

INTRODUCTION

2. This is a class action brought by Plaintiff to assert claims, individually and in her capacity as class representative, against Defendant, TD Bank, N.A. (“Defendant” or “the Bank”). Plaintiff’s claims arise from Defendant’s systematic assessment and collection of overdraft fees from checking accounts for posted transactions that did not actually overdraw the account, in breach of Defendant’s express written contracts with its account holders. Defendant’s system subtracts from actual account balances all amounts for “pending” debit transactions, which may not settle or be paid for several days (and may not settle for the authorized amount or at all), and then treats any item it pays that causes this artificially diminished “available balance” to fall below zero (or to remain below zero) as an “overdraft,” against which Defendant assess fees. Defendant assesses these fees without regard to an account’s actual balance. An account’s actual balance is the actual funds held in a demand account, which is an account with respect to which a bank must immediately pay over funds on deposit on demand, including for payment of the transactions Defendant treats as overdraft items. In so doing, Defendant increases significantly the fees it harvests from customers’ checking accounts, including subsequent fees assessed for overdrafts and negative balances that would not have occurred but for Defendant’s prior and unlawful removal of funds from customer accounts. Defendant further obscures the problem by failing to provide an accurate accounting of its overdraft fee assessments in customer account statements, which are supposed to be an accurate representation of account activity. Defendant omits information necessary to: (i) identify which transaction is connected to a particular overdraft fee, and (ii) reveal its off-ledger “available balance” calculations at the time of each purported overdraft. Masking this

information furthers Defendant's purpose of maximizing overdraft fee income by making it more difficult for customers to understand and challenge improper overdraft fee assessments.

3. There are two interrelated agreements at issue. One is Defendant's Personal Deposit Account Agreement ("PDAA"), which sets forth terms and conditions governing Defendant's relationship with account holders, such as consumers with personal checking accounts. The PDAA includes terms specific to overdrafts. The PDAA sets forth the contractual undertaking between a customer and Defendant that is first agreed to when a customer opens an account with Defendant, and it is amended from time to time by Defendant. At all times relevant hereto, the PDAA stated that an "Overdraft" is an "advance of funds" by Defendant resulting in fees that "may be assessed on items presented for payment that bring your Account into a negative balance." The PDAA states that "overdraft fees are not charged on 'pending' authorizations." As set forth in more detail below, these terms do not permit Defendant to impose fees on transactions that can be covered by actual funds in the account (which, therefore, do not require Defendant to advance its own funds to cover payment).

4. The second agreement is a form for customers to enroll in the TD Debit Card Advance program (the "Enrollment Agreement"), by which a customer may agree in writing to extend Defendant's checking account overdraft protection to debit card transactions (pursuant to Regulation E, 12 C.F.R. § 1005.17, banks must obtain separate consent before they can charge overdraft fees on debit card transactions). In the absence of written customer consent to opt-in to overdraft protection for a debit card, the PDAA's overdraft terms apply only to a customer's checks, ACH transactions and other remittances. The Enrollment Agreement incorporates standard form disclosures provided to customers at the time they enroll.

5. Once executed by a customer (and subsequently confirmed by Defendant in a separate writing), the Enrollment Agreement authorizes Defendant to impose overdraft fees on non-recurring debit card transactions and ATM withdrawals that overdraft an account. Specifically, the Enrollment Agreement states that “an overdraft occurs when you do not have enough money available in your account to cover a transaction, but we pay it anyway.” As set forth in more detail below, Defendant violates the terms of this agreement, imposing fees and removing funds from customer accounts when, in fact, there are sufficient funds to cover transactions, and therefore no need for Defendant to advance its own funds to prevent account balances from falling below zero when those transactions are paid.

6. Plaintiff seeks to represent a class of all Defendant’s customers who were assessed overdraft fees on transactions that did not actually overdraw those customers’ accounts, in violation of Defendant’s contractual obligations to its customers.

THE PARTIES

7. Plaintiff is a citizen of the State of New Jersey. Plaintiff is a customer of TD Bank, N.A., and at all times relevant hereto she has maintained a personal checking account with Defendant, which she opened at one of Defendant’s Cherry Hill, New Jersey branches. In connection with that account, Defendant issued to Plaintiff a debit card, which Plaintiff has used for transactions such as making point of sale purchases (“POS”) and ATM withdrawals. Plaintiff has been injured as a result of Defendant’s conduct alleged herein.

8. Defendant TD Bank, N.A. is a nationally chartered bank. In its charter it has designated Wilmington, Delaware as the location of its main office. Therefore, pursuant to 28 U.S.C. § 1348, Defendant is a citizen of Delaware. Defendant regularly and systematically conducts business throughout the Eastern United States, including through numerous branches.

The principal place of business it maintains is in this district at the offices of its parent bank holding company, TD Bank US Holding Company.

9. Defendant is one of the nation's ten largest banks, operating a network of more than 1300 branches and servicing millions of customers. Defendant has more than \$230 billion in assets, and approximately \$190 billion of customer deposits, including more than \$930 million held by individuals, households and families in non-interest bearing transaction accounts, primarily personal checking accounts.

10. Defendant is a direct subsidiary of TD Bank US Holding Company, which is an indirect subsidiary of Defendant's ultimate parent company, Toronto Dominion Bank. Toronto Dominion, through its various bank subsidiaries and other businesses, has assets of approximately \$945 billion, and holds more than \$343 billion in personal account deposits.

JURISDICTION AND VENUE

11. Pursuant to 28 U.S.C. § 1332(d), this Court has original jurisdiction because the aggregate claims of the putative class members exceed \$5 million, exclusive of interest and costs, there are at least 100 members of the putative class, and at least one member of the proposed class is a citizen of a state different than Defendant.

12. 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 New Jersey, 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.

FACTS

A. Maintenance of Checking Accounts

13. The most common consumer account is a non-interest bearing demand deposit transaction account. A demand deposit account is one in which the customer has the right to the return of her funds on deposit immediately upon demand. While such demand can be made through a withdrawal at the teller window, the right can also be transferred to a third-party when a customer writes a check, giving that third-party the right to claim against the customer's account and demand payment by the bank of the amount of funds reflected on the check, if the account has those funds when the check is presented for payment. Banks earn money on such accounts by making loans of the funds during the period between when they are deposited and withdrawn, receiving interest payments on those loans, and retaining the differential between interest received from borrowers and interest due to depositors (which in the case of a typical consumer checking account is zero, effectively providing banks short term interest-free loans). For a large bank such as Defendant, the aggregate of this "float" of funds deposited and not yet demanded is substantial, as are the returns earned as interest payments on those loans. Banks also use checking accounts as a means to develop relationships and sell other forms of longer term bank and investment accounts, lending services and credit products. Banks also generate significant earnings on consumer checking accounts by charging an array of fees, including substantial revenues from overdraft fees.

14. In addition to traditional checks, customers who open a checking account are also usually issued a debit card, sometimes known as a check card, ATM card or EFT (electronic fund transfer) card. Through the use of debit cards, customers can transact electronically instead of writing checks, withdrawing funds from ATMs and engaging in POS

(at the merchant's physical location) and online transactions. Whether the card is used for a purchase transaction or to withdraw cash from an ATM, the transaction is processed electronically – the bank is notified in seconds when the card is swiped, it immediately matches the debit request to the customer's account and related information, and it has the option to authorize or decline the transaction in light of the information it retrieves.

15. Banks maintain an account ledger, almost always in an electronic database, for each account they hold. When funds are deposited into an account, a credit in the amount of the deposit is booked on the account ledger and added to the account balance. Cash deposited at a branch teller window is typically booked to the ledger the same day; electronic transfers into the account are generally booked the same day or the following day. Checks presented for deposit may take as little as one day or as long as a week, depending on (among other things) the means by which the check is presented and the institution upon which the check is drawn. A deposit does not become final until the depositing customer's bank has settled the item with the bank of the person who wrote the check (the payor bank). When the customer's bank accepts the check, it posts the deposit amount as a provisional or pending credit until the check clears (is settled with the payor institution), at which time the provisional credit becomes a final credit posted to the account in the full amount of the deposit and added to the account's balance. When posting a provisional credit, a bank retains the right to withdraw that credit should the item be timely returned by the payor institution, so pending deposits are not added to the account balance until the deposited item is settled.

16. When a customer makes a branch withdrawal, writes a check or uses a debit card for a purchase or ATM withdrawal transaction, the bank debits the customer's account for the amount of the transaction and deducts it from the account balance at the time the item is

paid. For checks, the process is essentially the reverse of that set forth above for deposits. The customer writes a check and hands it over or sends it to a payee, the payee deposits it in his bank account, the payee's bank presents the check to the customer's bank (sometimes through a chain of intermediaries), which then checks the customer's balance and makes the decision whether to pay the item, hold the item for a very short period to see if the customer will cover it with a deposit, or return the item to the payee's bank. The customer's bank will debit the customer's account at the time it pays the item, deducting from the customer's account balance the amount of the debit. If the account has insufficient funds ("NSF") to cover the check, the bank may return the item, and it may charge the customer an NSF fee. In that event, the customer may be liable to the payee for the amount of the check.

17. In both instances, the posting of a debit or credit to a customer's account is tied to the time of actual payment. The bank has no obligation to enter a final credit to a customer's account and add to the account balance until a deposited item is actually paid, and it has no obligation or right to enter a final debit to a customer's account and reduce the account balance until it actually settles or pays the item.

18. For debit card transactions, there is a two-stage process: first, the merchant requests authorization to process the transaction, which occurs at the time of the transaction, typically at the merchant's POS terminal or, if online, in the merchant's payment processing system. But the timing of the bank's corresponding debit to the customer's account depends upon when the merchant (or the merchant's agent) presents the transaction to the bank for settlement. For some transactions, this occurs the same day as the transaction, either in real time or bundled with other transactions in batches. But some merchants, for various reasons, may take longer to present transactions for settlement. During the period between

authorization and settlement the transaction can only be listed as pending and no corresponding final debit to the customer's account or reduction in the account balance is permitted. The amount of the customer's funds on deposit stays unchanged. This is important, because not all debit card payment authorization requests settle, and not all are for the actual amount of the transaction. Certain businesses may request authorizations that exceed the transaction amount and, so long as the amount they present for settlement matches the transaction amount, the bank will settle the transaction, post the debit to the account ledger and reduce the account balance by that amount. It is at this moment – settlement – that the bank has paid the transaction, and that is the determinative factor affecting the account balance.

19. An account balance is the amount of funds in an account at any given point in time, after calculating actual debits and credits to the account's ledger. Many banks batch process items, typically first posting and adding all credits to the account's balance, and then posting and subtracting debits, sometimes in a predetermined order by category. If the total debits are less than the previous balance plus any newly added credits, the account has a positive balance and the amount of that balance is the customer's actual funds on deposit, his or her money actually in the account. If the debits to an account exceed the sum of the previous balance plus credits, the account statement reflects a negative balance and the customer must deposit at least enough money to zero out the balance.

20. A debit item presented for settlement that causes a negative account balance, or that extends one, is called an overdraft.

21. Banks sometimes impose a fee for an overdraft, which may be based on the amount of the shortfall, the period of time before sufficient funds are credited to the customer's account to eliminate the negative balance, or simply a set amount on each item that causes,

extends or increases the negative balance. Some banks offer customers various overdraft protection options, for example linking a checking account to a savings or money market account so that funds can be automatically transferred in the event of a transaction account overdraft, or extending a line of credit that covers overdrafts at a predetermined rate. These products offer opportunities for banks to earn additional loan-related income.

22. Some banks also have policies whereby they pay overdrafts in the absence of a credit line or linked account, often based on undisclosed criteria, in exchange for significant per-item fees. In the era of electronic banking and the widespread and frequent consumer use of debit cards, the assessment of overdraft and related fees has become a major profit center for Defendant and other banks. Although it varies from bank to bank depending on individual bank practices, overdraft fees can represent an enormous portion of all deposit account service fees imposed by banks and, consequentially, a significant percentage of total bank income. The Consumer Financial Protection Bureau has recently estimated that overdraft fees constitute more than half of all consumer checking account fees, which is more than three times greater than the second largest category.

23. Overdraft fees represent the lion's share of service related fees. Banks are currently estimated to generate \$32 billion in overdraft fees annually. Defendant has mastered the art of maximizing these staggering overdraft charges, and it does so at the expense of unwitting customers.

24. Only eight percent of banks' customers incur nearly seventy-five percent of all overdraft fees. These fees disproportionately affect the poor and working poor, who are most likely to maintain low balances and relatively small payroll or benefits deposits. Ninety percent of overdraft fees are paid by the poorest ten percent of banks' customer bases. 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 and even involuntary closure, which can damage a person's credit rating and impair their ability to open an account at another bank. An account with a negative balance for a period of time incurs additional fees for the "sustained negative balance episode."

25. Overdraft fees are completely out of proportion to overdraft transactions. The value of the average overdraft transaction is \$24. Defendant charges a fee of \$35 for each overdraft.

26. According to a recent study, more than ninety percent of consumers overdraw their accounts by mistake, and seventy-five percent of those who overdraw their accounts would prefer their bank to decline their transactions rather than pay the transaction into overdraft and assess a fee.

27. If banks simply declined items that would overdraw an account, retail and service transactions could still be executed if consumers presented an alternative form of payment. Indeed, with modern technology, ATM transactions could still proceed if banks provided a warning that an overdraft fee would be assessed, and customers chose to proceed nevertheless. Some banks do routinely decline overdrafts, and some provide overdraft warnings on ATM screens. Defendant does neither.

B. Defendant's Overdraft Practices

28. 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's automated overdraft system routinely processes such transactions and charges

customers an overdraft fee. Defendant's automated overdraft system is intentionally designed to maximize overdraft fee revenue without regard to customers' particular financial circumstances. In marketing its overdraft protection program, Defendant offers innocuous examples such as a person with a zero balance waiting for a payroll deposit to clear, who can pay for lunch without the embarrassment of her transaction being declined. Defendant represents that before it exercises its "discretion" to decide whether to authorize an overdraft transaction, it takes into consideration the personal circumstances of the customer, creating the false impression of a bank assessing personal information and making individualized decisions on a case-by-case, transaction-by-transaction basis. In reality, as the FDIC recently concluded, with automated overdraft systems, "[t]here is little to no discretion given to bank employees, and no case-by-case bank employee decision-making with respect to an individual customer or item."

29. These overdraft fees can cost Defendant's account holders 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. Defendant's improperly assessed overdraft fees can actually cause a negative balance in an account that had a positive balance, causing even more overdraft fees to be imposed on subsequent transactions. If the customer's account has a negative balance for ten days, Defendant charges an additional sustained overdrawn account fee on top of the overdraft fees. In this way, a customer's account can spiral out of control, incurring fee after fee even if there was no initial overdraft to trigger the sequence of events.

30. This fee income is critical to the Bank. In 2013, Defendant earned more than \$900 million in deposit account related service fees, roughly sixty-eight percent of its non-interest income. These fees include account maintenance fees, ATM fees, insufficient funds

(“NSF”) fees, and overdraft fees. Of the ten largest U.S. consumer banks (measured by the number of accounts with balances under \$250,000), Defendant earns more fees per account than any of its peers, by far: according to a Wall Street Journal study, in 2013 Defendant earned \$139.50 in fees per account, versus an average of \$71.29 per account for the group as a whole. Defendant has millions of customers with less than \$250,000 in their accounts.

31. Defendant can boast more than just being one of the ten largest banks in America, with the highest fees per account. It is also on top ten lists for the most complained about banks, according to data in the CFPB’s consumer complaint database. According to a study by NJPIRG, Defendant is the subject of the sixth most total number of complaints; the fifth most checking-account related complaints; the third most complaints related to low-funds problems including overdrafts; the fourth most complaints related to debit cards; and the sixth most unresolved complaints.

32. Defendant has been the subject of consumer lawsuits, regarding its overdraft practices. Those cases alleged that Defendant improperly assessed excessive overdraft fees by reordering and posting debit card transactions from highest dollar amount to lowest dollar amount in order to maximize the number of overdrafts in customer accounts and thus increase significantly the fees it charged against those accounts. Not long after one federal court found that the practices described by the consumers were clearly unlawful, Defendant settled. As part of that settlement Defendant paid tens of millions of dollars to victims of its practices during the period from December 1, 2003 to August 15, 2010. However, the Bank did not agree to revamp its overdraft policies, and it has continued to victimize its customers with predatory overdraft practices.

33. The size of the fee multiplied by the number of instances in which it is assessed by Defendant highlights the powerful incentive Defendant has to disregard both its contractual obligations and the interests of the customers who entrust it with custody of their funds.

34. Where a customer signs and submits the Enrollment Agreement, he or she is opting in to Defendant's "TD Debit Card Advance" program. Regulation E, 12 C.F.R. § 1005, requires Defendant to obtain the customer's affirmative consent to opt-in, or else it is forbidden from charging overdraft fees on non-recurring debit card transactions and ATM withdrawals. This is a contract of adhesion drafted by Defendant.

35. On the online Enrollment Form, Defendant describes an overdraft as occurring when there is not enough money in the account:

TD Debit Card Advance is a discretionary overdraft service that allows us to authorize ATM transactions or one-time debit card purchases if you don't have enough money available in your account.

In a linked disclosure, "Important Details About TD Debit Card Advance"),

Defendant further explains:

A \$35 fee applies to each transaction that overdraws your account if at the end of the business day your account is overdrawn by more than \$5 . . . A one-time \$20 sustained overdraft fee is charged when your account balance remains negative for 10 consecutive business days.

Customers who sign up at a branch are presented with documentation using the same language.

The use of the term "money" instead of "available balance," and the reference to fees incurred "when your account balance remains negative," makes clear to a reasonable consumer that overdrafts relate to the actual balance – not a balance that factors in future transactions that may or may not occur.

36. The second document is the PDAA, which is a contract that covers the general relationship between Defendant and the customer. This contract is a contract of adhesion drafted by Defendant.

37. The PDAA contains a section that specifically addresses what constitutes an overdraft, specifically entitled “Overdrafts,” which defines an overdraft as an advance of funds by Defendant:

An overdraft is an advance of funds greater than the amount that has become available in accordance with the Bank’s Fund Availability Policy...Overdrafts may include advances to cover a check, in-person withdrawal, ATM withdrawal, or a withdrawal by other electronic means from your Account.

(The “Funds Availability Policy” refers to when deposits clear, credits are posted and balances increased by the amounts of the deposits. It thus relates to actual balances in accounts.)

38. The PDAA has another section entitled “Processing Order of Payment of Checks and Other Items,” which “describes how we pay or charge to your Account checks and other items presented for payment.” After crediting accounts with deposits that have cleared, the next items to be processed are “[p]ending debit card, ATM or electronic transactions that have been authorized but not yet paid[.]” In the context of a section concerning the “payment” of “items,” this could reasonably be understood as meaning that previously pending items are paid first, before other newer items. Indeed, the section concludes by stating that “Overdraft fees are not charged on ‘pending’ authorizations, although they reduce your available balance.” But for other very clear language, this might leave a consumer confused. However, the PDAA clearly states that “overdraft fees may be assessed on items presented for payment that bring your Account into a negative balance.” Throughout the PDAA, when the term “balance” is used

without being preceded by “available,” it refers to the actual or ledger balance.¹ In contrast, in this same section, when referring to something other than ledger balance, Defendant uses the term “available balance.” Taking this section as a whole, Defendant has promised, under the terms it drafted and presented without negotiation to Plaintiff and its other customers, that it would assess overdraft fees only when there is a negative actual or ledger balance.

39. Taking the PDAA as a whole, Plaintiff and the class members have contracted with Defendant to allow it to assess overdraft fees when it advances funds to pay for a transaction that, at the time it is paid, would otherwise cause a negative account balance because the customer does not have enough money in the account to cover the transaction. In reality, however, Defendant assesses overdraft fees even when payment of an item with the customer’s funds would not cause a negative balance and thus when it does not advance any funds. This overdraft practice is a breach of the PDAA contract.

40. Specifically relating to non-recurring debit card and ATM transactions, Plaintiff and the class members have only contracted with Defendant to allow it to assess overdraft fees when it advances funds to prevent an actual overdraft and consequent negative balance. Because Defendant’s system assesses overdraft fees even when there is money in the account sufficient to cover the transaction without causing a negative balance, this overdraft practice is a breach of Defendant’s contract for non-recurring debit card and ATM transactions.

41. This helps to inform what a reasonable consumer would understand with respect to Defendant’s contracts. What triggers the right to an overdraft fee is the payment of an overdraft item, that is, an actual payment of an item that otherwise would have the immediate

¹ *E.g.*, “Minimum balance” for purposes of determining interest refers to the ledger balance; “Accounts with zero balance” may be closed after 45 days refers to the ledger balance; Balance Tier Structure refers to ledger balance; Interest Payment on daily balances refers to ledger balance.

result of causing a negative balance, and the overdraft fee is earned at the time of that payment.

Where a customer has sufficient funds on deposit, there is no shortfall, no overdraft, no reason to advance funds, likely no payment by the bank (and if there is, at least at times no record of it in periodic account statements), and no right to assess a fee.

42. Defendant anticipates possible overdrafts and assesses fees on an entirely artificial construct, the “available balance,” which is not the same as the actual or ledger balance of an account. Any number of scenarios might cause Defendant’s automated, predictive system for assessing fees to be incorrect – an authorized transaction might not settle, or it might settle for a lesser amount, or the customer may make an intervening deposit or issue a stop payment instruction for check or other pending transaction. Defendant’s obligation to its customers, however, is to maintain accurate ledgers, and pay actual items as they are actually presented for settlement against the actual funds in the customer’s account. Items that are not yet properly payable are not chargeable to customer accounts, they are merely pending transactions and, as such, they cannot cause an overdraft during that processing cycle. Pending transactions can only cause an overdraft as and when they are actually paid, if at that moment of payment the actual account balance is not sufficient to pay the items. That is the overdraft event, and that is when Defendant may charge its overdraft fee by paying an overdraft advance.

43. Defendant’s breach of its customer agreements by engaging in this overdraft practice is egregious in light of additional factors.

44. First, Defendant has been aware that this practice is illegal under the terms of its contractual provisions since 2012, as this practice has already been in the subject of a Court ruling in prior litigation:

In one example, Plaintiffs allege that TD Bank charged [one Plaintiff] two overdraft fees on May 13, 2011, yet the account

displayed a positive balance. Plaintiffs assert that “TD Bank deducted pending transactions on subsequent days without reflecting those transactions on [the Plaintiff’s] statement. Neither the parties nor the PDAA adequately explains how overdraft fees could accrue with a positive balance.

Hughes v. TD Bank, N.A., 856 F.Supp.2d 673, 677 (D.N.J. 2012).

Despite this warning that this practice is not permitted under Defendant’s customer account agreement, Defendant has intentionally and willfully continued to utilize the same practice and use the same contract language, intentionally deceiving and breaching its contracts with its customers.

45. Second, not only does Defendant fail to accurately and truthfully describe this overdraft practice in the terms of the customer agreements, but it also misrepresents what it actually does by stating that the Bank will only charge overdraft fees when there is not enough money in the account and thus a need for Defendant to advance funds to cover the transactions.

46. Third, Defendant’s statements obscure what is really going on in customer accounts. The statements do not always identify which transaction is connected to which overdraft fee, or for that matter which transaction causes an overdraft. Although customers expect their bank statements to accurately reflect account activity during the statement period, Defendant masks its overdraft practices, leaving customers unable to understand why they are incurring these fees. It is fair to conclude that Defendant is intentionally omitting important information with the purpose of furthering its systematic reaping of unearned and unlawful fee income, in violation of its contractual obligations and in complete opposition to the customers who have entrusted it with their hard earned money.

47. Finally, Defendant’s overdraft practice, in conjunction with its misrepresentations in the account agreements and concealing of material information, results in additional and

consequential overdraft fees. This is because the assessment of the overdraft fee itself further and immediately reduces the available balance so that subsequently posted transactions are more likely to be deemed overdrafts – because Defendant has improperly removed funds from customer accounts, there are less funds actually in the account (under both the actual ledger balance and Defendant’s “available balance” accounting), so an unaware customer is more likely to engage in an overdraft transaction. This kind of sequence can also result in sustained overdrawn account fees, which Defendant imposes if an account has a negative balance for ten consecutive days, even where the negative balance is attributable in whole or in part to the improperly removed fees. This chain of cause-and-effect can cost a customer hundreds of dollars.

48. According to Defendant, Plaintiff recently accepted overdraft protection through Defendant’s online Enrollment Agreement.

49. Defendant’s contracts with Plaintiff provided that it could assess overdraft fees on her checking account only when it had advanced funds to cover a transaction because there was not enough money in the account to cover the transaction without the account falling below a zero balance. Accordingly, Defendant was not authorized to assess and collect overdraft fees on transactions when there was money in the account (when it had a positive balance) sufficient to cover transactions on the date they were paid.

50. Defendant, however, assessed and removed from Plaintiff’s account fees for transactions with respect to which there was money in the account to cover each transaction, *i.e.*, when the account had an adequate positive balance both before and after the posting of the transaction debit to the ledger. For example, on December 5, 2014, Defendant assessed a \$35 overdraft fee. Yet, Plaintiff’s account maintained a positive balance at all times for weeks prior

to that date - there was not a single transaction that caused a negative balance, there was no reason for Defendant to “advance” any funds, and there is no indication in Plaintiff’s bank statement that Defendant actually advanced any funds. Three days later, on December 8, 2014, Defendant assessed an additional two overdraft fees, totaling \$70, despite the fact that Plaintiff’s account continued to have a positive balance both before and after each transaction preceding the assessment of those fees. On that same date, and without any warning to Plaintiff that her account was now missing \$105, Defendant authorized an ATM withdrawal that caused Plaintiff’s account to have a negative balance, for which Defendant assessed and removed from her account an overdraft fee of \$35. But for Defendant’s improper removal of funds from her account on December 5 and 8, 2014, Plaintiff’s withdrawal would not have exceeded her account balance, and no overdraft would have occurred. This sequence of events caused additional fees on later dates, including the assessment of a sustained overdrawn account fee for a period of time in which her account would not have had a negative balance on each consecutive day but for Defendant’s improper assessment of so many overdraft fees in violation of Defendant’s customer agreements.

51. Thus, Plaintiff seeks to represent a class of all TD Bank customers who were not members of the prior class action, and who have been harmed as a result of Defendant’s unlawful practices.

CLASS ACTION ALLEGATIONS

52. Plaintiff brings this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3), on behalf of herself and the members of the following Class:

All persons who maintained a checking account with TD Bank, NA, through any of its U.S. branches, which at any time from August 15, 2010 to the present incurred an overdraft fee on posted debit card transactions when the checking account did not

have a negative balance. Excluded from the class are all persons who have released all of their claims against Defendant arising from overdraft fees, Defendant, its parents, any entity in which Defendant has a controlling interest, their officers and directors, any judicial officer assigned to hear any aspect of this litigation, and any immediate family members of the foregoing.

53. Numerosity: The members of the Class are so numerous that joinder of all members is impracticable. While the precise number of members of the Class is unknown to Plaintiff at this time and can be determined only by appropriate discovery, Plaintiff believes that the Class consists of thousands of members. Class members can be identified by examination of business records regularly maintained by Defendant and its employees and agents.

54. Typicality: Plaintiff's claims are typical of all of the members of the Class. The evidence and legal theories of Defendant's wrongful conduct are identical or substantially similar for Plaintiff and all of the members of the Class.

55. Existence and Predominance of Common Questions of Fact and Law: There are numerous questions of law and fact common to Plaintiff and the Class that predominate over any questions affecting only individual Class members.

56. Common legal and factual issues include, but are not limited to:

- a. Whether members of the Class had common contracts or contracts with common language with Defendant;
- b. Whether the contracts with Defendant were contracts of adhesion;
- c. Whether Defendant had a standard policy of assessing overdraft fees on debit card transactions when a checking account had a positive actual or ledger balance;
- d. Whether Defendant assessed overdraft fees on debit card transactions when a checking account had a positive actual or ledger balance;

e. Whether Defendant breached its customer agreements by assessing checking account overdraft fees for debit card transactions when the account had a positive actual balance; and

f. Whether Defendant assessed overdraft fees on overdrafts that occurred as a result of Defendant's prior assessment of overdraft fees on non-overdraft items.

57. Adequacy: Plaintiff will fairly and adequately protect the interests of members of the Class. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel experienced in many types of class action litigation, including litigation on behalf of consumers.

58. Predominance, Superiority: This action may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) because questions of law and fact common to the Class predominate over questions affecting individual Class members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the injury of each individual Class member is relatively small, the expense and burden of individual litigation makes it nearly impossible for Plaintiff and the Class members individually to seek redress for Defendant's wrongful conduct. Even if Plaintiff or individual Class members themselves could afford to pursue separate lawsuits, it would be unduly burdensome to the courts in which those lawsuits would proceed. The class action device provides the benefits of unitary adjudication, economies of scale, and comprehensive adjudication by one court. In contrast, the prosecution of separate individual actions would create a risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for the party or parties opposing the Class and would lead to repetitious trials of numerous common questions of fact and law. Plaintiff is aware of no difficulty in the

management of this litigation that would preclude its maintenance as a class action.

Accordingly, a class action is superior to other available methods for the fair and efficient adjudication of this controversy. Absent a class action, Plaintiff and the Class members will continue to suffer losses, thereby allowing these violations of law to proceed without remedy, permitting Defendant to retain the proceeds of its wrongful conduct.

FIRST CLAIM FOR RELIEF
Breach of Contract

59. Plaintiff incorporates by reference paragraphs 1 through 58, as if fully set forth herein.

60. Plaintiff and each member of the Class entered into a contract with Defendant governing overdraft transactions and fees. Defendant's actions have violated the terms of its account agreements with checking account customers, including other documents referenced therein. Defendant is liable for the losses of Plaintiff and the Class resulting from Defendant's breaches of the parties' contractual agreements.

61. Plaintiff and the Class have performed all, or substantially all, conditions, covenants, and promises required of each of them to be performed in accordance with the terms and conditions of the contract, except for those they were prevented from performing or which were waived or excused by Defendant either expressly or through its misconduct.

62. As a proximate result of Defendant's breach of contract, Plaintiff and the Class have been damaged in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF
Breach of the Duty of Good Faith and Fair Dealing

63. Plaintiff incorporates by reference paragraphs 1 through 58 as if fully set forth herein.

64. Under every state's law, each contract contains an implied covenant of good faith and fair dealing.

65. Defendant has breached the covenant of good faith and fair dealing by assessing overdraft fees on debit card transactions when there are sufficient funds in the checking account to cover those transactions.

66. Defendant has acted in bad faith, and/or with malice, to deny Plaintiff and members of the Class some benefit of the bargain originally intended by the parties, thereby injuring Plaintiff and the Class members in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF
Violation of N.J.S.A. 56:8-1, et seq., the Consumer Fraud Act

67. Plaintiff incorporates by reference paragraphs 1 through 58 above as if fully set forth herein.

68. The NJCFA protects consumers from “any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission, in connection with the sale or advertisement of any merchandise....” N.J.S.A. 56:8-2.

69. Defendant entered into contracts with its consumer customers in which Defendant chose the language to bind the parties relating to the definition of “overdrafts” and the circumstances when Defendant was authorized to assess and collect overdraft fees from customers' accounts. Defendant contracted with its customers so as to allow it to assess and collect overdraft fees only when the posted transaction resulted in a negative ledger or account balance.

70. Defendant has engaged in, and continues to engage in, unlawful conduct as a general business practice by breaching those contracts and misrepresenting its practices in the

contracts. Specifically, contrary to what Defendant states is its practice in the contracts, Defendant uniformly and as a matter of policy assesses and collects overdraft fees on posted transactions with a positive account balance.

71. Further, Defendant has engaged in this practice through substantially aggravating circumstances. This includes continuing to engage in this practice even after a federal district court indicated that this practice is not permitted under the terms of the customer account agreement; the mechanism of this practice is very difficult for a consumer to figure out because of how it is concealed by the Defendant; and the practice is directed at and is especially harmful to the most vulnerable customers. Therefore, Defendant has had actual knowledge from the federal court since 2012 that this is an illegal practice that is in breach of the customer agreements, but has nevertheless continued to engage in this practice that has caused serious economic harm to the Plaintiff and the Class members. Furthermore, the overdraft practice renders customers vulnerable to being assessed an enormous amount of overdraft fees in a short period of time, as the unlawfully assessed overdraft fees themselves further reduce the balance prior to the posting of additional transactions, rendering otherwise non-overdraft transactions into overdraft transactions.

72. By engaging in the above-described practice and the actions, unconscionable commercial practices, and omissions herein alleged, Defendant has committed one or more unlawful acts in violation of the NJCFA.

73. Had Plaintiff and the Class members known the actual facts or legal implications of those acts, they would have avoided the overdraft fees. Therefore, a causal relationship exists between Defendant's unlawful conduct and the ascertainable losses suffered by Plaintiff and the Class.

74. By reason of the foregoing, Defendant has been improperly and unjustly enriched to the detriment of Plaintiff and the Class in an amount to be proven at trial. Plaintiff and the Class are entitled to have Defendant disgorge and restore to Plaintiff and the Class members all improperly taken monies as a result of their conduct as alleged herein.

75. Defendant's conduct caused Plaintiff and Class members to suffer an ascertainable loss. In addition to direct monetary losses, Plaintiff and the Class members have suffered an ascertainable loss in that they received less than what was promised to them by Defendant in their account agreement and other disclosure forms. Therefore, Plaintiff and the Class are entitled to recover such damages, together with appropriate penalties, including treble damages, attorneys' fees and costs of suit.

76. As a result, Plaintiff and the Class have suffered an ascertainable loss of monies and pursuant to N.J.S.A. 56:8-19 are entitled to threefold damages.

77. Unless Defendant is enjoined from continuing to engage in this business practice, Plaintiff and the Class will continue to be injured by Defendant's wrongful actions and conduct. Therefore, Plaintiff and the Class are entitled to injunctive relief.

PRAYER FOR RELIEF

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

1. Declaring Defendant's overdraft fee policies and practices to be in violation of the account agreements, wrongful, unfair, unconscionable, and to violate the NJCFA;
2. Awarding restitution of all overdraft fees at issue paid to Defendant by Plaintiff and the Class 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 treble damages under N.J.S.A. 56:8-19;
7. Awarding pre-judgment interest at the maximum rate permitted by applicable law;
8. Reimbursing all costs and disbursements accrued by Plaintiff 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.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

Dated: January 21, 2015

LITE DEPALMA GREENBERG, LLC

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CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2

Plaintiff, by her attorneys, hereby certifies that to the best of her knowledge, the matter in controversy is related to *Hurel v. TD Bank, N.A.*, Civil Action No. 14-7621 (JEI)((AMD); and *Klein, et al v. TD Bank, N.A.*, Civil Action No. 15-cv-179(JBS)(KMW). Plaintiff is not currently aware of any other party who should be joined in this action.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 21, 2015

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