

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN DIVISION**

DENISE GALGANO DBA SHEAR ENVY
HAIR STUDIO, individually, and on behalf
of all others similarly situated,

Plaintiff,

v.

TD BANK, N.A.,

Defendant.

CASE NO.:

CLASS ACTION

CIVIL COMPLAINT FOR DAMAGES:

- (1) Breach of Contract;**
- (2) Violation of New Jersey’s Consumer Fraud Act (N.J.S.A. § 56:8-1 *et seq.*)**
- (3) Breach of the Duty of Good-Faith and Fair Dealing**

DEMAND FOR JURY TRIAL

Plaintiff, Denise Galgano dba Shear Envy Hair Studio (“Plaintiff”), by her attorneys, hereby bring this class and representative action through this Complaint against TD Bank, N.A., (“TD Bank” or “Defendant”). All allegations in this Complaint are based upon information and belief except those allegations which pertain to Plaintiff or her counsel, which are based on personal knowledge. Plaintiff’s information and belief are based upon, *inter alia*, Plaintiff’s own investigation, and the investigations conducted by Plaintiff’s attorneys. Each allegation in this Complaint either has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

IDENTIFICATION OF PARTIES (LOCAL RULE 10.1)

1. The names and addresses of the named parties to this action are as follows:

Plaintiff—Denise Galgano dba Shear Envy Hair Studio, 765 Route 25a, Miller Place, NY 11764.

Defendant—TD Bank, N.A., is headquartered in Cherry Hill, New Jersey.

INTRODUCTION

2. Plaintiff brings this lawsuit as a class and representative action to assert claims individually and in her capacity as the class representative of all others similarly situated. This class action seeks monetary damages and other relief against Defendant TD Bank arising from its policy of charging Plaintiff and both consumer and business customers fees for use of non-TD Bank owned automated teller machines (or “ATMs”). This includes all TD non-owned ATM fees, but it is especially egregious for TD Bank to charge a \$3 fee simply to check an account balance at third-party, non-TD Bank owned ATMs. TD Bank charges its customers this \$3 balance-inquiry fee separate and in addition to the fees the ATM owner and TD Bank charge the customer for withdrawing cash from the ATM after checking the balance to confirm an account has enough money to cover the withdrawal. But the balance-inquiry fee, as well as the other fees for use charged by TD Bank at non-TD owned ATMs, was not disclosed at the ATM at the time that Plaintiff performed her transaction.

3. Nor are the withdrawal and balance-inquiry fees legally authorized or disclosed in TD Bank’s account agreement or accompanying fee schedule, the documents TD Bank provides to its customers to govern their relationship with the bank, included in the fees that TD Bank can charge as a result of that relationship. In those documents, TD Bank failed to disclose that it intended to charge separate and distinct fees from those fees that might be charged by the owner of the non-TD Bank ATM used by the TD Bank customer.

4. TD Bank’s communicated in the agreement that the “institution that owns the terminal *may* assess a fee,” but did not clearly communicate that it intended not only to charge a fee for using the non-TD Bank owned ATM to withdraw cash from the ATM, but also to charge a separate fee for the simple act of checking the balance before withdrawing funds. The true nature of TD Bank’s fee practice at non-TD Bank owned ATMs was similarly lost among TD Bank’s complex and ambiguous set of disclosures in its fee schedule, which alternatively suggested that any such fee would be charged by the ATM’s owner, or that a uniform \$3 fee

would be charged when the accountholder made both a balance inquiry and incurred an account withdrawal at a single use of a non-TD Bank owned ATM. TD Bank's agreements with its customers do not authorize charging TD Bank accountholders like Plaintiff (or members of the Class) the fees discussed in this complaint.

5. TD Bank's practice of charging these fees is also fundamentally unfair because TD Bank is using vague and ambiguous language to prey on accountholders who are merely attempting to check their balance at an ATM before withdrawing money to avoid punitive overdraft fees (\$35, irrespective of the amount of the cash withdrawal or the size of the overdraft). Indeed, TD Bank encourages members like Plaintiff to check their balances for the very purpose of avoiding these extraordinary overdraft fees, using many different forms of communication to do so. But in doing so, TD Bank gets its accountholders one way or the other, trapping them into paying these undisclosed fees.

6. TD Bank's practice of charging these fees is also inequitable because the closer a customer's account is to zero, the more likely that a customer will check his or her account balance before making a withdrawal. Indeed, TD Bank's poorer accountholders must often check their account balances merely to avoid the draconian \$35 fee TD Bank charges for overdrawing the account. Thus, TD Bank engages in this unjust practice, in which it targets low-balance customers by leveraging the pain of overdraft fees into checking their balances, then charging hidden fees after the transaction is over. The customer finds out about these fees only long after the ATM transaction has been long completed.

7. It is not only TD Bank encouraging customers to check balances at an ATM to avoid overdraft fees. Both the ATM owner and the Consumer Financial Protection Bureau (CFPB) encourage customers to check balances before taking money out of an ATM, precisely for the purpose of avoiding overdraft fees. For instance, the CFPB blog designed to help

consumers from paying expensive overdraft fees, states:

Check your account balance before making a debit card purchase (or ATM withdrawal), and then pause to ask yourself if you have any other payments coming up.

The ATM owner also asks the customer if they want to check the balance without disclosing the balance inquiry fee because unlike a cash withdrawal, the ATM owner does not charge a transaction for a balance inquiry fee like it does for a cash withdrawal. So, the customer is not presented with the information necessary to avoid the fee at the ATM.

8. Finally, while fees from ATM machines are one of the top fee revenue generators for TD Bank, there is no cost justification for TD Bank to assess these fees. A mere balance inquiry is a non-monetary act undertaken completely without cost or risk to TD Bank. TD Bank does not have to pay an interchange fee for transferring money, nor must it incur any of the inherent or express costs of transferring money to third parties. The TD Bank accounting system is simply accessed by way of the request, and the system provides an automated response disclosing the requestor's balance. The request costs TD Bank next to nothing. Any cost for a switch fee incurred while using the system is minimal and immaterial, particularly when compared to the hefty profit TD Bank realizes from the transaction fee it charges when money is withdrawn from the ATM.

9. Likewise, a customer's use of an out-of-network ATM is without cost to TD Bank because the third-party ATM owner is dispensing cash to the consumer, and the out-of-network ATM is identified as the party that "may" impose a fee as set forth in TD Bank's agreements with its customers.

10. On February 12, 2016, Plaintiff was snagged by this unfair, undisclosed, and unauthorized practice. A review of the transaction from the monthly bank statement, shows that TD Bank assessed Plaintiff the \$3 balance-inquiry fee (5% of the requested \$60 transaction) for checking her balance, before she proceeded with the withdrawal transaction. The withdrawal transaction resulted in a \$2.95 fee charged by the ATM owner (disclosed at the point of sale),

and a separate \$3.00 transaction fee from TD Bank (undisclosed at the point of sale). In total, for the simple act of checking the balance and withdrawing \$60 of her own money, she incurred three separate fees: TD Bank's \$3 balance-inquiry fee, a separate \$3 fee TD Bank charged for the withdrawal, and the \$2.95 fee charged by the ATM owner. These fees combined added up to nearly \$9 of the \$60 transaction, or 15% of the total just for Plaintiff to withdraw her own money from TD Bank.

11. Plaintiff is an individual sole proprietor with a small business, and thus every dollar counts. However, in the last year before the transaction, TD Bank had assessed Plaintiff more than \$600 in overdraft fees. In just the few days before the transaction alleged herein that triggered the balance inquiry fee (February 3 – February 11, 2016), TD Bank had assessed Plaintiff \$140 in overdraft fees.

12. Based on information and belief, TD Bank's practice of charging these fees on non-TD Bank owned ATM machines was a uniform practice using generally uniform disclosure and authorizing language from May 4, 2014 to March 1, 2020, the date on which TD Bank amended its standardized contracts to begin disclosing its actual practices. It is believed that TD Bank uniformly applied this practice to both consumer and business accounts. It is also believed that TD Bank's "disclosure" and "authorization" language regarding the balance inquiry and withdrawal transaction fees at non-TD Bank owned ATM machines were the same for both business and consumer accounts.

13. Plaintiff, and other TD Bank customers, have been injured by TD Bank's improper practices. On behalf of herself and the class, Plaintiff seeks damages, restitution, and injunctive relief for TD Bank's breach of contract and related claims.

14. Accordingly, Plaintiff seeks to represent a nationwide class of all TD Bank customers who were improperly assessed non-owned ATM fees from May 4, 2014 to March 1, 2020 in breach of its standardized contract provisions with its customers.

15. This action does not challenge TD Bank's practices or disclosures except in those

cases where they conflict with the promises and conditions expressly stated by TD Bank in their contracts with customers. Specifically, while unfair, this action does not challenge TD Bank's right to assess authorized and disclosed fees at non-TD Bank owned ATM machines, except when doing so conflicts with, and is in breach of, the terms of the standardized contracts which TD Bank drafted and presented, without negotiation, to its customers.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction of this action pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d)(2) and (6) because: (i) there are 100 or more class members; (ii) there is an aggregate amount in controversy exceeding \$5,000,000.00 exclusive of interest and costs; and (iii) there is minimal diversity because plaintiff and defendant are citizens of different states.

17. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391 because Defendant resides and is headquartered in this district, regularly transacts substantial business in this district, and because a substantial part of the events or omission giving rise to the claims asserted herein occurred and continue to occur in this district.

THE PARTIES

A. Plaintiff

18. Plaintiff Denise Galgano dba Shear Envy Hair Studio ("Galgano") is an individual who owns a business located in Miller City, New York, and at all times relevant herein maintained her account at a TD Bank branch located in the State of New York. Galgano has been injured as a result of TD Bank's conduct alleged herein.

B. Defendant

19. Defendant TD Bank, N.A., is a national bank chartered and supervised by the federal Office of the Comptroller of Currency, and is headquartered in Cherry Hill, New Jersey. TD Bank conducts substantial business with approximately 1,227 branches throughout the

Northeast, Mid-Atlantic, Metro D.C., the Carolinas, and Florida. TD Bank reports having \$320 billion in assets.

20. Should Plaintiff discover the identities and capacities of additional parties that are liable under the claims set forth herein, Plaintiff will seek leave of Court to amend this Complaint to add these parties as additional defendants.

FACTUAL BACKGROUND

A. General Background

21. An ATM is an electronic banking outlet that allows customers to complete banking transactions without interacting with another person. Generally speaking, anyone with a debit card can use an ATM machine.

22. ATM machines can be owned and operated by a host of individuals or entities, which include, but are not necessarily limited to, banks and other commercial financial institutions. As noted above, TD Bank owns and operates nearly 3,000 ATMs across the United States. Banks and financial institutions similarly own and operate many hundreds of thousands of ATMs across the country, some of which are found in places like restaurants, gas stations, and other small businesses, some of whom still only accept cash for payments.

23. In order to ensure that debit-card users are able to use ATMs sponsored by other banks, TD Bank joins other banks in an interbank network, or ATM network, which enables those who use TD Bank debit or ATM cards to use ATMs that are owned and operated outside of TD Bank's own ATM network. In such cases, federal law requires the owners of out-of-network ATMs to inform users of the usage fees that the ATM owner will charge for using the ATM. In nearly all cases, this notice comes by way of an on-screen message stating that using the ATM will trigger fees to be assessed by the owner, and that any such fee is in addition to those fees that are charged by the customer's financial institution.

24. Though ATMs can be used to conduct a number of basic banking transactions, their primary purpose is to withdraw the customer's own funds, after which a debit is taken from

the accountholder's account. The ATM makes the requested amount of cash available to the accountholder, and fees are generally charged as a result.

25. TD Bank also assesses overdraft fees to member accounts when it claims it has determined that an account has been overdrawn. This is true for overdrafts caused by ATM transactions, whether inside or outside TD Bank's own ATM network.

26. When a bank or credit union pays an overdraft, it is extending a form of very expensive credit. Indeed, overdraft and NSF fees constitute one of the primary fee generators for banks and credit unions. According to a banking industry market research company, Moebs Services, in 2018 alone, banks generated an estimated \$34.5 billion on overdraft fees.

27. Defendant charges an extraordinarily high overdraft fee of \$35 per incident. Defendant's \$35 overdraft fee already bears no relation to the bank's minute risk of loss for purported overdraft transactions. Indeed, its practical effect is to charge those who pay the overdraft an interest rate with an APR in the thousands.

28. Customers assessed with overdraft fees are generally the most vulnerable among the banking population. Younger, lower-income, and non-white account holders are among those most likely to be assessed overdraft fees. A 25-year-old is 133% more likely to pay an overdraft penalty fee than a 65-year-old. More than 50% of the customers assessed overdraft fees earned under \$40,000 per year. And non-whites are 83% more likely to pay an overdraft fee than whites.

29. In response to the inequities of charging these overdraft fees, TD Bank produces materials that encourage customers to avoid overdraft fees, and the principal way it does so is by encouraging customers to regularly check their balance before executing transactions that may lead to incurring an overdraft fee.

B. About TD Bank

30. TD Bank, N.A., is a subsidiary of Toronto-Dominion Bank of Canada and a U.S. nationally chartered bank. Prior to the year 2000, TD Bank did not have branches in the United

States. Since 2000, TD Bank has undergone an aggressive expansion into the U.S. consumer market by acquiring other banks and converting those customers to the TD Bank system. By assets, TD Bank is now ranked in the top 10 of U.S. banks, providing banking services to its 6.5 million east-coast customers extending from Maine to Florida through its 1,300 branches and 1,900 ATM machines.

31. Defendant is one of the 10 largest banks in the United States, with over 27,000 employees, 1,236 retail branches, and more than 9 million personal and commercial banking customers. Defendant has over \$338.3 billion in total assets, \$279.4 billion in total deposits, and maintains a network of nearly 3,000 TD Bank-owned ATM machines.

32. Among the services that Defendant offers its customers is a checking account. One of the features of the checking account is a debit card used for a variety of transactions including purchasing goods and services. With the debit card, the customer can withdraw money from ATMs, and not just TD Bank-owned ATM machines but ATM machines owned and operated by third parties as well.

C. TD Bank's Non-TD Bank Owned ATM Fee Practices

33. Like most other consumer financial institutions, TD Bank enables its accountholders to use ATMs owned and operated by third parties. In virtually all circumstances, customers are permitted to withdraw cash as well as most of these ATMs, the customer is given the option to inquire about their balance before withdrawing cash. This permits consumers to check their balances before engaging in a withdrawal that could ultimately trigger the expensive overdraft fees described in the previous section. Indeed, consumers unsure about the amount of money in the account at that time have the reasonable expectation that timely checking their balance will give them the opportunity to cancel or modify their expected transaction before they incur overdraft fees as a result of their cash transaction.

D. TD Bank's Contracts Relating to Non-TD Bank Owned ATM Fees**1. Account Agreement**

34. TD Bank uses this knowledge against consumers to mislead them into paying yet another fee. Indeed, TD Bank creates a win-win scenario where no matter what the consumer does, he or she ends up paying highly-profitable fees for services that cost little, if anything, to TD Bank. When a customer opens a bank account at TD Bank, TD Bank provides them with a copy of its standardized customer agreement, called the "Personal Deposit Account Agreement" (the "Account Agreement"). TD Bank explains to its customers in the Account Agreement that it intends to charge overdraft fees when ATM transactions cause overdrafts. Furthermore, TD Bank also discloses that an owner of a non-TD Bank owned ATM may charge a fee. (*See* Exh. A (4/20/16 Account Agreement), p.6.)¹ But TD Bank does not disclose the fact that it *will* charge consumers fees for the use of the non-TD Bank owned ATM, including a \$3 balance-inquiry fee.

35. Indeed, based on information and belief, including reviewing old versions of the Account Agreement, it was only recently that TD Bank discussed or disclosed the balance-inquiry fee at all in the Account Agreement. TD Bank explained that the consumer could access his or her account by ATM for several purposes, including to "get information about the Account balance(s) in the Checking, Statement Savings, and/or Statement Money Market Account(s) linked to your Card." But prior to the recent changes, TD Bank did not disclose in the Account Agreement that it would charge a fee for that service, much less that it is a separate and distinct fee from the fee it charges users to conduct cash transactions at an out-of-network ATM.² Nor did TD Bank disclose that such a fee would be charged if it was not the third-party owner of the out-of-network ATM that was charging it.

¹ The Account Agreement attached hereto as Exhibit A is believed to be one of the operative agreements during the class period and representative of the account agreements in the class period.

² TD Bank's April 2020 version of its personal fee schedule expressly provides in a footnote that "each transfer, each withdrawal and each balance inquiry is a separate transaction."

36. Instead, TD Bank only states that it “may impose a fee, as disclosed on the Personal Fee Schedule, for Account transactions you conduct at an ATM that we do not own or operate.” A reasonable reading of that sentence would be that TD Bank does not presently charge those fees. Further, a reasonable reading of that statement is that the fee schedule is the operative document to refer to as to any such fee that it may impose at some point. To state that TD Bank “may” do something that it actually does do and has done for many years in fact appears to quite purposefully mislead customers about the bank’s routine practice.

37. Furthermore, TD Bank explains that for non-TD ATM transactions, the “institution that owns the ATM (or the network) may assess a fee (surcharge) at the time of your transaction, including for balance inquiries.” (Exh. A, pp. 25-26.) In other words, TD Bank misled consumers by disclosing that the owner of the ATM might charge a fee for balance inquiries, but disclosed nothing about its own practices and procedures. In particular, TD Bank failed to clearly explain that it intended to charge fees for using an out-of-network ATM, much less a separate \$3 fee for each and every event a customer executed during a single ATM transaction.

2. Personal Fee Schedule

38. The only disclosure of any ATM fee is found in TD Bank’s Personal Fee Schedule in effect before the recent changes, which provided the following:

and usage	ATM fees	\$0.00 For using TD ATMs in the U.S. and Canada
		\$3.00 For each withdrawal, transfer, and balance inquiry conducted at a non-TD ATM. The institution that owns the terminal (or network) may assess a fee (surcharge) at the time of your transaction, including balance inquiries.

(Exh. B (TD Convenience Checking Account Guide), p. 1.)

39. The reasonable consumer would not read this disclosure to expect that TD Bank would charge \$3 every time a consumer engaged in a withdrawal, transfer, or balance inquiry at a non-TD Bank owned ATM machine. The much more reasonable interpretation of this fee disclosure is that only the institution that owns the terminal (or network) is going to impose a fee,

if any fee is imposed at all, for using the ATM including balance inquiries.

40. TD Bank has recently added a footnote to its fee schedule that clarifies and acknowledges what it had not previously explained—that TD Bank did, in fact, intend to charge fees for non-owned ATM usage, and that if it did so, it would do so based on each transfer, withdrawal, and balance inquiry being considered a separate transaction.

¹ For transactions conducted at non-TD ATMs, the owner and/or operator of the ATM (or the network) may assess a fee ("surcharge") at the time of your transaction, including for balance inquiries. In certain instances, we will reimburse this surcharge. Additionally, TD-Bank may impose fees for non-TD ATM transactions which will be reflected in your monthly statement and are charged per transaction. Each transfer, each withdrawal and each balance inquiry is a separate transaction. For certain Account types, we may waive these fees as disclosed in the chart below.

41. This is particularly true because TD Bank is aware that ATMs are not programmed to provide separate warnings for each separate transaction a consumer may undertake in the course of a single use. Instead, ATMs are programmed only to disclose that the customer will be charged a fee for withdrawing funds from an out-of-network ATM, and that the consumer may be responsible for any overdraft fees resulting from the withdrawal. The ATM does not warn that use of the ATM will itself trigger any kind of fee, that a balance inquiry will trigger a separate fee, or that the customer will incur multiple and cumulative fees for using the ATM in different ways during a single use.

42. Indeed, no reasonable consumer would expect that TD Bank could charge multiple \$3 fee charges for a single \$20 consumer transaction. In such a hypothetical situation, a consumer intending to engage in a small, cash-only transaction might withdraw \$20 from a non-TD Bank ATM machine; uses their TD Bank Debit Card to access their account; and reads the standard disclosures regarding the use of an out-of-network ATM. Concerned about his or her account balance, the consumer decides to push the button showing the account balance before engaging in the transaction. After confirming that there are sufficient funds in the account to continue with the transaction, the consumer proceeds with the transaction and the ATM dispenses \$20. Not only does the consumer end up paying the fees associated with the cash transaction, but the consumer also pays the additional \$3 fee merely for checking their account balance. As a result of this, consumers pay \$9 in fees, a full 45% of the original \$20 transaction,

when only the ATM owner's fee is disclosed in the account agreement, the fee schedule, and at the ATM.

3. Aggravating Circumstances Related To TD Bank's Breaches of Contract

43. TD Bank's breach of its customer agreements by engaging in this practice is particularly egregious and detrimental in light of additional factors that exist in this case.

a. TD Bank Has Settled Two Separate Cases (\$62 million and \$70 million) Arising From Unfair Overdraft Fee Practices

44. First, it has been alleged in lawsuits that TD Bank has been charging customers and accountholders fees for many years without obtaining appropriate authorization in its account agreements.

45. In 2009, the Judicial Panel for Multidistrict Litigation issued an order transferring checking account overdraft litigation cases against several nationwide banks to the Southern District of Florida, under the title of *In re: Checking Account Overdraft Litigation*, MDL No. 2036, Case No. 1:09-MD-02036-JLK. In the subsequent complaints that followed, plaintiffs alleged that TD Bank had been manipulating and altering its customers' transaction records in order to maximize the charging of expensive \$35 overdraft fees. Plaintiffs alleged that TD Bank was reordering each individual's financial transactions from largest to smallest—as opposed to chronologically—because the largest transactions tended to deplete the account, and the smaller transactions would trigger multiple \$35 overdraft charges.

46. Thus, if an accountholder had \$100 in his or her account, then made four transaction of \$10 and a subsequent transaction of \$100 on the same day, TD Bank would reorder the debits from largest to smallest. The result would be that the \$100 transaction would empty the account, and then TD Bank could charge the accountholder four \$35 overdraft fees on each of the four \$10 transactions. Had these five transactions been debited consistent with the chronological order of the transactions, only one overdraft fee would have been assessed.

47. After years of hard-fought litigation, in 2012 TD Bank agreed to settle the claims

against it for \$62 million. TD Bank also agreed to change its disclosure practices.

48. TD Bank, however, did not get the message from the first lawsuit. Several accountholders residing in multiple states sued TD Bank over its overdraft fee policies, again on the basis that TD Bank was charging accountholders illegal overdraft fees in several different ways.

49. Among other allegations, Plaintiffs alleged that TD Bank was charging overdraft fees that were not authorized by its agreements with accountholders. At the time, TD Bank's account agreement explained that an overdraft only occurs "when you do not have enough money available in your account to cover a transaction." But TD Bank was subtracting from the actual account balances any amounts for "pending" debit transactions—many of which may not settle at all or may take several days to be paid. It was only after TD Bank subtracted these amounts from the account that the balance allegedly turned negative, and then TD Bank charged an overdraft fee. If TD Bank had been calculating the balance using the actual funds in the account, it would not have charged overdraft fees because there was sufficient money actually in the account to cover the debit.

50. These complaints were again ordered consolidated by the Judicial Panel on Multidistrict Litigation into a single pre-trial proceeding, this time called *In re: TD Bank, N.A. Debit Card Overdraft Fee Litigation*, MDL No. 2613, Case No. 6:15-mn-02613-BHH, in the District of South Carolina. After several years of litigation, TD Bank again agreed to settle the claims against it, this time for value of \$70 million, including the payment of approximately \$43 million in cash toward the settlement and the forgiveness of \$27 million more in fees incurred by TD Bank accountholders.

51. As these settlements demonstrate, TD Bank has long failed to demonstrate adequate oversight over its internal fee generating policies, particularly as they pertain to its agreements with accountholders. Instead, TD Bank's response has been to shift the focus and responsibility to consumers to encourage them to check their balances to avoid overdraft fees.

52. TD Bank's non-TD Bank owned ATM fee was designed to capitalize on TD Bank's overdraft revenue by using TD Bank's egregiously high fees for overdrafts against its customers. Given the sheer size of its disclosed overdraft fees, TD Bank knew that accountholders would be likely to initiate balance inquiries before engaging in ATM transactions. Indeed, TD Bank encourages, both by express and implied means, customers to check their balance before engaging in an ATM transaction. But TD Bank did not disclose to its customers that the simple act of making an account inquiry would alone double the fee for their use of a non-owned ATM. Instead, TD Bank took advantage of accountholders through its knowledge that they would not receive adequate disclosure at the non-owned ATM regarding the existence of the balance inquiry fee TD Bank was going to charge.

53. Therefore, Plaintiff, on behalf of herself and all others similarly situated, seek relief as fully set forth below.

E. PLAINTIFF INCURS ATM FEES CHARGED WITHOUT AUTHORIZATION THROUGH HER ACCOUNT AGREEMENT WITH TD BANK

54. On February 12, 2016, Plaintiff went to a nearby non-TD Bank owned ATM to obtain \$60 in cash. To confirm the amount of funds in her account, and confirm that she would not be charged with a punitive \$35 overdraft fee in connection with receiving the \$60 in cash, she first checked her balance at the ATM. Based on information and belief, and recent investigation, there was no warning on the ATM suggesting that she would incur a \$3.00 fee simply for conducting a balance inquiry.

55. After having confirmed that she had sufficient funds to withdraw from the ATM, Plaintiff went forward with the transaction. The ATM machine warned her that proceeding with the transaction would result in a \$2.95 fee charged to her account. However, while she was charged a \$2.95 fee from the ATM owner, she was also charged the unexpected fees from TD Bank of \$3 for her balance inquiry and \$3 for her cash withdrawal.

56. What is more, the fact that Plaintiff was going to be charged a balance inquiry fee was not disclosed at any time to Plaintiff, either in the Account Agreement or elsewhere. Plaintiff was instead only told that the third-party owner of the non-network ATM “may” charge her a fee for its use. Plaintiff did not know that TD Bank intended to charge her fees at all, much less a separate \$3 fee for each deposit, withdrawal, or balance inquiry she engaged in on a non-TD Bank owned ATM.

CLASS ACTION ALLEGATIONS

57. Plaintiff brings this action as a class action pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure on behalf of themselves and all others similarly situated as members of the following Class:

58. Plaintiff proposes the following classes (the “Nationwide Classes”):

The “**Non-TD Bank ATM Fee National Class**” is composed of a national class of owners of bank checking accounts maintained through a TD Bank branch in the U.S. that paid ATM transaction fees as a result of using a non-TD Bank owned ATM.

The “**Balance Inquiry National Class**” is composed of a national class of owners of bank checking accounts maintained through a TD Bank branch in the U.S. that paid TD Bank Balance Inquiry fees as a result of using a non-TD Bank owned ATM.

59. Alternatively, Plaintiff propose the following state-specific classes (the “State Sub-Classes”):

The “**New York Non-TD Bank ATM Fee Class**” is composed of owners of bank checking accounts maintained through a TD Bank branch in the state of New York that paid TD Bank Transaction ATM fees as a result of using a non-TD Bank owned ATM.

The “**New York Balance Inquiry Class**” is composed of owners of bank checking accounts maintained through a TD Bank branch in the state of New York. that paid TD Bank Balance Inquiry fees as a result of using a non-TD Bank owned ATM.³

60. **Excluded from the Class.** Any entity in which TD Bank has a controlling

³ For ease of reference, the Nationwide Classes and the State Sub-Classes shall be referred to in this Complaint inclusively as the “Class.”

interest, officers or director of TD Bank, any judicial officer assigned to the case, or a customer who has released all of their claims arising from overdraft fees against TD Bank. Subject to additional information obtained through further investigation and discovery, the foregoing Class definitions may be expanded or narrowed by amendment or amended complaint. Plaintiff expressly reserve the right to move for class certification of different state classes and subclasses.

61. **Numerosity of the Class.** The members of the Class are so numerous that a joinder of all members would be impracticable. While the exact number of the members of the Class is unknown to Plaintiff at this time and can be determined only by appropriate discovery, Plaintiff believe that the Class is likely to include thousands of members. Inasmuch as the Class members may be identified through business records regularly maintained by TD Bank and its employees and agents, and through the media, the number and identities of Class members can be ascertained. Members of the Class can be notified of the pending action by e-mail and mail and supplemented by published notice, if necessary.

62. **Existence and Predominance of Common Question of Fact and Law.** There are questions of law and fact common to Plaintiff and the Class. These questions predominate over any questions affecting only individual Class members. These common legal and factual issues include, but are not limited to:

1. Whether Class members had common contracts, or common contract language, with TD Bank;
2. Whether the contracts with TD Bank, including but not limited to the Account Agreement, were contracts of adhesion;
3. Whether TD Bank had a standard policy of charging fees from customers for a non-TD Bank owned ATM transaction;
4. Whether TD Bank breached its customer agreements by assessing ATM fees, including multiple fees during the course of a single non-TD Bank owned ATM transaction; and

5. Whether TD Bank's conduct violated New Jersey's Consumer Fraud Act.

63. **Typicality.** Plaintiff's claims are typical of all members of the Class. The evidence and the legal theories regarding TD Bank's alleged wrongful conduct are identical or substantially similar to Plaintiff and all of the Class members.

64. **Adequacy.** Plaintiff will fairly and adequately protect the interests of the Class members. Plaintiff have retained competent counsel experienced in class action litigation, and specifically with experience in class action litigation involving bank practices, to ensure such protection. Plaintiff and her counsel will prosecute this action vigorously.

65. **Predominance and Superiority.** This suit 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 the questions affecting only individual members of the Class, and a class action is superior to other available means for the fair and efficient adjudication of this dispute. Because the injuries suffered by the Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for Plaintiff and Class members individually to seek redress for the alleged wrongful conduct. Even if any individual persons or group(s) of Class members could afford individual litigation, it would be unduly burdensome to the courts in which the individual litigation(s) would proceed. The class action device is preferable to individual litigation(s) because it provides the benefits of unitary adjudication, economies of scale, and comprehensive adjudication by a single court. In contrast, the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for the party (or parties) opposing the Class, and thus lead to repetitious trials of the numerous common questions of fact and law involved in this case. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action. As a result, 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 and allowing TD Bank to retain the proceeds of its ill-gotten gains.

66. Plaintiff contemplates the eventual issuance of notice to the proposed Class members setting forth the subject and nature of the instant action. Upon information and belief, TD Bank's own business records and electronic media can be utilized for the contemplated notices. To the extent that any further notices may be required, Plaintiff would contemplate the use of additional media and/or mailings.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(For Breach of Contract)

67. Plaintiff and the Nationwide Classes (or in the alternative, the State Sub-Classes) incorporate by reference each preceding and succeeding paragraph as those fully set forth at length herein.

68. Plaintiff and each of the Class members entered into a contract with TD Bank that included the Account Agreement and Fee Schedules covering the subject of TD Bank's fees in conjunction with using the TD Bank issued debit card. As described above, Defendant's actions have violated specific terms of the account agreements with customers, including other documents referenced therein. TD Bank is liable for the losses of Plaintiff and the Class that have resulted from TD Bank's breaches of the parties' contractual agreements.

69. Plaintiff and the Class have performed all, or substantially all, conditions, covenants, and promises required by each of them on their part 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 TD Bank's misconduct.

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

SECOND CAUSE OF ACTION

(Violation of New Jersey's Consumer Fraud Act, N.J. Stat. Ann. § 56:8-1, *et seq.*)

71. Plaintiff and the Nationwide Classes (or in the alternative, the State Sub-Classes) incorporate by reference each preceding and succeeding paragraph as those fully set forth at length herein.

72. Plaintiff who has suffered injury in fact and has lost money or property as a result of TD Bank's violations of New Jersey's Consumer Fraud Act ("NJCFA"), alleges this cause of action as a class action.

73. 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. Stat. Ann. § 56:8-2.

74. TD Bank entered into contracts with its customers in which TD Bank chose the language to bind the parties relating to describing and disclosing the circumstances when TD Bank was authorized to assess and collect fees for use at a non-TD Bank owned ATM.

75. TD Bank has engaged in unlawful conduct as a general business practice by breaching those contracts and misrepresenting its practices in the contracts.

76. By engaging in the above-described practice and the actions and omissions herein alleged, TD Bank has committed one or more unlawful acts in violation of the NJCFA.

77. Plaintiff justifiably relied on TD Bank's contracts, disclosures, representations, and omissions in expecting that TD Bank would implement its policies and procedures consistent with its contracts and disclosures.

78. TD Bank intended for customers to rely on the contracts and disclosures with regarding to how it would implement its policies and procedures, including the manner in which it imposes fees on its customers.

79. Had Plaintiff and the Class known the actual facts or legal implications of those acts, they would have avoided the fees discussed in this complaint. Therefore, a causal

relationship exists between TD Bank's unlawful conduct and the ascertainable losses suffered by Plaintiff and the Class.

80. By reason of the foregoing, TD Bank 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 disgorged and restored to Plaintiff and the Class members all improperly taken monies as a result of their conduct as alleged herein.

81. TD Bank's conduct caused Plaintiff and Class members to suffer an ascertainable loss. In addition to direct monetary losses, Plaintiff and the Class have suffered an ascertainable loss in that they received less than what was promised to them by TD Bank 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.

82. As a result, Plaintiff and the Class have suffered an ascertainable loss of monies and pursuant to NJ Stat. § 56:8-19 is entitled to threefold damages.

THIRD CAUSE OF ACTION

(Breach of the Duty of Good Faith and Fair Dealing)

83. Plaintiff and the Nationwide Classes (or in the alternative, the State Sub-Classes) incorporate by reference each preceding and succeeding paragraph as though fully set forth at length herein.

84. Every contract contains an implied covenant of good faith and fair dealing.

85. TD Bank breached the covenant of good faith and fair dealing by, *inter alia*, assessing non-TD Bank owned ATM fees when not authorized to do so by its contract with Plaintiff and the Class.

86. TD Bank acted in bad faith and/or with a malicious motive to deny Plaintiff and the Class members some benefit of the bargain originally intended by the parties, thereby causing them injuries in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class pray for judgment as follows:

1. For an order certifying this action as a class action;
2. For an order appointing Plaintiff as representative of the Class and her counsel of record as Class counsel;
3. For an award of actual, general, special, incidental, statutory, compensatory and consequential damages on all applicable claims and in an amount to be proven at trial;
4. For an award of exemplary and punitive and treble damages on all applicable claims and in an amount to be proven at trial;
5. For an order requiring Defendant to disgorge, restore, and return all monies wrongfully obtained together with interest calculated at the maximum legal rate;
6. For costs;
7. For interest;
8. For attorneys' fees under applicable law; and
9. For such other relief as the Court deems just and proper.

DATED: May 6, 2020

By: /s/ Michele M. Vercoski

Michele M. Vercoski, NJ Bar No. 031012004
mmv@mccunewright.com
Richard D. McCune, CA Bar No. 132124*
rdm@mccunewright.com
David C. Wright, CA Bar No. 177468*
dcw@mccunewright.com
MCCUNE • WRIGHT • AREVALO LLP
3281 E. Guasti Road, Suite 100
Ontario, CA 91761
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Elaine S. Kusel, NJ Bar No. 319302020
esk@mccunewright.com
MCCUNE • WRIGHT • AREVALO LLP
One Gateway Center, Suite 2600
Newark, NJ 07102
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Emily J. Kirk, IL Bar No. 6275282*
ejk@mccunewright.com
MCCUNE • WRIGHT • AREVALO LLP
231 N. Main Street, Suite 20
Edwardsville, IL 62025
Telephone: (618) 307-6116
Facsimile: (618) 307-6161

Taras Kick, CA Bar No. 143379*
Taras@kicklawfirm.com
THE KICK LAW FIRM, APC
815 Moraga Drive
Los Angeles, CA 90049
Telephone: (310) 395-2988
Facsimile: (310) 395-2088

Attorneys for Plaintiff Denise Galgano dba
Shear Envy Hair Studio and the Putative Class

**Pro Hac Vice* applications to be submitted

JURY DEMAND

Plaintiff, on behalf of herself and the putative Class, demand a trial by jury on all issues so triable.

DATED: May 6, 2020

By: /s/ Michele M. Vercoski
Michele M. Vercoski, NJ Bar No. 031012004
mmv@mccunewright.com
Richard D. McCune, CA Bar No. 132124*
rdm@mccunewright.com
David C. Wright, CA Bar No. 177468*
dcw@mccunewright.com
MCCUNE • WRIGHT • AREVALO LLP
3281 E. Guasti Road, Suite 100
Ontario, CA 91761
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Elaine S. Kusel, NJ Bar No. 319302020
esk@mccunewright.com
MCCUNE • WRIGHT • AREVALO LLP
One Gateway Center, Suite 2600
Newark, NJ 07102
Telephone: (909) 557-1250
Facsimile: (909) 557-1275

Emily J. Kirk, IL Bar No. 6275282*
ejk@mccunewright.com
MCCUNE • WRIGHT • AREVALO LLP
231 N. Main Street, Suite 20

Edwardsville, IL 62025
Telephone: (618) 307-6116
Facsimile: (618) 307-6161

Taras Kick, CA Bar No. 143379*
Taras@kicklawfirm.com
THE KICK LAW FIRM, APC
815 Moraga Drive
Los Angeles, CA 90049
Telephone: (310) 395-2988
Facsimile: (310) 395-2088

Attorneys for Plaintiff Denise Galgano dba
Shear Envy Hair Studio and the Putative Class

**Pro Hac Vice* applications to be submitted