

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

MARY JENNIFER PERKS, MARIA
NAVARRO-REYES, individuals, on behalf of
themselves, and all others similarly situated,

Plaintiffs,

v.

TD BANK, N.A.,

Defendant.

CASE NO. 1:18-CV-11176-DAB

**AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

Plaintiffs Mary Jennifer Perks and Maria Navarro-Reyes (“Plaintiffs”), on behalf of themselves and all others similarly situated, by and through their counsel, bring this Amended Class Action Complaint (“Complaint”) against Defendant TD Bank, N.A. (“TD Bank” or the “Bank”), and based upon personal knowledge with respect to themselves, and on information and belief and the investigation of counsel as to all other matters, in support thereof allege as follows:

INTRODUCTION

1. This case concerns TD Bank’s unlawful business practice of imposing multiple Non-Sufficient Funds Fees (“NSF Fee”) on a single consumer transaction.
2. Plaintiffs bring this action on behalf of themselves and all similarly situated consumers against TD Bank arising from a specific fee generation practice that violates the Bank’s contracts and/or is deceptive.
3. The Deposit Account Agreement permits TD Bank to charge a \$35 NSF Fee when it determines a customer’s account contains insufficient funds to pay a transaction and it rejects the charge. *See* Deposit Account Agreement (“Deposit Agreement”), attached hereto as Exhibit A.

4. Through the imposition of NSF Fees the Bank makes hundreds of millions of dollars annually. TD Bank NSF Fees fall disproportionately on racial and ethnic minorities, the elderly, and the young, many of whom regularly carry low bank account balances. Take for example Plaintiff Navarro-Reyes who TD Bank assessed nearly \$1,000 in NSF Fees between June 2017 and November 2018.

5. Plaintiffs do not dispute the Bank's right to reject a transaction and charge a single NSF Fee, but TD Bank unlawfully maximizes its already profitable NSF Fees with deceptive practices that also violate its contract.

6. Specifically, TD Bank unlawfully assesses multiple NSF Fees on a single Automated Clearing House (ACH) transaction or check transaction. ACH transactions require the party making a payment or money transfer to provide the party's account number and TD Bank's routing number.

7. In TD Bank's sole and undisclosed view, each time the Bank unilaterally reprocesses an ACH transaction or check for payment after a having been rejected for insufficient funds, it becomes a new, unique item that is subject to another NSF Fee. But TD Bank's Deposit Agreement never even hints that this counterintuitive result could be possible. Moreover, the premise is far from obvious as a matter of common sense and becomes even less so when one considers that TD Bank's own bank statements refer to the re-attempted items as "RETRY PAYMENTS"—i.e., mere iterations of the same initial item, not items *ex nihilo*.

8. TD Bank's Deposit Agreement and Personal Fee Schedule indicate that only a single NSF Fee will be charged per "item," however many times the request for payment is reprocessed. An electronic item reprocessed after an initial return for insufficient funds cannot and does not fairly become a new, unique item for fee assessment purposes.

9. As discussed more fully below, it is a breach of TD Bank's contract and of

reasonable consumers' expectations for the Bank to charge more than one \$35 NSF Fee on the same item, since the Bank's Personal Fee Schedule explicitly states—and reasonable consumers understand—that the same item can only incur a single NSF Fee.

10. TD Bank also breaches its duty of good faith and fair dealing when it charges multiple NSF Fees on a single transaction. Specifically, TD Bank abuses its contractual discretion by (a) reprocessing transactions when it knows full well that a customer's account lacks sufficient funds, and (b) charging NSF Fees upon reprocessing.

11. This practice not only violates TD Bank's contracts and the covenant of good faith and fair dealing but is also unfair and deceptive under the consumer protection law of New York (where Ms. Perks is a citizen and resides and banks with TD Bank).

12. Plaintiffs and other TD Bank customers have been injured by these practices. On behalf of themselves and the Classes, Plaintiffs seek damages, restitution and injunctive relief for TD Bank's breach of contract and breach of the covenant of good faith and fair dealing, unjust enrichment, and violations of the New York consumer protection statute.

PARTIES

13. Plaintiff Mary Jennifer Perks is a citizen of New York. She maintains a checking account at TD Bank. At all times relevant, Plaintiff patronized TD Bank banking centers located in New York City.

14. Plaintiff Maria Navarro-Reyes is a citizen of Florida. She maintains a checking account at TD Bank. At all times relevant, Plaintiff patronized TD Bank banking center located in New Port Richey, Florida.

15. Defendant TD Bank is a national bank with its headquarters and principal place of business located in Cherry Hill, New Jersey. Among other things, TD Bank is engaged in the business of providing retail banking services to consumers, including Plaintiffs and members of

the Classes. TD Bank operates banking centers, and thus conducts business, throughout the State of New York, including within this District.

JURISDICTION AND VENUE

16. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2), because the matter in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which at least one member of the class (both Plaintiffs) is a citizen of a State different from the Defendant. The number of members of the proposed Classes in aggregate exceeds 100 accountholders. 28 U.S.C. § 1332(d)(5)(B).

17. This Court has personal jurisdiction over the Defendant because it regularly conducts and/or solicits business in, engages in other persistent courses of conduct in, and/or derives substantial revenue from products and/or services provided to persons in this District and in New York.

18. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District—where Plaintiff Perks lives and conducts her banking business with TD Bank.

SUBSTANTIVE ALLEGATIONS

19. As described more fully herein, TD Bank’s Deposit Agreement allows it to take certain steps when a TD Bank accountholder attempts a transaction but does not have sufficient funds to cover it. Specifically, the Bank may (a) authorize the transaction and charge a single \$35 overdraft fee (“OD Fee”), or (b) reject the transaction and charges a single \$35 NSF Fee.

20. However, TD Bank regularly assesses two or more NSF Fees on the same transaction.

21. This abusive practice is not universal in the banking industry. Indeed, major banks like Chase—the largest consumer bank in the country—do not charge repeated NSF Fees on the

same item when it is re-submitted for payment. Instead, they charge one NSF Fee even if an item is submitted for payment multiple times.

22. Worse, TD Bank's Deposit Agreement never discloses this practice. To the contrary, it indicates it will not undertake this practice.

A. Plaintiffs' Experience

Plaintiff Perks

17. On September 24, 2018, Plaintiff Perks attempted to make a one-time PayPal transfer, via an ACH transaction.

18. TD rejected payment of that item due to insufficient funds and charged Plaintiff Perks a \$35 NSF Fee.

19. Seven days later, on October 1, 2018, the same item was re-submitted for payment, and again TD Bank rejected the item due to insufficient funds and charged Plaintiff Perks another \$35 NSF Fee.

20. In sum, *TD Bank charged Plaintiff Perks \$70 in fees to process a single payment to PayPal.*

21. Plaintiff Perks took no affirmative action to reinitiate the item or to authorize its reprocessing. Instead, TD Bank unilaterally and automatically reprocessed it a second time for payment.

22. On October 25, 2018, Plaintiff Perks attempted to make two separate one-time PayPal transfers, via an ACH transaction, in the amounts of 99 cents and \$4.99.

23. TD rejected payment of those items due to insufficient funds and charged Plaintiff Perks a \$35 NSF Fee on each.

24. Seven days later, on November 1, 2018, the same items were re-submitted for payment, and again TD rejected the item due to insufficient funds and charged Plaintiff Perks

another \$35 NSF Fee on each.

25. In sum, *TD Bank charged Plaintiff Perks \$70 in fees to process a single 99 cent transfer to PayPal, and an additional \$70 in fees to process a single \$4.99 transfer to PayPal.*

26. Plaintiff Perks took no affirmative action to reinitiate the items or to authorize their reprocessing. Instead, TD Bank unilaterally and automatically reprocessed them a second time for payment.

27. Plaintiff Perks understood her PayPal transactions to be single transactions as is laid out in TD Bank's contract, capable at most of receiving a single NSF Fee (if TD Bank returned it) or OD Fee (if TD Bank paid it).

28. TD Bank itself also understood the PayPal transactions to be single transactions, and its systems categorized it as such. Indeed, on Plaintiff Perks's account statement, TD Bank described subsequent attempts to debit the transactions as a "RETRY PYMT."

Plaintiff Navarro-Reyes

29. On November 14, 2017, Plaintiff Navarro-Reyes attempted to make a \$9 one-time Acorns Investing transfer, via an ACH transaction.

30. TD rejected payment of that item due to insufficient funds and charged Plaintiff Navarro-Reyes a \$35 NSF Fee.

31. Seven days later, on November 21, 2017, the same item was re-submitted for payment, and again TD Bank rejected the item due to insufficient funds and charged Plaintiff Navarro-Reyes another \$35 NSF Fee.

32. In sum, *TD Bank charged Plaintiff Navarro-Reyes \$70 in fees to process a single \$9 payment to Acorns Investing.*

33. Plaintiff Navarro-Reyes took no affirmative action to reinitiate the item or to authorize its reprocessing. Instead, TD Bank unilaterally and automatically reprocessed it a

second time for payment.

34. On April 24, 2018, Plaintiff Navarro-Reyes attempted to make two separate one time payments to Progressive Select Insurance and Bright House Net Cable TV, via ACH transaction.

35. TD rejected payment of those items due to insufficient funds and charged Plaintiff Navarro-Reyes a \$35 NSF Fee on each.

36. Six days later, on April 30, 2018, the same items were re-submitted for payment, and again TD rejected the item due to insufficient funds and charged Plaintiff Navarro-Reyes another \$35 NSF Fee on each.

37. In sum, *TD Bank charged Plaintiff Perks \$70 in fees to process a single transfer to Progressive Select Insurance, and an additional \$70 in fees to process a single transfer to Bright House Net Cable TV.*

38. Plaintiff Navarro-Reyes took no affirmative action to reinitiate the items or to authorize their reprocessing. Instead, TD Bank unilaterally and automatically reprocessed them a second time for payment.

39. Plaintiff Navarro-Reyes understood her Acorns Investing, Progressive Select Insurance, and Bright House Net Cable TV transactions to be single transactions as is laid out in TD Bank's contract, capable at most of receiving a single NSF Fee (if TD Bank returned it) or OD Fee (if TD Bank paid it).

40. TD Bank itself also understood those transactions to be single transactions, and its systems categorized it as such. Indeed, on Plaintiff Navarro-Reyes's account statement, TD Bank described subsequent attempts to debit the transactions as a "RETRY PYMT."

B. The Imposition of Multiple NSF Fees on a Single Transaction Violates Express Promises and Representations Made by the Bank

24. The Deposit Agreement provides the general terms of Plaintiffs' relationship with

the Bank and makes promises and representations regarding how transactions will be processed and when NSF Fees and OD Fees may be assessed. The Deposit Agreement defines the term “item,” and the circumstances under which an item can trigger NSF Fees or OD Fees.

25. The Deposit Agreement contains material misrepresentations and omissions indicating that NSF Fees will only be assessed once per transaction or “item”—defined as a customer request, instruction, or order for payment or transfer—when in fact TD Bank regularly charges two or more NSF Fees per transaction or item.

26. TD Bank’s account documents state that it will charge \$35 per “item” that is returned due to insufficient funds.

27. As used throughout the Deposit Agreement, the term “item” must describe all iterations of a customer’s given instruction or order for payment or deposit from a checking or savings account. For example, “item” is defined as:

An “item” includes a *check, substitute check, purported substitute check, remotely created check or draft, electronic transaction, draft, demand draft, image replacement document, indemnified copy*, ATM withdrawal or transfer, debit card point-of-sale transaction, pre-authorized debit card payment, automatic transfer, telephone-initiated transfer, *ACH transaction*, online banking transfer to or from Accounts at TD Bank or external transfers to other institutions, online bill payment instruction, payment to or from other people (Send Money with Zelle® transaction), withdrawal or deposit slip, in-person transfer or withdrawal, cash ticket, deposit adjustment, wire transfer, and any other instruction or order for the payment, transfer, deposit or withdrawal of funds.

See Exhibit A. By TD Bank’s own definition, an “item” describes only instructions or orders initiated by the customer. It does not describe instructions or orders initiated by someone other than the customer.

28. In the section of the Deposit Agreement titled “Reasons Why We May Refuse to Pay an Item,” TD Bank states it may refuse to make a payment when the “item” “is drawn in an amount greater than the amount of funds then available for withdrawal in your Account (see the Funds Availability Policy) or which would, if paid, create an overdraft.” This section does not

create a right for TD Bank to reprocess any item returned for insufficient funds because, again, TD Bank’s contract only permits TD Bank to return for insufficient funds customer-initiated instructions or orders for payment or transfer.

29. Because Plaintiffs had only made one authorization for payment, there is no new “item” when that transaction is rejected then automatically reprocessed for payment. This is because there is no instruction or order for the payment or transfer of funds from the account by the accountholder.

30. In sum, the same instruction for payment cannot conceivably become a new “item” each time it is rejected for payment and then reprocessed, especially when—as here—Plaintiffs took no action to reprocess it.

31. Even if an instruction for payment is reprocessed, it is still the same “item.” It is simply another attempt at Plaintiffs’ original order or instruction, but it is not an instruction or order by the accountholder for the payment or transfer of funds from the account.

32. This is important because the Personal Fee Schedule—which is the specific document disclosing fee assessments on checking account—states that a single NSF Fee of \$35 is assessed “per item”:

Overdraft – return (NSF)/overdraft – paid (per item)\$ 35.00

See Exhibit B.

33. This code-like disclosure gives no indication that the same “item” is eligible to incur *multiple* NSF Fees.

34. The Personal Fee Schedule is incorporated in the Deposit Agreement.

35. Moreover, the Deposit Agreement and Personal Fee Schedule never describe a circumstance where TD Bank may assess multiple NSF Fees for a single check or ACH transaction that was returned for insufficient funds and later reprocessed one or more times and

returned again.

36. In sum, TD Bank promises that one \$35 NSF Fee will be assessed per item, and “item” must mean all iterations of the same instruction or order for payment made by the accountholder. As such, TD Bank breached the contract when it charged more than one fee per item.

37. Consistent with express representations in the contract by way of the incorporated Personal Fee Schedule, reasonable consumers understand any of their given authorizations for payment to be one, singular “item” as that term is used in TD Bank’s fee schedule and Deposit Agreement.

38. Upon information and belief, TD Bank has this same understanding in practice, since its systems code items in a way that alerts the Bank when the same item is being re-submitted for payment.

39. The Personal Fee Schedule bars TD Bank from assessing multiple NSF Fees on the same item.

40. Taken together, the representations and omissions identified above convey to customers (1) that NSF Fees can only be charged on items that the customer instructed or ordered, and (2) that all submissions for payment of the same transaction will be treated as the same “item,” which the bank will *either* authorize (resulting in *an* overdraft item) or reject (resulting in *a* returned item) when it decides there are insufficient funds in the account. Nowhere does TD Bank disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees or that a non-customer-initiated instruction or order of payment or transfer can result in an NSF Fee.

41. Customers reasonably understand, based on the language of the Deposit Agreement, that reprocessing of checks or ACH payments are simply additional attempts to

complete the original order or instruction for payment, and as such, will not trigger NSF Fees. In other words, it is always the same item.

42. Contrast the Deposit Agreement, which never once mentions NSF Fees with what TD Bank provides in its Online Banking Service Agreement for Personal Account Customers (“Online Banking Agreement”) that governs its Bill Payment Service.

43. TD Bank’s Bill Payment Service allows accountholders to schedule payments to third parties through TD Bank’s website from their checking accounts.

44. As yet another clear indication that the Deposit Agreement does not contemplate multiple NSF Fees on the same “item,” the Online Banking Agreement makes an express pronouncement with respect to electronic “Bill Payment” transactions that it never makes with respect to the ACH transactions at issue in this litigation. With respect to Bill Payment transactions (unlike the PayPal, investment, insurance, and cable transactions initiated by Plaintiffs), the Online Banking Agreement states that: “Payment transactions may be attempted up to three (3) times, and you may or may not incur multiple Bank insufficient fund fees as a result.”

45. TD’s decision not to include a similar provision with respect to ACH or other transactions is an indication that it intentionally left such a provision out of the Deposit Agreement.

46. Notably, the Online Banking Agreement does not use the phrase “item” to refer to the Bill Payment transactions.

47. Moreover, if “payment transactions” were understood to be eligible for multiple NSF fees, the express warning regarding multiple insufficient funds fees would not have been necessary in the Online Banking Agreement.

48. Banks like TD Bank that employ this abusive practice know how to plainly and

clearly disclose it. Indeed, other banks and credit unions that do engage in this abusive practice disclose it expressly to their accountholders—something TD Bank here never did.

49. For example, First Citizens Bank, a major institution in the Carolinas, engages in the same abusive practice as TD Bank, but at least expressly states:

Because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. All fees are charged during evening posting. When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft.

(emphasis added).

50. First Hawaiian Bank engages in the same abusive practices as Defendant, but at least currently discloses it in its online banking agreement, in all capital letters, as follows:

YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT OF A RETURNED ITEM AND RESUBMISSION.

(emphasis added).

51. Klein Bank similarly states in its online banking agreement:

[W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment (electronic or check) is submitted to us for payment from your Bill Payment Account when, at the time of posting, your Bill Payment Account is overdrawn, would be overdrawn if we paid the item (whether or not we in fact pay it) or does not have sufficient available funds; or (2) we return, reverse, or decline to pay an item for any other reason authorized by the terms and conditions governing your Bill Payment Account. We will charge an NSF/Overdraft Fee as provided in this section regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the bill payment.

52. TD provides no such disclosure, and in so doing, deceives its accountholders.

C. The Imposition of Multiple NSF Fees on a Single Transaction Breaches TD Bank's Duty of Good Faith and Fair Dealing

53. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are invested with a discretionary power over the other party. In such circumstances, the party with discretion is required to exercise that power

and discretion in good faith. This creates an implied promise to act in accordance with the parties' reasonable expectations. That means that the Bank is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the Bank has a duty to honor transaction requests in a way that is fair to Plaintiffs and is prohibited from exercising its discretion to pile on ever greater penalties on the depositor. Here—in the form agreement the Bank foisted on Plaintiffs—TD Bank has provided itself numerous discretionary powers affecting Plaintiffs' bank accounts. But instead of exercising that discretion in good faith and consistent with Plaintiffs' reasonable expectations, the Bank abuses that discretion to take money out of Plaintiffs' account without their permission and contrary to their reasonable expectations that she will not be charged multiple fees for the same transaction.

54. As set forth in its Deposit Agreement the Bank “*may* charge a non-sufficient funds (NSF), returned item, overdraft, or similar fee.” *Id.* (emphasis supplied). Given that TD Bank always knows its customers' account balances, it could simply not reprocess a transaction when a customer's account lacks sufficient funds. This would result in a single NSF fee, rather than two or more NSF fees. By exercising its discretion in its own favor—and to the prejudice of Plaintiffs and other customers—by reprocessing a transaction when it knows a customer's account lacks funds and then charging additional NSF Fees, TD Bank abuses the power it has over Plaintiffs and their bank account and acts contrary to their reasonable expectations under the Deposit Agreement. This is a breach of the Bank's implied covenant to engage in fair dealing and act in good faith.

CLASS ALLEGATIONS

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

56. The proposed “Classes” are defined as:

Class 1 – Nationwide Multiple NSF Class

All TD Bank checking accountholders in the United States who, during the applicable statute of limitations, were charged multiple NSF Fees on an item other than an item that was initiated by the accountholders using TD Bank’s Bill Payment Service (the “Multiple NSF Class”).

Subclass 1 – New York Multiple NSF Class

All TD Bank checking accountholders in New York who, during the applicable statute of limitations, were charged multiple NSF Fees on an item other than an item that was initiated by the accountholders using TD Bank’s Bill Payment Service (the “New York Subclass”).

Subclass 2 – Florida Multiple NSF Class

All TD Bank checking accountholders in Florida who, during the applicable statute of limitations, were charged multiple NSF Fees on an item other than an item that was initiated by the accountholders using TD Bank’s Bill Payment Service (the “Florida Subclass”).

Hereinafter, Class 1 and Subclasses 1 and 2 are collectively referred to as the “Classes.”

46. Plaintiffs reserve the right to modify or amend the definition of the proposed Classes before the Court determines whether certification is appropriate.

47. Specifically excluded from the Classes are any entities in which TD Bank has a controlling interest, or which have a controlling interest in TD Bank, TD Bank’s legal representatives, assigns, and successors, any Judge to whom this action is assigned, and any member of such Judge’s staff and immediate family.

48. The members of the Classes are so numerous that joinder is impractical. The Classes consist of thousands of members, the identities of whom are within the exclusive knowledge of TD Bank and can be readily ascertained only by resort to TD Bank’s records.

49. The claims of the representative Plaintiffs are typical of the claims of the Classes in that the representative Plaintiffs, like all members of the Classes, were charged multiple NSF Fees on a single transaction. The representative Plaintiffs, like all members of the Classes, have been damaged by TD Bank’s misconduct in that they have been assessed unfair and

unconscionable NSF Fees. Furthermore, the factual basis of TD Bank's misconduct is common to all members of the Classes and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Classes. Plaintiffs have suffered the harm alleged and have no interests antagonistic to the interests of any other members of the Classes.

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

51. Among the questions of law and fact common to the Classes include:

a. Whether TD Bank violated contract provisions by charging multiple NSF Fees on the same transaction;

b. Whether TD Bank breached its covenant of good faith and fair dealing through its NSF Fee policies and practices;

c. Whether TD Bank was unjustly enriched through its NSF Fee policies and practices;

d. Whether TD Bank violated the consumer protection law of New York through its NSF Fee policies and practices;

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

f. The declaratory and injunctive relief to which the Classes are entitled.

52. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions, particularly on behalf of consumers and against financial institutions. Accordingly, Plaintiffs is an adequate representative and will fairly and adequately protect the interests of the Classes.

53. 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, no class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members

of the classes will continue to suffer losses and TD Bank's misconduct will proceed without remedy.

54. 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 for the consideration of claims which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

55. Plaintiffs suffer a substantial risk of repeated injury in the future. Plaintiffs, like all Class members, are at risk of additional NSF Fees on repeated reprocessing of transactions that they did not request or authorize. Plaintiffs and the Class members are entitled to injunctive and declaratory relief as a result of the conduct complained of herein. Money damages alone could not afford adequate and complete relief, and injunctive relief is necessary to restrain TD Bank from continuing to commit its unfair and illegal actions.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing (On Behalf of the Classes)

56. Plaintiffs reallege and incorporate by reference all the foregoing allegations as if they were fully set forth herein.

57. Plaintiffs and TD Bank have contracted for bank account services, as embodied in TD Bank's Deposit Agreement and related documentation.

58. TD Bank's account documents explicitly state that, when a customer lacks sufficient funds to cover a transaction, the Bank may either (a) authorize the transaction and

charge a single OD Fee, or (b) reject the transaction and charge a single NSF fee. TD Bank regularly violates its contractual promises by charging multiple NSF Fees on a single transaction.

59. Under the laws of the states where TD Bank does business, parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are invested with a discretionary power over the other party. In such circumstances, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties' reasonable expectations. That means that the Bank is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the Bank has a duty to honor transaction requests in a manner that is fair to Plaintiffs and the Classes and is prohibited from exercising its discretion to pile on ever greater penalties on them. Here—in the form agreements the Bank foisted on Plaintiffs and the Classes—TD Bank has provided itself numerous discretionary powers affecting their bank accounts.

60. Instead of exercising that discretion in good faith and consistent with Plaintiffs' and the Classes' reasonable expectations, the Bank abuses that discretion to take money out of their accounts without their permission, instruction, or order, and contrary to their reasonable expectations that they will not be charged multiple NSF Fees for the same transaction. Specifically, TD Bank regularly (a) reprocesses previously declined transactions, even when a customer's account lacks sufficient funds, and (b) charges TD Bank Account Fees upon reprocessing of previously declined transactions.

61. TD Bank further breaches the covenant of good faith and fair dealing by charging more than one NSF Fee on a single transaction and by charging an NSF Fee on an instruction or order for payment that was not initiated by the accountholder

62. By exercising its discretion to enrich itself by gouging its consumers, TD Bank

consciously and deliberately frustrates the agreed common purposes of the contract and disappoints the reasonable expectations of Plaintiffs and members of the Classes, thereby depriving them of the benefit of their bargain.

63. Plaintiffs and members of the Classes have performed all, or substantially all, of the obligations imposed on them under the Deposit Agreement.

64. Plaintiffs and members of the Classes have sustained damages as a result of TD Bank's breaches of the Deposit Agreement.

SECOND CLAIM FOR RELIEF
New York General Business Law, N.Y. Gen. Bus. Law § 349 et seq.
(On Behalf of the New York Subclass)

65. Plaintiffs reallege and incorporate by reference all the foregoing allegations as if they were fully set forth herein.

66. TD Bank's practice of charging multiple NSF Fees on a single transaction violates New York General Business Law § 349 ("NYGBL § 349").

67. NYGBL § 349 prohibits deceptive acts or practices in the conduct of any business, trade, or commerce, or in the furnishing of any service in the state of New York.

68. As one of the largest banks in the United States with multiple branch locations in New York, Defendant conducted business, trade or commerce in New York State.

69. In the conduct of its business, trade, and commerce, and in furnishing services in New York State, Defendant's actions were directed at consumers.

70. In the conduct of its business, trade, and commerce, and in furnishing services in New York State, Defendant engaged in deceptive, unfair, and unlawful trade acts or practices, in violation of N.Y. Gen. Bus. Law § 349(a), including but not limited to the following:

a. Defendant misrepresented material facts, pertaining to the sale and/or furnishing of banking services, to the New York Subclass by representing and advertising that it would only

assess a single \$35 returned item fee for a single transaction; and

b. Defendant omitted, suppressed, and concealed the material fact that it would charge multiple \$35 returned items fees for a single transaction.

96. Defendant systematically engaged in these deceptive, misleading, and unlawful acts and practices, to the detriment of Plaintiff Perks and members of the New York Subclass.

97. Defendant willfully engaged in such acts and practices, and knew that it violated NYGBL § 349 or showed reckless disregard for whether it violated NYGBL § 349.

98. As a direct and proximate result of Defendant's deceptive trade practices, New York Subclass Members suffered injury and/or damages, including the payment of multiple \$35 returned item fees on a single transaction and the loss of the benefit of their respective bargains with TD Bank.

99. The above unfair and deceptive practices and acts by TD Bank were immoral, unethical, oppressive, and unscrupulous. These acts caused substantial injury to consumers that these consumers could not reasonably avoid; this substantial injury outweighed any benefits to consumers or to competition.

100. Further, TD Bank's conduct was substantially injurious to Plaintiff Perks and members of the putative New York Subclass in that they were forced to pay NSF Fees they were told they would not incur.

101. TD Bank's actions in engaging in the above-named unfair practices and deceptive acts were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of members of the New York Subclass.

102. Had Plaintiff Perks and the members of the New York Subclass known they could be charged more than one NSF fee on a single transaction, they would have made different payment decisions so as to avoid incurring such fees.

103. As a result of TD Bank's violations of the NYGBL § 349, Plaintiff Perks and members of the New York Subclass have paid and will continue to pay NSF Fees and OD Fees. Accordingly, they have suffered and will continue to suffer actual damages.

104. Accordingly, Plaintiff Perks and New York Subclass Members are entitled to relief under N.Y. Gen. Bus. Law § 349(h), including, but not limited to, actual damages, treble damages, statutory damages, injunctive relief, and/or attorney's fees and costs.

THIRD CLAIM FOR RELIEF
Unjust Enrichment
(On Behalf of the Classes)

105. Plaintiffs reallege and incorporate by reference all the foregoing allegations as if they were fully set forth herein.

106. Plaintiffs, on behalf of themselves and the Classes, asserts a common law claim for unjust enrichment.

107. By means of TD Bank's wrongful conduct alleged herein, TD Bank knowingly provided banking services to Plaintiffs and members of the Classes that was unfair, unconscionable, and oppressive.

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

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

110. TD Bank's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

111. Under the common law doctrine of unjust enrichment, it is inequitable for TD

Bank to retain the benefits it received, and is still receiving, without justification, from the imposition of NSF Fees and OD fees on Plaintiffs and members of the Classes in an unfair, unconscionable, and oppressive manner. TD Bank's retention of such funds constitutes unjust enrichment.

112. The financial benefits derived by TD Bank rightfully belong to Plaintiffs and members of the Classes. TD Bank should be compelled to disgorge in a common fund for the benefit of Plaintiffs and members of the Classes all wrongful or inequitable proceeds received by them. Further, a constructive trust should be imposed upon all wrongful or inequitable sums received by TD Bank traceable to Plaintiffs and the members of the Classes.

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the members of the Classes, respectfully request the Court to enter an Order:

- a. certifying the proposed Classes;
- b. declaring TD Bank's NSF Fee policies and practices to be wrongful, unfair and unconscionable;
- c. enjoining TD Bank from charging more than one NSF Fee for any single transaction;
- d. enjoining TD Bank from materially misrepresenting its true fee processing practices;
- e. granting restitution of all NSF Fees paid to TD Bank by Plaintiffs and the Classes, as a result of the wrongs alleged herein in an amount to be determined at trial;
- f. granting disgorgement of the ill-gotten gains derived by TD Bank from its misconduct;

- g. awarding actual damages in an amount according to proof;
- h. awarding statutory damages;
- i. awarding pre-judgment interest at the maximum rate permitted by applicable law;
- j. awarding punitive or exemplary damages in accordance with proof and in an amount consistent with applicable precedent;
- k. awarding costs and disbursements assessed by Plaintiffs in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- l. awarding such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs and all others similarly situated hereby demand trial by jury on all issues in this complaint that are so triable as a matter of right.

Dated: February 19, 2019

Respectfully submitted,

/s/ James J. Bilborrow

James J. Bilborrow
WEITZ & LUXENBERG, P.C.
700 Broadway
New York, New York 10003
(212) 558-5500
jbilborrow@weitzlux.com

Jeffrey D. Kaliel (admitted *pro hac vice*)
Sophia Gold (pending *pro hac vice*)
KALIEL PLLC
1875 Connecticut Ave., NW, 10th Floor
Washington, D.C. 20009
(202) 350-4783
jkaliel@kaliellpc.com
sgold@kaliellpc.com

Jeff Ostrow (admitted *pro hac vice*)
Jonathan M. Streisfeld (admitted *pro hac vice*)
KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT
One W. Las Olas Blvd., Suite 500
Fort Lauderdale, Florida 33301
Telephone: (954) 525-4100

Facsimile: (954) 525-4300
ostrow@kolawyers.com
streisfeld@kolawyers.com

Richard E. Shevitz (admitted *pro hac vice*)
Lynn A. Toops (admitted *pro hac vice*)
Vess A. Miller (admitted *pro hac vice*)
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Fax: (317) 636-2593
rshevitz@cohenandmalad.com
ltoops@cohenandmalad.com
vmiller@cohenandmalad.com

Attorneys for Plaintiff and the Putative Classes

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorneys of record for each other party through the Court's electronic filing service on February 19, 2019, which will send notification of such filing to the email addresses registered.

/s/ James J. Bilborrow
James J. Bilborrow