repossession of these funds.

85. Defendant has wrongfully converted these specific and readily identifiable funds.

86. Defendant's wrongful conduct to the Breach Class is continuing.

87. As a direct and proximate result of this wrongful conversion, Plaintiffs and the members of the Classes have suffered and continue to suffer damages.

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

FOURTH CLAIM FOR RELIEF
Unjust Enrichment

89. Plaintiffs repeat paragraphs 1 through 64 above.

90. Plaintiffs, on behalf of themselves and the Classes, assert a common law claim for unjust enrichment. This claim is brought solely in the alternative and Plaintiffs concede that this

claim cannot survive if their contractual claims succeed. If, however, the parties' contracts are deemed unconscionable or otherwise unenforceable for any reason, unjust enrichment will dictate that Defendant disgorge all improperly assessed overdraft fees.

91. By means of Defendant's wrongful conduct alleged herein, it knowingly provided banking services to Plaintiffs and members of the Classes that are unfair, unconscionable, and oppressive.

92. Defendant knowingly received and retained wrongful benefits and funds from Plaintiffs and members of the Classes. In so doing, Defendant acted with conscious disregard for the rights of Plaintiffs and the members of the Classes.

93. As a result of Defendant's wrongful conduct as alleged herein, it has been unjustly enriched at the expense of and to the detriment of, Plaintiffs and the members of the Classes.

94. Defendant's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

95. Under the common law doctrine of unjust enrichment, it is inequitable for Defendant to be permitted to retain the benefits it received, and is still receiving, without justification, from the imposition of overdraft fees on Plaintiffs and members of the Classes in an unfair, unconscionable, and oppressive manner. Defendant's retention of such funds under circumstances making it inequitable to do so constitutes unjust enrichment.

96. The financial benefit derived by Defendant rightfully belongs or belonged to Plaintiffs and the members of the Classes. Defendant should be compelled to disgorge in a common fund for the benefit of Plaintiffs 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 Defendant traceable to Plaintiffs and the members of the Classes.

97. Plaintiffs and members of the Classes have no adequate remedy at law.

FIFTH CLAIM FOR RELIEF
Violation of the Electronic Funds Transfer Act and Regulations Such as
15 U.S.C. § 1693 and 12 C.F.R. § 205

98. Plaintiffs repeat paragraphs 1 through 64 above.

99. Plaintiffs allege this claim on behalf of themselves and the EFTA Class members who have been assessed one or more overdraft fees or charges based on ATM or debit card transactions.

100. Plaintiffs, on behalf of themselves and the EFTA Class, asserts the Defendant 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).

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

102. As a result of Defendant's violation of EFTA, Defendant is liable to Plaintiffs and the EFTA Class for actual statutory damages pursuant to 15 U.S.C. § 1693m.

103. As a result of Defendant's violation of EFTA, Defendant is liable to Plaintiffs and the EFTA Class for actual and statutory damages, and Plaintiffs and the Class are entitled to recover costs of suit and reasonable attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the Classes demand a jury trial on all claims so triable and judgment as follows:

1. Declaring Defendant's overdraft fee policies and practices to be violative of the account agreements, wrongful, unfair, unconscionable, and in violation of EFTA;
2. Awarding restitution of all overdraft fees at issue paid to Defendant by Plaintiffs and the Classes as a result of the wrongs alleged herein in an amount to be determined at trial;
3. Compelling disgorgement of the ill-gotten gains derived by Defendant from its misconduct;
4. Awarding actual damages in an amount according to proof;
5. Awarding punitive and exemplary damages;
6. Awarding statutory damages;
7. Awarding pre-judgment interest at the maximum rate permitted by applicable law;
8. Reimbursing all costs and disbursements accrued by Plaintiffs in connection with this action, including reasonable attorneys' fees pursuant to the applicable law; and
9. Awarding such other relief as this Court deems just and proper.

Respectfully submitted,

GOLOMB & HONIK, P.C.

RMG3741

Richard M. Golomb, Esquire

Ruben Honik, Esquire

Kenneth J. Grunfeld, Esquire

1515 Market Street, Suite 1100

Philadelphia, PA 19102

Phone: (215) 985-9177

Fax: (215) 985-4169

Email: rgolomb@golombhonik.com

rhonik@golombhonik.com

kgrunfeld@golombhonik.com

Date: February 28, 2014