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26 **UNITED STATES DISTRICT COURT**
27 **SOUTHERN DISTRICT OF CALIFORNIA**

28 SARA HILL, on behalf of herself) Case No : '20CV1016 BEN WVG
and all others similarly situated,) **CLASS ACTION COMPLAINT**
Plaintiff,)
vs.) **[DEMAND FOR JURY TRIAL]**
BBVA USA, an Alabama Corporation)
Defendants.)

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CLASS ACTION COMPLAINT

Plaintiff Sarah Hill on behalf of herself and all persons similarly situated, allege the following based on personal knowledge as to allegations regarding the Plaintiff and on information and belief as to other allegations.

INTRODUCTION

1. Plaintiff brings this action on behalf of themselves, the general public, and classes of all similarly situated consumers against Defendant BBVA USA (“BBVA” or “Bank”), arising from their routine practices of (a) assessing OD Fees on transactions that did not actually overdraw the account; and (b) charging more than one non-sufficient funds fee (“NSF Fee”) on a single item.

2. BBVA misleadingly and deceptively misrepresents the above practices in its publicly available marketing materials, including its own account contracts. BBVA also omits material facts pertaining to each of the above practices in its publicly available marketing materials, including its account contracts.

3. BBVA’s customers have been injured by BBVA’s improper practices to the tune of millions of dollars bilked from their accounts in violation of their agreements with BBVA.

4. In addition, the deception, aimed at general public, continues to this day. BBVA’s account contracts (including the Consumer Account Deposit Agreement and the Fee Schedule) and marketing materials (including the

1 Overdraft Disclosure) and are publicly available online and in BBVA branches to
2 all current and prospective accountholders. The general public relies on
3 representations in these documents in making important financial decisions
4 regarding with whom they would like to open a checking account. Consumers who
5 have already opened accounts also rely on the misrepresentations and omissions in
6 the publicly available account documents when making every day financial
7 transactions.
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11 5. The Pew Charitable Trusts has emphasized the importance of
12 transparent checking account fee disclosures for both comparison shopping for
13 checking accounts and for effective fee avoidance:
14

15 Bank accounts are an essential financial product, used by 9 in 10
16 American households, and need to be safe and transparent. Account
17 agreements and fee schedules provide customers with account costs,
18 terms, and conditions. Among the largest U.S. banks, however, the
19 median length of checking account disclosure documents is 40 pages,
20 and the information is presented in varied formats with inconsistent
21 wording, making it difficult for consumers to easily find the
22 information they need to comparison shop, avoid overdraft and other
23 fees, and manage their money.

24 The Pew Trusts, “The Benefits of Uniform Checking Account Disclosures.”

25 6. Members of the public considering opening a checking account have
26 the right to accurate information regarding the checking accounts they are
27 considering. Research shows that fees are the most important factor influencing
28 consumers’ selection of a new banking provider. *See* Ron Shevlin, “How

1 Consumers Choose a Bank: A Tale of Two Surveys.” Insight Vault, Cornerstone
2 Advisors, 23 Aug. 2018, www.cornstone.com/insightvault/2018/08/23/how-
3 [consumers-choose-a-bank-a-tale-of-two-surveys/](http://www.cornstone.com/insightvault/2018/08/23/how-consumers-choose-a-bank-a-tale-of-two-surveys/) (summarizing two consumer
4 surveys that revealed that the most important factor influencing consumers’
5 selection of a new banking provider is the amount of fees charged); Claire Greene
6 and Joanna Stavins, The 2016 and 2017 Surveys of Consumer Payment Choice:
7 Summary Results. Federal Reserve Bank of Boston, 10 May 2018,
8 www.bostonfed.org/publications/research-data-report/2018/the-2016-and-2017-
9 [surveys-of-consumer-payment-choice-summary-results.aspx](http://www.bostonfed.org/publications/research-data-report/2018/the-2016-and-2017-surveys-of-consumer-payment-choice-summary-results.aspx) (finding that 4 in 10
10 consumers who did not have a bank account cited expense as the reason, including
11 “fees and service charges are too high.”).

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16 7. Reasonable consumers would not agree to open BBVA checking
17 accounts if they were informed, for example, that they could incur overdraft fees
18 on transactions that did not overdraw their account; could incur two or three
19 insufficient funds fees on a single attempted electronic payment; or could incur
20 three or four discrete ATM fees for a single out-of-network ATM use.

21
22
23 8. On behalf of themselves, the general public, and the Classes, Plaintiff
24 seek damages, restitution, and public injunctive relief for Defendant’ breach of
25 contract and violations of California’s consumer protection laws.
26

27 //
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1 **PARTIES**

2 9. Sarah Hill is a resident of San Diego, California and holds a BBVA
3 checking account.
4

5 10. Defendant BBVA USA is engaged in the business of providing retail
6 banking services to consumers, including Hill and members of the putative
7 Classes, which includes the issuance of debit cards for use by its customers in
8 conjunction with their checking accounts. BBVA USA operates banking centers,
9 and thus conducts business, throughout the State of California and the United
10 States.
11
12

13 **JURISDICTION AND VENUE**

14 11. BBVA USA regularly and systematically provides retail banking
15 services throughout the State of California, including in this county, and provides
16 retail banking services to its customers, including members of the putative Class.
17 As such, it is subject to the personal jurisdiction of this Court.
18

19 12. This Court has original jurisdiction of this action under the Class
20 Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this
21 Court has original jurisdiction because the aggregate claims of the putative class
22 members exceed \$5 million, exclusive of interest and costs, and at least one of the
23 members of the proposed classes is a citizen of a different state than BBVA.
24
25
26

27 //

28

1 13. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because
2 BBVA is subject to personal jurisdiction here and regularly conducts business in
3 this District, and because Plaintiff was assessed fees in this district
4

5 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

6 **I. BBVA CHARGES OD FEES ON TRANSACTIONS THAT DO NOT**
7 **ACTUALLY OVERDRAW THE ACCOUNT**

8 **A. Overview of Claim**

9 14. Plaintiff bring this cause of action challenging BBVA’s practice of
10 charging overdraft fees on what are referred to in this complaint as “Authorize
11 Positive, Purportedly Settle Negative Transactions,” or “APPSN Transactions.”
12

13 15. Here is how it works. At the moment debit card transactions are
14 authorized on an account with positive funds to cover the transaction, BBVA
15 immediately reduces consumers’ checking accounts for the amount of the
16 purchase, sets aside funds in a checking account to cover that transaction, and as a
17 result, the consumer’s displayed “available balance” reflects that subtracted
18 amount. As a result, customers’ accounts will always have sufficient available
19 funds available to cover these transactions because BBVA has already sequestered
20 these funds for payment.
21

22 16. However, BBVA still assesses crippling \$32 OD Fee on many of
23 these transactions and misrepresents its practices in its account documents.
24

25 //

1 17. Despite putting aside sufficient available funds for debit card
2 transactions at the time those transactions are authorized, BBVA later assesses OD
3 Fees on those same transactions when they purportedly settle days later into a
4 negative balance. These types of transactions are APPSN transactions.
5

6 18. BBVA maintains a running account balance in real time, tracking
7 funds consumers have for immediate use. This running account balance is adjusted,
8 in real-time, to account for debit card transactions at the precise instance they are
9 made. When a customer makes a purchase with a debit card, BBVA sequesters the
10 funds needed to pay the transaction, subtracting the dollar amount of the
11 transaction from the customer's available balance. Such funds are not available for
12 any other use by the accountholder, and such funds are specifically associated with
13 a given debit card transaction.
14
15
16
17

18 19. Indeed, the entire purpose of the immediate debit and hold of positive
19 funds is to ensure that there are enough funds in the account to pay the transaction
20 when it settles, as discussed in the Federal Register notice announcing revisions to
21 certain provisions of the Truth in Lending Act regulations:
22

23 When a consumer uses a debit card to make a purchase, a hold may be
24 placed on funds in the consumer's account to ensure that the
25 consumer has sufficient funds in the account when the transaction is
26 presented for settlement. This is commonly referred to as a "debit
27 hold." During the time the debit hold remains in place, which may be
28 up to three days after authorization, those funds may be unavailable
for the consumer's use for other transactions.

1 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union
2 Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29,
3 2009).
4

5 20. That means when any *subsequent*, intervening transactions are
6 initiated on a checking account, they are compared against an account balance that
7 has already been reduced to account for any earlier debit card transactions. This
8 means that many subsequent transactions incur OD Fees due to the unavailability
9 of the funds sequestered for those debit card transactions.
10
11

12 21. Still, despite keeping those held funds off-limits for other transactions,
13 BBVA improperly charges OD Fees on those APPSN Transactions, although the
14 APPSN transactions *always* have sufficient available funds to be “covered.”
15

16 22. Indeed, the Consumer Financial Protection Bureau (“CFPB”) has
17 expressed concern with this very issue, flatly calling the practice “deceptive”
18 when:
19

20
21 A financial institution authorized an electronic transaction, which
22 reduced a customer’s available balance but did not result in an
23 overdraft at the time of authorization; settlement of a subsequent
24 unrelated transaction that further lowered the customer’s available
25 balance and pushed the account into overdraft status; and when the
26 original electronic transaction was later presented for settlement,
27 because of the intervening transaction and overdraft fee, the electronic
28 transaction also posted as an overdraft and an additional overdraft fee
was charged. Because such fees caused harm to consumers, one or
more supervised entities were found to have acted unfairly when they
charged fees in the manner described above. Consumers likely had no

1 reason to anticipate this practice, which was not appropriately
2 disclosed. They therefore could not reasonably avoid incurring the
3 overdraft fees charged. Consistent with the deception findings
4 summarized above, examiners found that the failure to properly
5 disclose the practice of charging overdraft fees in these circumstances
6 was deceptive. At one or more institutions, examiners found deceptive
7 practices relating to the disclosure of overdraft processing logic for
8 electronic transactions. Examiners noted that these disclosures created
9 a misimpression that the institutions would not charge an overdraft fee
10 with respect to an electronic transaction if the authorization of the
11 transaction did not push the customer's available balance into
12 overdraft status. But the institutions assessed overdraft fees for
13 electronic transactions in a manner inconsistent with the overall net
14 impression created by the disclosures. Examiners therefore concluded
15 that the disclosures were misleading or likely to mislead, and because
16 such misimpressions could be material to a reasonable consumer's
17 decision-making and actions, examiners found the practice to be
18 deceptive. Furthermore, because consumers were substantially injured
19 or likely to be so injured by overdraft fees assessed contrary to the
20 overall net impression created by the disclosures (in a manner not
21 outweighed by countervailing benefits to consumers or competition),
22 and because consumers could not reasonably avoid the fees (given the
23 misimpressions created by the disclosures), the practice of assessing
24 fees under these circumstances was found to be unfair.

19 Consumer Financial Protection Bureau, Winter 2015 "Supervisory
20 Highlights."

21
22 23. There is no justification for these practices, other than to maximize
23 BBVA's overdraft fee revenue. APPSN Transactions only exist because
24 intervening checking account transactions supposedly reduce an account balance.
25
26 But BBVA is free to protect its interests and either reject those intervening
27 transactions or charge OD Fees on those intervening transactions—and it does the
28

1 latter to the tune of millions of dollars each year. But BBVA was not content with
2 these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these
3 APPSN Transactions.
4

5 24. Besides being deceptive, unfair, and unconscionable, these practices
6 breach contract promises made in BBVA’s adhesion contracts—contracts which
7 fundamentally misconstrue and mislead consumers about the true nature of
8 BBVA’s processes and practices. These practices also exploit contractual
9 discretion to gouge consumers.
10
11

12 25. In plain, clear, and simple language, the checking account contract
13 documents covering overdraft fees promise that BBVA will only charge overdraft
14 fees on transactions that have insufficient funds to “cover” that transaction.
15

16 26. In short, BBVA is not authorized by contract to charge OD Fees on
17 transactions that have not overdrawn an account, but it has done so and continues
18 to do so.
19

20
21 **B. Mechanics of a Debit Card Transaction**

22 27. A debit card transaction occurs in two parts. First, authorization for
23 the purchase amount is instantaneously obtained by the merchant from BBVA.
24 When a merchant physically or virtually “swipes” a customer’s debit card, the
25 credit card terminal connects, via an intermediary, to BBVA, which verifies that
26 the customer’s account is valid and that sufficient available funds exist to “cover”
27
28

1 the transaction amount.

2 28. At this step, if the transaction is approved, BBVA immediately
3
4 decrements the funds in a consumer’s account and sequesters funds in the amount
5 of the transaction, but does not yet transfer the funds to the merchant.

6 29. Indeed, the entire purpose of the immediate debit and hold of positive
7
8 funds is to ensure that there are enough funds in the account to pay the transaction
9
10 when it settles, as discussed in the Federal Register notice announcing revisions to
11 certain provisions of the Truth in Lending Act regulations:

12 When a consumer uses a debit card to make a purchase, a hold may be
13 placed on funds in the consumer’s account to ensure that the
14 consumer has sufficient funds in the account when the transaction is
15 presented for settlement. This is commonly referred to as a “debit
16 hold.” During the time the debit hold remains in place, which may be
17 up to three days after authorization, those funds may be unavailable
for the consumer’s use for other transactions.

18 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union
19 Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29,
20 2009).

21
22 30. Sometime thereafter, the funds are actually transferred from the
23 customer’s account to the merchant’s account. This is referred to in the banking
24 industry as “posting” or “settling”—something which may occur several days after
25 the transaction was initially initiated.
26
27

28 31. There is no change—no impact whatsoever—to the available funds in

1 an account when posting or payment of a transaction that settles in the same
2 amount for which it authorized occurs. That is because available funds amounts do
3 not change for debit card transactions that settle in the same amount for which they
4 were authorized.
5

6
7 **C. BBVA's Account Contract**

8 32. Plaintiff has a BBVA checking account, which is governed by
9 BBVA's standardized Consumer Account Agreement.

10 33. The standardized Consumer Account Agreement is a publicly
11 available document available online and in BBVA branches to all current and
12 prospective accountholders. Consumers, and the general public, rely on account
13 agreements like BBVA's in making important financial decisions regarding to
14 whom they would like to entrust their money. In addition, BBVA accountholders
15 rely on the Consumer Deposit Account Agreement in making every day financial
16 transactions and predicting which transactions will incur fees and for how much.
17
18

19 34. The Consumer Deposit Account Agreement and relevant contract
20 documents covering overdraft fees provide that BBVA will only charge OD Fees
21 on transactions with insufficient funds to cover a given transaction:
22
23

24 Available Balance. The balance of funds in your account that is available for
25 immediate withdrawal. Unlike the posted balance, the available balance
26 reflects any holds placed on your account, including the restrictions
27 described in the Funds Availability Disclosure included with this
28 Agreement. Your available balance may be more or less than the amount of
your posted balance, but does not include any credit available under any

1 BBVA USA Overdraft Protection Line of Credit you may have.

2 [...]

3
4 If an item was initiated at a point-of-sale terminal or is a VISA transaction or
5 ATM transaction, you agree that we may charge the amount of the item to
6 your account or place a hold on your account in the amount requested by the
7 merchant immediately upon authorization of such transaction, even though
8 we have not then actually received the item for payment. We will make
9 payment for a transaction only after the actual transaction is presented to us
physically or electronically. Each such hold will reduce the available balance
in your account by the amount of the hold.

10 [...]

11
12 Insufficient Available Balance and Overdrafts. If your available
13 balance is insufficient to pay the total amount of items presented
14 against your account, we may, at our option, return any of the items
15 unpaid or pay any or all of the items, even though payment will cause
16 an overdraft of your account. We may return any item at any time if
17 your available balance is insufficient to pay that item, even if we
18 previously have permitted overdrafts. You are not entitled to rely on
19 any prior act by us with respect to your account. Our election to pay
20 overdrafts does not establish a course of dealing between you and us
21 or modify the terms of this Agreement. You agree that, if your
available balance is insufficient to pay any item presented against
your account, you will pay promptly both our service charge for
handling and processing that item and the amount of any overdraft
without further notice or demand.

22 Exhibit A, Consumer Account Agreement.

23
24 35. The “What You Need to Know about Overdrafts and Overdraft Fees”
25 disclosure (“Overdraft Disclosure”) also contains important representations.
26 Consumers, and the general public, rely on the Overdraft Disclosure in making
27 important financial decisions regarding to whom they would like to entrust their
28

1 money. In addition, BBVA accountholders rely on the Overdraft Disclosure in
2 making every day financial transactions and predicting which transactions will
3 incur fees and for how much. The Overdraft Disclosure states:
4

5 An overdraft occurs when you do not have enough money in your
6 account to cover a transaction, but the transaction is paid anyway.

7 [...]

8
9 We may, at our discretion, authorize and pay overdrafts for the
10 following types of transactions: (i) checks and other transactions made
11 using your checking account number; and (ii) automatic bill payments.
12 If you do not want BBVA to authorize and pay overdrafts arising from
13 checks and other transactions made using your checking account
14 number and from automatic bill payments, you must opt-out of our
15 standard overdraft practices for these types of transactions.

16 36. The critical contract term “to cover” is never defined.

17 37. For APPSN Transactions, which are immediately deducted from a
18 positive account balance and held aside for payment of that same transaction, there
19 are always funds to “cover” those transactions—yet BBVA assesses OD Fees on
20 them anyway.

21 38. Moreover, the Overdraft Disclosure reaffirms that debit card
22 transactions are “authorized and paid” immediately in one fell swoop. BBVA
23 clarifies that authorization and payment are linked and essentially a coterminous
24 process—in other words, that authorization necessitates payment, and account
25 balances are deducted once for any given transaction.
26
27
28

1 39. In fact, BBVA actually “authorizes” transactions on positive funds,
2 sets those funds aside on hold, then fails to use those same funds to “pay” those
3 same transactions when they settle. Instead, it uses a secret posting process
4 described below.

5
6 40. All these representations and contractual promises are untrue. In fact,
7 BBVA charges OD Fees even when sufficient funds exist to “cover” transactions
8 that are “authorized and approved” into a positive balance. No express language in
9 any document states that BBVA may impose overdraft fees on any APPSN
10 Transactions.

11 41. The account documents misconstrue BBVA’s true debit card
12 processing and overdraft practices.

13
14 42. First, and most fundamentally, BBVA charges overdraft fees on debit
15 card transactions for which there are sufficient funds available to “cover” the
16 transactions. That is despite contractual representations that BBVA will only
17 charge overdraft fees on transactions with insufficient available funds to “cover” a
18 given transaction.

19
20 43. BBVA assesses OD Fees on APPSN Transactions that *do* have
21 sufficient funds available to “cover” them throughout their lifecycle.

22
23 44. BBVA’s practice of charging OD Fees even when sufficient available
24 funds exist to “cover” a transaction violates a contractual promise not to do so.
25
26
27
28

1 This discrepancy between BBVA's actual practice and the contract causes
2 consumers like Plaintiff to incur more overdraft fees than they should.

3
4 45. Next, sufficient funds for APPSN Transactions are actually debited
5 from the account immediately, consistent with standard industry practice.

6
7 46. Because these withdrawals take place upon initiation, they cannot be
8 re-debited later. But that is what BBVA does when it re-debits the account during a
9 secret batching posting process.

10
11 47. In reality, BBVA's actual practice is to assay the same debit card
12 transaction twice to determine if the transaction overdraws an account—both at the
13 time a transaction is authorized and later at the time of settlement.

14
15 48. At the time of settlement, however, an available balance *does not*
16 *change at all* for these transactions previously authorized into good funds. As such,
17 BBVA cannot then charge an overdraft fee on such transaction because the
18 available balance has not been rendered insufficient due to the pseudo-event of
19 settlement.
20
21

22 49. Upon information and belief, something more is going on: at the
23 moment a debit card transaction is getting ready to settle, BBVA does something
24 new and unexpected, during the middle of the night, during its nightly batch
25 posting process. Specifically, BBVA releases the hold placed on funds for the
26 transaction for a split second, putting money back into the account, then re-debits
27
28

1 the same transaction a second time.

2 50. This secret step allows it to charge overdraft fees on transactions that
3 never should have gotten them—transactions that were authorized into sufficient
4 funds, and for which BBVA specifically set aside money to pay them.
5

6 51. This discrepancy between BBVA’s actual practices and the contract
7 causes consumers to incur more overdraft fees than they should.
8

9 52. In sum, there is a huge gap between BBVA’s practices as described in
10 the account documents and BBVA’s practices in reality.
11

12 **D. BBVA Abuses Contractual Discretion**

13 53. BBVA’s treatment of debit card transactions to charge overdraft fees
14 is not simply a breach of the express terms of the numerous account documents. In
15 addition, BBVA exploits contractual discretion to the detriment of accountholders
16 when it uses these policies.
17

18 54. The terms “hold” and “to cover” a transaction is undefined. BBVA
19 uses its discretion to define “hold” and “to cover” in a manner contrary to any
20 reasonable, common sense understanding of that term. In BBVA’s implied
21 definition, a transaction is not “covered” even if BBVA sequesters sufficient
22 available funds for that transaction.
23
24

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1 55. Moreover, BBVA uses its contractual discretion to cause APPSN
2 Transactions to incur overdraft fees by knowingly authorizing later transactions
3 that it allows to consume available funds previously sequestered for APPSN
4 Transactions.
5

6 56. BBVA uses all of these contractual discretion points unfairly to
7 extract overdraft fees on transactions that no reasonable consumer would believe
8 could cause overdraft fees.
9

10
11 **E. Plaintiff Hill’s Debit Card Transactions**

12 57. By way of example only, on December 6, 2019, Plaintiff was charged
13 an overdraft fee in the amount of \$32 for a debit card transaction that settled that
14 day, despite the fact that positive funds were deducted immediately for that
15 transaction on which she was assessed an overdraft fee at the time of authorization.
16

17 **II. BBVA CHARGES MULTIPLE NSF FEES ON THE SAME ITEM**

18 **A. Overview of Claim**

19
20 58. Plaintiff brings this cause of action challenging BBVA’s imposition of
21 more than one NSF Fee on the same item.
22

23 59. As discussed more fully below, it is a breach of the Bank’s contract
24 and of reasonable consumers’ expectations for the Bank to charge more than one
25 NSF Fee, on the *same item*, since the contract explicitly states—and reasonable
26 consumers understand—that the same item cannot more than one fee.
27

28 //

1 **B. Plaintiff Hill’s Experience**

2 60. By way example only, on September 13, 2019, Ms. Hill attempted to
3 make a transfer to Paypal in the amount of \$4.19. Because Ms. Hill had
4 insufficient funds in her account, BBVA rejected that payment request and charged
5 Ms. Hill a \$32 NSF Fee for doing so. Unbeknownst to Plaintiff, that very same
6 item was processed again by BBVA days later, on September 24, with BBVA
7 calling the transaction a “RETRY PAYMENT” on the bank statement. This time,
8 BBVA again returned the item for insufficient funds and charged Plaintiff a \$32
9 OD Fee for doing so. In sum, *BBVA charged Plaintiff \$64 in fees to process a*
10 *single bill payment of \$4.19.*

11
12 61. Ms. Hill took no affirmative action to reinitiate or resubmit the item.

13
14 62. Plaintiff understood the Paypal transfer to be a single item, capable at
15 most of receiving a single NSF *or* OD Fee. BBVA itself also understood the
16 transaction to be a single item, and its systems categorized it as such. Indeed, on
17 Ms. Hill’s bank statements, BBVA described subsequent attempts to debit the
18 transaction as “RETRY PAYMENT.”

19 63. Instead—and unlike of BBVA’s major competitors such as JP Morgan
20 Chase, which does not charge multiple NSF or OD Fees on the same item—BBVA
21 charges more than one NSF Fee on the same item.

22
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25
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27 //

28

1 64. BBVA has charged Plaintiff this deceptive fee numerous times on a
2 variety of similar transactions.
3

4 **C. Relevant Account Documents**

5 65. The account documents promise that only one NSF Fee or OD Fee
6 will be charged per item.
7

8 66. The Fee Schedule is a publicly available document available online
9 and in BBVA branches to all current and prospective accountholders. Consumers,
10 and the general public, rely on the Fee Schedule in making important financial
11 decisions regarding to whom they would like to entrust their money and predicting
12 which transactions will incur fees and for how much. In addition, BBVA
13 accountholders rely on the Fee Schedule in making every day financial
14 transactions.
15
16

17 67. According to the Fee Schedule:

18 Insufficient Funds (NSF) Charge - Returned Item \$32 Per returned item
19 presented against insufficient funds
20

21 [...]

22 Insufficient Funds Charge (NSF) - Returned Item \$32 per item
23 Fee Schedule, Exhibit B.
24

25 68. The Consumer Deposit Account Agreement also supports these
26 promises, especially when it defines “Item” as:

27 Item. A check, substitute check, draft, withdrawal order, payment
28 order, or other similar instrument, order or instruction, whether oral,

1 written or electronic, either for the deposit of funds to your account or
2 for the payment of funds from your account. Items include debits and
3 credits for point-of-sale, ATM, and Debit Card transactions.

4 “Consumer Account Agreement, Important legal information, disclosures, and
5 terms you need to know,” *see* Exhibit A, p. 1 (“Consumer Deposit Account
6 Agreement”).

8 69. The general public relies on marketing materials like the above in
9 making important financial decisions regarding to whom they would like to entrust
10 their money.

12 70. The terms of those agreements are starkly binary: for a given item,
13 the Bank may assess only a single fee.

15 71. This abusive practice is not universal in the banking industry. Indeed,
16 major banks like Chase—the largest consumer bank in the country—do not
17 undertake the practice of charging more than one NSF or OD Fee on the same item
18 when it is submitted for payment multiple times.

21 72. Banks like Defendant know how to plainly and clearly disclose this
22 abusive practice. Indeed, other banks that do engage in this abusive practice
23 disclose it expressly to their accountholders—something Defendant here never did.

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

27 //

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

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

9
10 YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO
11 SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT
12 MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT
13 OF A RETURNED ITEM AND RESUBMISSION.

14 75. Klein Bank similarly states in its Online Banking Agreement:

15 [W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment
16 (electronic or check) is submitted to us for payment from your Bill Payment
17 Account when, at the time of posting, your Bill Payment Account is overdrawn,
18 would be overdrawn if we paid the item (whether or not we in fact pay it) or does
19 not have sufficient available funds; or (2) we return, reverse, or decline to pay an
20 item for any other reason authorized by the terms and conditions governing your
21 Bill Payment Account. We will charge an NSF/Overdraft Fee as provided in this
22 section regardless of the number of times an item is submitted or resubmitted to us
23 for payment, and regardless of whether we pay the item or return, reverse, or
24 decline to pay the bill payment.
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1 76. BBVA intentionally provides no such disclosure, in an effort to
2 deceive its accountholders.
3

4 **D. BBVA Abuses Contractual Discretion**

5 77. To the extent the account documents do not explicitly bar the policies
6 described above, BBVA exploits contractual discretion to the detriment of
7 accountholders and breaches good faith and fair dealing when it uses these
8 policies.
9

10 78. The Bank uses its discretion to define the meaning of “item” in an
11 unreasonable way that violates common sense and reasonable consumer
12 expectations. BBVA uses its contractual discretion to set the meaning of that term
13 to choose a meaning that directly causes more NSF Fees or OD Fees.
14
15

16 **CLASS ACTION ALLEGATIONS**

17 79. Plaintiff bring this action on behalf of themselves and on behalf of all
18 others similarly situated. The Classes include:
19

20 All holders of a BBVA checking and/or money market account in
21 California who, within the applicable statute of limitations preceding
22 the filing of this lawsuit, incurred more than one NSF Fee on the same
23 item (the “Multiple Fee Class”).

24 All holders of a BBVA checking account in California who, within
25 the applicable statute of limitations preceding the filing of this
26 lawsuit, were charged OD Fees on transactions that were authorized
27 into a positive available balance (the “APPSN Class”).

28 All consumers in California eligible to open a BBVA checking
account (the “Injunctive Relief Class”).

1 80. Excluded from the Classes are Defendant, their subsidiaries and
2 affiliates, their officers, directors and member of their immediate families and any
3 entity in which defendants have a controlling interest, the legal representatives,
4 heirs, successors or assigns of any such excluded party, the judicial officer(s) to
5 whom this action is assigned, and the members of their immediate families.
6
7

8 81. Plaintiff reserve the right to modify or amend the definition of the
9 proposed Classes and/or to add a Subclass(es) if necessary before this Court
10 determines whether certification is appropriate.
11

12 82. The questions here are ones of common or general interest such that
13 there is a well-defined community of interest among the class members. These
14 questions predominate over questions that may affect only individual class
15 members because BBVA has acted on grounds generally applicable to the classes.
16
17 Such common legal or factual questions include, but are not limited to:
18

- 19 a) Whether BBVA improperly charged multiple NSF Fees on the
20 same item;
- 21 b) Whether BBVA improperly charged OD Fees on APPSN
22 Transactions;
- 23 c) Whether such conduct enumerated above violates the contract;
- 24 d) Whether such conduct is deceptive or in bad faith;

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- 1 e) Whether Plaintiff and other members of the Classes have sustained
- 2 damages as a result of BBVA wrongful business practices
- 3 described herein, and the proper measure of damages; and
- 4 f) Whether BBVA's fee disclosures are deceptive and misleading to
- 5 both U.S. Bank customers and the general public.

6 83. The parties are numerous such that joinder is impracticable. Upon
7 information and belief, and subject to class discovery, the Classes consist of
8 thousands of members or more, the identity of whom are within the exclusive
9 knowledge of and can be ascertained only by resort to BBVA's records. BBVA
10 has the administrative capability through its computer systems and other records to
11 identify all members of the Classes, and such specific information is not otherwise
12 available to Plaintiff.
13
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16 84. It is impracticable to bring Class members' individual claims before
17 the Court. Class treatment permits a large number of similarly situated persons or
18 entities to prosecute their common claims in a single forum simultaneously,
19 efficiently and without the unnecessary duplication of evidence, effort, expense, or
20 the possibility of inconsistent or contradictory judgments that numerous individual
21 actions would engender. The benefits of the class mechanism, including providing
22 injured persons or entities with a method for obtaining redress on claims that might
23 not be practicable to pursue individually, substantially outweigh any difficulties
24 that may arise in the management of this class action.
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1 85. Plaintiff's claims are typical of the claims of the other Class members
2 in that they arise out of the same wrongful business practices by BBVA, as
3 described herein.
4

5 86. Plaintiff is more than an adequate representative of the Classes in that
6 she has a BBVA checking account and has suffered damages as a result of
7 BBVA's improper business practices. In addition:
8

- 9 a) Plaintiff is committed to the vigorous prosecution of this action on
10 behalf of themselves and all others similarly situated and have
11 retained competent counsel experienced in the prosecution of class
12 actions and, in particular, class actions on behalf of consumers against
13 financial institutions;
14 b) There is no conflict of interest between Plaintiff and the unnamed
15 Class members;
16 c) They anticipate no difficulty in the management of this litigation as a
17 class action; and
18 d) Plaintiff's legal counsel has the financial and legal resources to meet
19 the substantial costs and legal issues associated with this type of
20 litigation.
21

22 87. Plaintiff knows of no difficulty to be encountered in the maintenance
23 of this action that would preclude its maintenance as a class action.
24

25 88. BBVA has acted or refused to act on grounds generally applicable to
26 the class, thereby making appropriate final injunctive relief or corresponding
27 declaratory relief with respect to the class as a whole.
28

1 89. All conditions precedent to bringing this action have been satisfied
2 and/or waived.
3

4 **DESCRIPTION OF PUBLIC INJUNCTIONS SOUGHT**

5 90. Plaintiff is seeking injunctions on behalf of herself, the Injunctive
6 Relief Class (under Rule 23(b)(2)), and the public, prohibiting BBVA from making
7 material omissions and misrepresentations to the public as to the nature and
8 amount of the fees that it assesses on its customers.
9

10
11 91. Fees are one of the most important factors that consumers take into
12 account when deciding whether to open a checking account, and which financial
13 institution to bank with. The public has the right to a transparent marketplace in
14 which banks are open and honest about the number, nature, and amount of fees
15 they charge, and the circumstances under which those fees are assessed.
16
17

18 92. The injunctive relief sought by Plaintiff will protect the public from
19 BBVA's deceitful marketing practices which lure customers in by understanding
20 the amount and frequency it assesses OD and NSF Fees. It will prevent BBVA
21 from distorting the marketplace by representing that it charges fewer fees than it
22 actually does.
23

24
25 93. Plaintiff seeks to enjoin BBVA from misrepresenting and/or omitting
26 material information as to its fee assessment practices in the documents that it
27 makes available to the public.
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CAUSES OF ACTION

FIRST CAUSE OF ACTION
BREACH OF CONTRACT INCLUDING THE COVENANT
OF GOOD FAITH AND FAIR DEALING
(On behalf of the APPSN Class and Multiple Fee Class)

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94. Plaintiff Hill incorporates the preceding allegations by reference as if fully set forth herein.

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95. Plaintiff Helen Hill and BBVA contracted for checking account and debit card services, as embodied in the Account documents.

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96. BBVA breached the contract when it charged overdraft fees on APPSN transactions and when it assessed multiple NSF Fees on the same item.

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97. Plaintiff and members of the putative Class have performed all of the obligations on them pursuant to the Consumer Account Agreement.

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98. Plaintiff and members of the putative Class have sustained monetary damages as a result of Defendant' breach.

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99. Under the laws of the State of California where BBVA does business, good faith is an element of every contract. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are

1 mutually obligated to comply with the substance of their contract in addition to its
2 form. Evading the spirit of the bargain and abusing the power to specify terms
3 constitute examples of bad faith in the performance of contracts.
4

5 100. Subterfuge and evasion violate the obligation of good faith in
6 performance even when an actor believes their conduct to be justified. Bad faith
7 may be overt or may consist of inaction, and fair dealing may require more than
8 honesty. Examples of bad faith are evasion of the spirit of the bargain, willful
9 rendering of imperfect performance, abuse of a power to specify terms, and
10 interference with or failure to cooperate in the other party's performance.
11
12

13 101. BBVA breached the covenant of good faith and fair dealing in its
14 Consumer Account Agreement through its OD and NSF Fee policies and practices
15 as alleged herein. Specifically, BBVA's Consumer Account Agreement
16 misrepresents to accountholders the true nature of BBVA's assessment of its OD
17 and NSF Fees.
18
19

20 102. Plaintiff Hill and members of the Class have performed all, or
21 substantially all, of the obligations imposed on them under the Consumer Account
22 Agreement.
23
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25 103. Plaintiff Hill and members of the Class have sustained damages as a
26 result of BBVA's breach of the contract and the covenant of good faith and fair
27 dealing.
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SECOND CAUSE OF ACTION
VIOLATION OF THE UNFAIR COMPETITION LAW
Cal. Bus. & Prof. Code § 17200, et seq.

(On behalf of the APPSN Class, the Multiple Fee Class and Injunctive Relief Class)

104. Plaintiff Hill incorporates paragraphs 1-93 as if fully set forth herein.

105. California Business & Professions Code § 17200 prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice.” BBVA’s conduct related to the imposition of overdraft fees violated each of this statute’s three prongs.

106. BBVA committed an unlawful business act or practice in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, by violating the Consumers Legal Remedies Act, as set forth above.

107. BBVA committed unfair business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, by representing that it only authorizes one OD Fee or NSF Fee per item but does otherwise.

108. BBVA committed fraudulent business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, when it affirmatively and knowingly misrepresented that it only authorizes one OD Fee or NSF Fee per item but does otherwise. BBVA’s representations are likely to mislead the public with regard to when it imposes overdraft and NSF fees.

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- (c) Restitution of all relevant NSF Fees and OD Fees paid to BBVA by Plaintiff and the Classes, as a result of the wrongs alleged herein in an amount to be determined at trial;
- (d) Disgorgement of the ill-gotten gains derived by BBVA from its misconduct;
- (e) Actual damages in an amount according to proof;
- (f) Statutory, punitive, and exemplary damages, as permitted by law;
- (g) Pre-judgment interest at the maximum rate permitted by applicable law;
- (h) An order on behalf of the general public enjoining BBVA from continuing to employ unfair methods of competition and commit unfair and deceptive acts and practices alleged in this complaint and any other acts and practices proven at trial;
- (i) Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys’ fees pursuant to applicable law; and
- (j) Such other relief as this Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff 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: June 2, 2020

By: s/ William Litvak
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**Pro hac vice forthcoming*
Attorneys for Plaintiff and the Proposed
Class

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS SARAH HILL, on behalf of herself and all others similarly situated</p> <p>(b) County of Residence of First Listed Plaintiff <u>San Diego</u> (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) William Litvak DAPEER ROSENBLIT & LITVAK, LLP 11500 W. Olympic Blvd. Suite 550, Los Angeles, California 90064 Telephone: (310) 477-5575 Email: wlitvak@drllaw.com</p>	<p>DEFENDANTS BBVA USA, an Alabama Corporation</p> <p>County of Residence of First Listed Defendant _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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'20CV1016 BEN WVG

<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"></td> <td style="width:33%; text-align: center;">PTF</td> <td style="width:33%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> </tr> </table>		PTF	DEF	Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3
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Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2											
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3											

Click here for: Nature of Suit Code Descriptions.				
CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from Another District (specify)	<input type="checkbox"/> 6 Multidistrict Litigation - Transfer	<input type="checkbox"/> 8 Multidistrict Litigation - Direct File
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VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. §§ 1332(d)(2) and (6)

Brief description of cause:
 Diversity of citizenship; amount in controversy; costs

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND \$** _____

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE: June 2, 2020 SIGNATURE OF ATTORNEY OF RECORD: s/William Litvak

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____