IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

IRWIN BARKER, individually, and on behalf of all others similarly situated, Plaintiff, v. BAYPORT CREDIT UNION, and DOES 1-100, Defendant.	**Civil No.: 2:20-cv-195** **JURY TRIAL DEMANDED**

CLASS ACTION COMPLAINT

Plaintiff Irwin Barker ("Plaintiff"), by his attorneys, hereby brings this class action against BayPort Credit Union and DOES 1 through 100 (collectively "BayPort" or "Defendant").

NATURE OF THE ACTION

1. All allegations herein are based upon information and belief except those allegations which pertain to Plaintiff or his counsel. Allegations pertaining to Plaintiff or his counsel are based upon, *inter alia*, Plaintiff or his counsel's personal knowledge, as well as Plaintiff or his counsel's own investigation. Furthermore, each allegation alleged herein either has evidentiary support or is likely to have evidentiary support, after a reasonable opportunity for additional investigation or discovery.

2. This is a class action brought by Plaintiff to assert claims in his own right, and in his capacity as the class representative of all other persons similarly situated. BayPort wrongfully charged Plaintiff and the Class Members overdraft fees and Non-Sufficient Funds ("NSF") fees.

3. This class action seeks monetary damages, restitution, and injunctive relief due to, *inter alia*, BayPort's policy and practice of 1) assessing an overdraft or NSF fee on transactions when there was enough money in the checking account to cover (pay for) the transactions presented for payment; and 2) charging repeat NSF fees on the *same* electronic item. The charging of such overdraft and NSF fees breaches BayPort's contracts with its members, who include Plaintiff and the members of the Class.

4. The charging for such overdraft fees also violates federal law. BayPort failed to describe its actual overdraft service in its Opt-In Agreement by, *inter alia*, failing to describe accurately in its Opt-In Agreement the actual method by which BayPort calculates its overdraft fees, and because BayPort also violated or did not fulfill other prerequisites of Regulation E, 12 C.F.R. §§ 1005.17 *et seq*., of the Electronic Fund Transfer Act, 15 U.S.C.A. §§ 1693 *et seq*., before charging overdraft fees for automated teller machine (ATM) and non-recurring debit card transactions, 12 C.F.R. § 1005.17(b)(1).

PARTIES

5. Plaintiff Irwin Barker is a resident of Virginia and was a member of BayPort at all times relevant to the class action allegations.

6. Based on information and belief, Defendant BayPort is and has been a federally-chartered credit union with branches in Virginia and headquartered in Newport News, Virginia. BayPort is a "financial institution" within the meaning of Regulation E, 12 C.F.R. § 1005.2(i).

7. Without limitation, defendants DOES 1 through 100, include agents, partners, joint ventures, subsidiaries and/or affiliates of BayPort and, upon information and belief, also own and/or operate BayPort branch locations. Each of defendants DOES 1 through 100 is a "financial institution" within the meaning of Regulation E, 12 C.F.R. § 1005.2(i). As used

herein, where appropriate, the term "BayPort" is also inclusive of defendants DOES 1 through 100.

8. Plaintiff is unaware of the true names of defendants DOES 1 through 100. Defendants DOES 1 through 100 are thus sued by fictitious names, and the pleadings will be amended as necessary to obtain relief against defendants DOES 1 through 100 when the true names are ascertained, or as permitted by law or by the Court.

9. There exists, and at all times herein mentioned existed, a unity of interest and ownership between the named defendants (including DOES) such that any corporate individuality and separateness between the named defendants has ceased, and that the named defendants are *alter egos* in that the named defendants effectively operate as a single enterprise, or are mere instrumentalities of one another.

10. At all material times herein, each defendant was the agent, servant, co-conspirator and/or employer of each of the remaining defendants, acted within the purpose, scope, and course of said agency, service, conspiracy and/or employment and with the express and/or implied knowledge, permission, and consent of the remaining defendants, and ratified and approved the acts of the other defendants. However, each of these allegations are deemed alternative theories whenever not doing so would result in a contradiction with the other allegations.

11. Whenever reference is made in this Complaint to any act, deed, or conduct of Defendant, the allegation means that Defendant engaged in the act, deed, or conduct by or through one or more of its officers, directors, agents, employees, or representatives who was actively engaged in the management, direction, control, or transaction of Defendant's ordinary business and affairs.

12. As to the conduct alleged herein, each act was authorized, ratified or directed by Defendant's officers, directors, or managing agents.

VENUE AND JURISDICTION

13. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1332 under the Class Action Fairness Act of 2005 because: (i) there are 100 or more Class Members, (ii) there is an aggregate amount in controversy exceeding $5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity because at least one plaintiff and one defendant are citizens of different States. This court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

14. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Defendant is headquartered and resides in this District and a substantial part of the events and/or omissions giving rise to Plaintiff's claims occurred in this District.

FACTUAL ALLEGATIONS

15. BayPort is a credit union with approximately 23 branches in Virginia with over 144,000 members and holding more than $1.7 billion in assets. Membership at BayPort is open to those who live, work, worship, volunteer or attend school in certain cities or counties in Virginia and North Carolina. BayPort offers its members a checking account. One of the features of a BayPort checking account is a debit card, which can be used for a variety of transactions including the purchasing of goods and services. In addition to receiving a debit card, other features of a BayPort checking account include: the ability to write checks; withdraw money from ATMs; schedule Automated Clearing House (ACH) transactions (which include certain recurring and non-recurring payments); and other types of transactions that debit from a checking account.

16. In connection with its processing of debit transactions (debit card, ATM, check, ACH, and other similar transactions), BayPort assesses overdraft and NSF fees to member accounts when it claims to have determined that a member's account has been overdrawn.

17. 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 from overdraft fees.

18. BayPort's financial filings and practices show BayPort has followed the trend of for-profit banks. BayPort's overdraft fee is up to $25.00 for purported overdraft transactions that bears no relation to the credit union's very small risk of loss and constitutes an APR in the thousands. Its NSF fee of $29.00 is even higher and less related to approximating the cost to the credit union of the automated rejection of the item. Further, in a practice that is uniquely punitive, unconscionable and financially predatory in the banking industry, it has assessed an additional charge of $3 for *each* day (after 7 consecutive days) that an account remains overdrawn.

19. While credit unions portray themselves to customers as more overdraft and fee friendly than banks, a 2015 study conducted by Moebs Services confirmed that the median overdraft fees charged by credit unions are not statistically significantly less than the median overdraft fees charged by banks. For credit unions such as BayPort, overdraft and NSF fees are a major source of revenue and a profit center. According to a 2010 report by Georgetown University Law Professor Adam Levitin, overdraft fees comprise 6% to 7% of the gross revenue of credit unions. Filene Research Institute Report, *Overdraft Regulation: A Silver Lining In The Clouds?* (Filene Research Institute 2010).

20. The high cost of an overdraft fee is usually unfairly punitive. In a 2012 study,

more than 90% of customers who were assessed overdraft fees overdrew their accounts by mistake. Pew Charitable Trust Report, *Overdraft America: Confusion and Concerns about Bank Practices*, at p. 4 (May 2012). More than 60% of the transactions that resulted in a large overdraft fee were for less than $50. Pew Charitable Trust Report, *Overdrawn*, at p. 8 (June 2014). More than 50% of those who were assessed overdraft fees do not recall opting into an overdraft program, *id*. at p. 5, while more than two-thirds of customers would have preferred the financial institution decline their transaction rather than paying the transaction into overdraft and charging a very large fee, *id*. at p. 10.

21. Unfortunately, the customers who are assessed these fees are the most vulnerable customers. Younger, lower-income, and non-white account holders are among those who are more likely to be assessed overdraft fees. *Id*. at p. 1. A 25-year-old is 133% more likely to pay an overdraft penalty fee than a 65-year-old. *Id*. at p. 3. More than 50% of the customers assessed overdraft fees earned under $40,000 per year. *Id*. at p. 4. And non-whites are 83% more likely to pay an overdraft fee than whites. *Id*. at p. 3.

22. As a result of banks and credit unions having taken further advantage of millions of customers through the unfair practice of charging overdraft and NSF fees through methodologies that maximize the possible number of expensive fees to be charged, there has been a substantial amount of litigation over the past few years alleging these practices are in violation of the contracts with the customer and in violation of consumer protection statutes. The rulings in these cases has predominantly fallen in favor of the customers, forcing the banks and credit unions to repay their customers significant amounts of wrongfully collected overdraft and NSF fees.

23. In response to financial institutions' use of overdraft and NSF fees as profit

centers at the expense of vulnerable customers, the federal government has also stepped in to provide additional protections to customers with respect to abusive overdraft policies. In 2010, the Federal Reserve Board enacted regulations giving financial institutions the authority to charge overdraft fees on ATM and one-time debit card transactions only if the institution first obtained the affirmative consent of the customer to do so. 12 C.F.R. § 1005.17 (Regulation E's "Opt-In Rule").

24. To qualify as affirmative consent, the Opt-In Agreement must accurately describe the overdraft program and must include, but is not limited to, the following:

- the customer must be provided the overdraft policy, including the dollar amount of any fees that will be charged for an overdraft, and the maximum number of fees that can be assessed on any given day (if there is not a maximum, that fact must be stated);
- the financial institution must state whether alternatives, such as linking the checking account to a secondary account or line of credit, are available;
- the consent must be obtained separately from other consents and acknowledgements;
- the consent cannot serve any purpose other than opting into the overdraft program;
- the consent cannot be a pre-selected checked box; and
- the financial institution may not provide different terms for the account depending on whether the customer opted into the overdraft program.

If the financial institution does not obtain proper, affirmative consent from the customer that meets all of the requirements of Regulation E's Opt-In Rule, including fulfilling each of the

above requirements, then it is not permitted to charge overdraft fees on ATM and one-time debit card transactions. On information and belief, although formal discovery will be required to confirm this, to the extent BayPort engages in a Regulation E overdraft program, it did not fulfill these prerequisites.

25. Further, at all relevant times, on information and belief, BayPort has had an overdraft and NSF fee program in place for assessing overdraft and NSF fees which, *inter alia*, is 1) contrary to the express and implied terms of its contracts with members; 2) contrary to BayPort's representations about its overdraft and NSF fee program to its members; and 3) contrary to its members' expectations regarding the assessment of such fees.

26. There are three balances in an account: the "balance;" the "collected available balance;" and, the "artificial available balance." The "balance" (sometimes called the "actual balance," "current balance," or "ledger balance") is the money in the account, without deductions for holds on pending transactions or on deposits. It is the official balance of the account. It is the balance provided to the customer in monthly statements, which are the official record of activity in the account. It is the balance used to determine interest on deposits and any minimum balance requirements. Further, based on information and belief, it is the balance used by BayPort to report its deposits to regulators, shareholders, and the public. It is the balance provided to regulators in call reports and reserve reports. It is the balance used in financial reports to shareholders and the balance used for internal financial reporting. It is also the balance used by credit reporting agencies in providing the credit ratings of BayPort.

27. The "collected available balance" is the "balance" less holds placed on certain deposits pursuant to a financial institution's "Funds Availability Policy" ("FAP").

28. The "artificial available balance" is a completely different calculation than the

"collected available balance." Although the "artificial available balance" has the words "available balance" in it like the "collected available balance" does, the "artificial available balance" is an accounting gimmick which takes the "collected available balance" and then further deducts from it pending debit transactions which have not yet posted (and which might or might not ever post), meaning the money is still in the account of the credit union member.

29. While BayPort's contracts indicated to members that it was using the "balance" to determine and assess overdraft and NSF fees, it was using the "artificial available balance." There is no requirement to use the "artificial available balance," and during the class period BayPort had no authority, disclosure, or statement in its contracts or otherwise that it was using the "artificial available balance" for purposes of assessing overdraft and NSF fees. BayPort did this in order to increase the number of overdraft and NSF fees charged, and to maximize its profits. As a result of such practices, BayPort has improperly assessed its members unlawful overdraft and NSF fees.

30. BayPort entered into a uniform written contract with Plaintiff and the other Class Members titled "BayPort Overdraft Privilege" or "What You Need to Know about Overdrafts and Overdraft Fees (Exhibits A and B, hereafter referred to collectively as the "Opt-in Agreement"). On information and belief, BayPort used this contract to disclose to members its "standard overdraft practices" as well as to obtain the affirmative consent of its members under Regulation E before being allowed to charge them an overdraft fee on a non-recurring debit card transaction or ATM withdrawal. The importance of Regulation E is highlighted by the fact that the Consumer Financial Protection Bureau's ("CFPB") study of actual practices found that:

1) ATM and debit card transactions are by far the most frequent transactions that occur;

2) overdraft fee policies entail expensive fees at very little risk to the financial institutions; and

3) opted-in accounts have seven times as many overdrafts that result in fees as not opted-in accounts.[1]

31. BayPort does not have a separate Opt-in Agreement that meets the requirements of Regulation E, including, *inter alia*, an adequate description of BayPort's actual practice for applying overdraft fees. Such a description would include use of an "artificial available balance" rather than just "balance" or "money in the account."

32. But the Opt-In Agreement does not do this and instead defines an "overdraft" as: "An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway." (Emphasis in original.) This promise means that BayPort was not authorized to assess an overdraft fee—because an overdraft had not occurred—unless there was not enough money in the member's account to cover the transaction, and BayPort used its own money to pay the transaction. It does not in any way state that there will be deductions made from the money in the member's account arising from holds placed on pending debit card transactions to create a different "artificial available balance," nor does it state that holds placed on deposits would lower the amount of money in the account and create a "collected available balance" for purposes of allowing an overdraft fee to be assessed. In addition, because, *inter alia*, the Opt-In Agreement does not describe BayPort's actual overdraft practice, let alone in a manner which is "clear and readily understandable" as required by 12 C.F.R. §205.4(a)(1), the Opt-In Agreement fails to comply with Regulation E's opt-in requirements. Alternatively, on information and belief, BayPort did not follow additional Regulation E opt-in requirements and, thus, failed to obtain members' opt-ins (*i.e*. affirmative consent) before charging them overdraft

[1] http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf [last viewed March 24, 2020].

fees for ATM and non-recurring debit transactions, in violation of Regulation E. Discovery will be necessary to determine if any further Regulation E violations have occurred in the opt-in process.

33. BayPort clearly could have accurately described its overdraft program in its Opt-In Agreement. Because it did not, BayPort breached that agreement when it charged overdraft fees on a positive balance, and it violated Regulation E, *inter alia*, by charging any overdraft fees whatsoever on ATM and one-time debit card transactions, given that it did not accurately describe its overdraft program in the required agreement, or otherwise follow Regulation E's requirements.

34. BayPort entered into a second uniform written contract with Plaintiff and the other Class Members titled "Important Account Information for Our Members – Terms and Conditions, Electronic Transfers, Funds Availability, and Truth in Savings" (Exhibit C, hereafter referred to as "Account Agreement"). Like the Opt-in Agreement, the Account Agreement contained a promise that BayPort would not charge overdraft or NSF fees for any type of transaction when there was enough money in the account to pay for the transaction. It stated in the section called "Overdrafts" that and overdraft is determined on the "*account balance,*" which is all of the money in the account – not a subset of the account that artificially factors in pending holds on deposits or debits. In another section called "Payment Order of Items," when discussing how the order of items may affect whether an account is overdrawn, it states that "[t]he order in which items are paid is important *if there is not enough money in your account* to pay all of the items that are presented." Again, like in the Opt-in Agreement, enough money in the account refers to all of the money in the account. Further, it states "[i]f an item is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item

(creating an overdraft) or return the item (NSF)." "Sufficient funds" without further explanation also means all of the funds in the account as reflected in the account balance. And while the Account Agreement revised as of December 2018, states that merchants "may" request temporary holds on debit authorizations that might affect an account balance, that section is not located in the Overdraft section to alert customers that it might be important to overdrafts, and is limited to situations where a merchant requests a hold for more than the actual amount of the purchase, which often happens at gas stations or restaurants. For example, restaurants may request a hold of $50.00 for your dinner, even though the final bill only came to $42.00. That temporary hold will eventually be released and the purchase amount will be adjusted to $42.00, but until it is released (usually within three days), the extra $8.00 may not be available to use, and could result in an overdraft or NSF fee. What this section on holds does not say is that a hold may be placed on all authorized debits (such as those reflecting the accurate amount of the purchase) and such holds can reduce the balance for purposes of assessing overdraft or NSF fees. Moreover, it does not state that pending deposits can affect a determination as to whether an account is overdrawn. Instead the Account Agreement clearly states that an account will not be overdrawn as long as there is enough money in an account to cover transactions. Nowhere did it state that to determine whether there was money in an account to cover a transaction, BayPort would not look to the actual amount of money in the account but, instead, to the money in the account only ***after deducting holds placed on deposits and after also deducting holds placed on all types of pending debit card transactions***. Further, the Account Agreement made no mention of the term "available balance," and instead only referred to "balance" or "account balance" which mean all of the money in an account, and not a subset of the money in an account subject to holds. Per the language in the Account Agreement, a fee could only be imposed when the

account as a whole contained less money than was called for (or possibly when a hold was placed due to a unique circumstance in which a merchant requested a larger authorization than the final amount of a transaction). Yet, despite the Account Agreement's express language, BayPort actually determined when to charge overdraft or NSF fees not based on the money in the account but based on the money in the account after deductions for holds on deposits and all pending debit transactions.

35. On information and belief, BayPort's Account Agreements prior to December 2018 did not contain the limited debit hold language described above.

36. Further, regarding deposits, the Account Agreement, at most, stated in a separate section pertaining to deposits rather than to overdraft/NSF fees that temporary holds might be placed on certain deposited items before they could be withdrawn (the "collected available balance"), but this section does not state that such holds will be considered in determining when overdraft/NSF fees occur and, indeed, nowhere was it stated in the Account Agreement that overdraft/NSF fees could result from holds placed on funds earmarked for all pending debit card transactions (the "artificial available balance").

37. BayPort also has an improper practice of charging multiple NSF fees for the same electronic item. BayPort charges a $29 fee when an electronic transaction or item is first processed for payment and BayPort determines that there supposedly is not enough money in the account to cover the transaction (a practice that wrongfully uses the "artificial available balance" described above). BayPort then charges an *additional* NSF fee if the *same* item is presented for processing again by the payee, even though the account holder took no action to resubmit the item for payment. This violates the Account Agreement, *inter alia*, in the Payment Order of Items section, which states that "[i]f an item is presented without sufficient funds in your account

to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item (NSF)." In another section it states when describing an NSF and overdraft transaction, "[y]ou will be charged an NSF or overdraft fee." In other words, the Account Agreement drafted by BayPort states, in the singular, "**an NSF charge**" will be assessed, not plural "**multiple NSF charges**" will be assessed. Further, "item" means a single electronic transaction, and a "representment" or "retry" of an "item" does not change it into a new or different item. It is still the same "item" being presented by the same merchant in the same dollar amount; not a new "item." An electronic item reprocessed after an initial return for insufficient funds, especially through no action by the member, cannot and does not fairly become a new, unique additional "item" for fee assessment purposes

38. BayPort's Account Agreement provided no disclosure of this practice and deceived BayPort's accountholders. BayPort's practice of charging multiple NSF fees for a single electronic item was particularly egregious because, as described, BayPort assessed such fees using the improper calculation of the balance in a member's account (the "artificial available balance"), causing additional fees, confusion, and ambiguity. Specifically, because BayPort charged NSF fees improperly, and because BayPort's improper deduction of the $29 fee from a member's account further decreased the member's "balance," it generated even more NSF fees or overdraft fees to the account.

39. Plaintiff and the Class Members have performed all conditions, covenants, and promises required by each of them in accordance with the terms and conditions of all contracts at issue.

40. Meanwhile, Plaintiff and the Class Members could not have anticipated the harm resulting from BayPort's practice throughout the class periods. The money in the account,

without deductions for holds on pending transactions or on deposits, as already stated, is known as the "balance," and is considered the official balance of the account. It is the balance provided to the member in monthly statements, which is the official record of activity in the account. It is the balance used by BayPort to determine interest on deposits to regulators, shareholders and the public, the balance provided to regulators in call reports and reserve reports, and the balance used in financial reports to shareholders and the balance used for internal financial reporting. It is reasonable therefore to understand that all of the money in a member's account was available for use to pay debit card or other transactions before an overdraft or NSF fee would be assessed.

41. The CFPB has concluded that when a financial institution creates the "overall impression" that it would determine overdraft transactions and fees based on the balance in the account rather than an artificially created balance which has deducted pending transactions, then the "disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer's decision-making and actions, examiners found the practice to be deceptive." The CFPB further found that "consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures)." CFPB*, Supervisory Highlights*, at p. 9 (Winter 2015).[2]

42. Unlike BayPort, numerous financial institutions' account contracts explain the use of the artificial available balance for assessing overdraft or NSF fees. For example, GTE Federal Credit Union's account contract contains the following language since June 2016:

> YOUR CHECKING ACCOUNT BALANCE: . . . Any purchases, holds, fees, charges, or deposits made on your account that have not yet posted will not appear in your actual balance . . . Your available balance is the amount of money in your account that is available to you to use without incurring an overdraft or NSF fee. The available balance takes into

[2] https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf [last viewed March 24, 2020].

> account things likes holds placed on deposits and pending transactions (such as pending debit card purchases) that the Credit Union has authorized but have not yet posted to your account . . . .

Logix Credit Union has also adopted an account contract which specifically describes its use of the artificial available balance:

> The available balance takes into account things like holds placed on deposits and payments that have been authorized but have not yet posted to your account (such as pending debit card purchases). For example, assume you have an actual balance of $50 and an available balance of $50. If you were to swipe your debit card…for $20, then that merchant could ask us to pre-authorize the payment. In that case, we will reduce your available balance by $20. Your actual balance would still be $50 because this transaction has not yet posted, but your available balance would be $30 because you have committed to pay the restaurant $20. When the [merchant] submits the transaction to us (which could be a few days later), we will post the payment transaction to your account and your actual balance will be reduced by $20.

Baxter Credit Union has an account contract which states that the "[a]vailable balance is used to determine when there are insufficient funds to pay an item presented for payment from the account" and describes the available balance as "generally equal to the actual balance, less the amount of any holds placed on recent deposits, holds for other reasons, and holds for pending transactions (such as pending debit card purchases) that the Credit Union has authorized but that have not yet posted to your account." Similarly, State Employees Credit Union of Maryland discloses that for purposes of assessing an overdraft fee it, "[t]akes into account things such as holds placed on deposits and decreases in your Available Balance (such as pending debit card purchases) that you initiated and SECU has authorized but that have not yet posted to your account." Point Loma Credit Union explains in its account contract that for purposes of assessing overdraft fees "[a]ny purchases, holds, fees, other charges, or deposits made on my account that have not yet posted will not appear in my actual balance." San Diego County Credit Union's account contract states that in determining whether an overdraft fee will be assessed

against a member, "[w]e will consider all transactions that have posted to your account, any holds that may be in place on deposits you have made, and pending transactions (such as pending debit card purchases) that the Credit Union has authorized but that have not yet posted to your account." That contract also contains a section on authorization holds, titled, "Authorization Holds for Debit Card Transactions," which states, "[w]e generally place a temporary hold against some or all of the funds in the account linked to your debit card if and when an authorization request is obtained," and that "[t]he amount of the authorization hold will be subtracted from your available balance." In contrast, BayPort's Account Agreement did not so much as mention the "artificial available balance" or that holds for deposits and pending debits could affect the balance for purposes of assessing overdraft or NSF fees.

43. Likewise, numerous financial institutions that engage in the abusive practice of charging repeat NSF fees for the same "item" also plainly and clearly disclose it in their Account Agreements and Fee Schedules.

44. For example, Air Academy Federal Credit Union an NSF fee is "$32.00 **per presentment**." *See* https://www.aafcu.com/fees.html (emphasis added) [last viewed March 24, 2020].

45. Central Pacific Bank contracts unambiguously:

> Items and transactions (such as, for example, checks and electronic transactions/payments) returned unpaid due to insufficient/non-sufficient ("NSF") funds in your account, **may be resubmitted one or more times for payment, and a $32 fee will be imposed on you each time an item and transaction resubmitted for payment is returned due to insufficient/nonsufficient funds**.

See https://www.cpb.bank/media/1618/fee-001-rev-10-24-2019-misc-fee-schedule.pdf (emphasis added) [last viewed March 24, 2020].

46. Delta Community Credit Union states its NSF fee is "$35 **per presentment**." *See*

https://www.deltacommunitycu.com/home/fees.aspx (emphasis added) [last viewed March 24, 2020]. Further, in its Account Agreement, Delta unambiguously states as follows:

> The Credit Union reserves the right to charge you an overdraft/insufficient funds fee if you write a check or initiate an electronic transaction that, if posted, would overdraw your Checking Account. **Note that you may be charged an NSF fee each time a check or ACH is presented to us, even if it was previously submitted and rejected**.

See https://www.deltacommunitycu.com/home/forms/member-savings-services-disclosures-and-agreements.aspx (emphasis added) [last viewed March 24, 2020].

47. Glendale Federal Credit Union lists its NSF fee as "$30 **per presentment**." *See* https://glendalefcu.org/pdf/fees.pdf (emphasis added) [last viewed March 24, 2020].

48. First Financial Bank contracts unambiguously:

> Merchants or payees may present an item multiple times for payment if the initial or subsequent presentment is rejected due to insufficient funds or other reason (representment). **Each presentment is considered an item and will be charged accordingly**."

See https://www.bankatfirst.com/content/dam/first-financial-bank/eBanking_Disclosure_of_Charges.pdf (emphasis added) [last viewed March 24, 2020].

49. First Northern Credit Union lists its NSF fee as "$22.00 per each presentment and any subsequent representment(s)." *See* https://www.fncu.org/feeschedule/?scpage=1&scupdated=1&scorder=-click_count (emphasis added) [last viewed March 24, 2020]. Further, in its Account Agreement, First Northern unambiguously states as follows:

> You further agree that **we may charge a NSF fee each time an item is presented for payment even if the same item is presented for payment multiple times**. For example, if you wrote a check to a merchant who submitted the payment to us and we returned the item (resulting in a NSF fee), the merchant may re-present the check for payment again. If the second and any subsequent presentments are returned unpaid, **we may charge a NSF fee for each time we return the item. You understand**

> **this means you could be charged multiple NSF fees for one check** that you wrote as that check could be presented and returned more than once. **Similarly**, if you authorize a merchant (or other individual or entity) to electronically debit your account, such as an ACH debit, **you understand there could be multiple submissions of the electronic debit request which could result in multiple NSF fees**.

See

https://www.fncu.org/SecureAsset.aspx?Path=/7/Member_Agreement_November_1_2019.pdf

(emphasis added) [last viewed March 24, 2020].

50. Liberty Financial states its NSF fee is "27.00 **per presentment**." *See*

https://liberty.financial/about/fee-schedule (emphasis added) [last viewed March 24, 2020].

51. Los Angeles Federal Credit Union lists its NSF fee as "$29 **per presentment**."

See https://www.lafcu.org/pdf/currentfees_bus.pdf (emphasis added) [last viewed March 24, 2020].

52. Members First Credit Union states:

> We reserve the right to charge an Non-Sufficient Funds Fee (NSF Fee) each time a transaction is presented if your account does not have sufficient funds to cover the transaction at the time of presentment and we decline the transaction for that reason. **This means that a transaction may incur more than one Non-Sufficient Funds Fee (NSF Fee) if it is presented more than once…we reserve the right to charge a Non-Sufficient Funds (NSF Fee) for both the original presentment and the representment** . . . .

See http://www.membersfirstfl.org/files/mfcufl/1/file/Membership_and_Account_Agreement.pdf

(emphasis added) [last viewed March 24, 2020].

53. Meriwest Credit Union lists its fee as "$35.00/item **per presentment**." *See*

https://www.meriwest.com/sites/www.meriwest.com/files/media/consumer_feesched.pdf

(emphasis added) [last viewed March 24, 2020].

54. Partners 1st Federal Credit Union states:

> Consequently, because **we may charge a fee for an NSF item each time**

> **it is presented, we may charge you more than one fee for any given item**. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

See https://www.partners1stcu.org/uploads/page/Consumer_Account_Agreement.pdf (emphasis added) [last visited March 24, 2020].

55. Regions Bank states:

> If an item is presented for payment on your account at a time when there is an insufficient balance of available funds in your account to pay the item in full, you agree to pay us our charge for items drawn against insufficient or unavailable funds, whether or not we pay the item. **If any item is presented again after having previously been returned unpaid by us, you agree to pay this charge for each time the item is presented for payment and the balance of available funds in your account is insufficient to pay the item**.

See https://www.regions.com/virtualdocuments/Deposit_Agreement_6_1_2018.pdf (emphasis added) [last viewed March 24, 2020].

56. Tyndall Federal Credit Union lists its NSF fee as "$28.00 **per presentment** (maximum 5 per day)." *See* https://tyndall.org/member_center/document_center/fee_schedule (emphasis added) [last viewed March 24, 2020].

57. USE Credit Union states "**Fees are charged per presentment, meaning the same item is subject to multiple fees if presented for payment multiple times**." *See* https://www.usecu.org/home/fiFiles/static/documents/Schedule_of_Fees.pdf (emphasis added) [last viewed March 24, 2020].

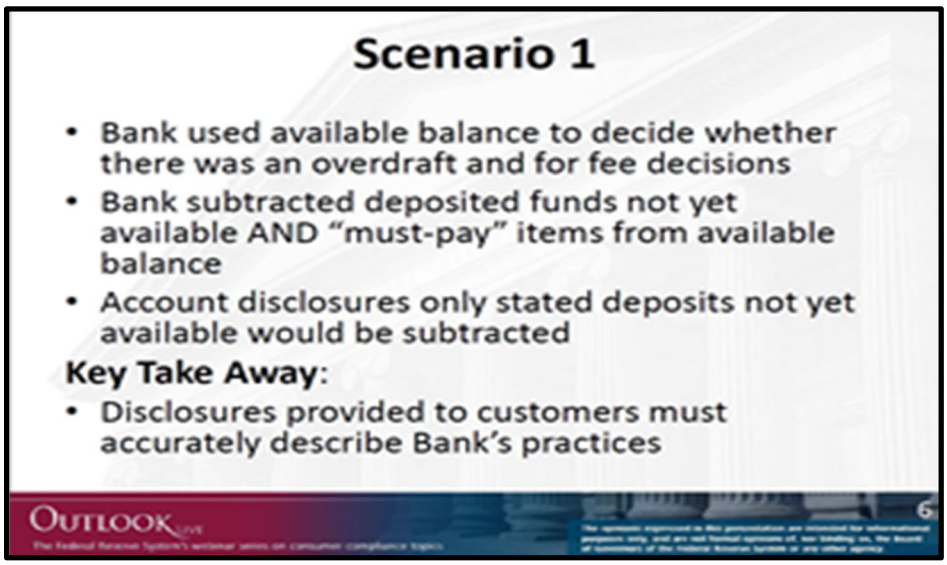
58. In contrast, BayPort's Account Agreement stated no such thing.

59. Further, with regard to the Opt-In Agreement, Plaintiff anticipates that BayPort might try to argue that it was required by Regulation E to use the language it used. But Regulation E contains no such requirement to use the language: "[a]n overdraft occurs when you

do not have enough money in your checking account to cover a transaction, but we pay it anyway." In fact, numerous banks and credit unions which use an "artificial available balance" method to determine when accounts are overdrawn, have adopted language in their Opt-In Agreements that affirmatively discloses this, showing that Regulation E does not prevent explaining what "available balance" means. For instance, TD Bank's Opt-In Agreement states as follows: "An overdraft occurs when your available balance is not sufficient to cover a transaction, but we pay it anyway. **Your available balance is reduced by any 'pending' debit card transactions (purchases and ATM withdrawals), and includes any deposited funds that have been made available pursuant to our Funds Availability Policy**." (Emphasis added.) Similarly, Communications Federal Credit Union's Opt-In Agreement states, "[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, or the transaction exceeds your available balance, but we pay it anyway. **'Available Balance' is your account balance less any holds placed on your account.**" (Emphasis added.) San Diego County Credit Union's Opt-in Agreement, recognizing that "available balance" is at best an ambiguous term, explains on that same page, as follows: "In determining your available balance **we will consider** all transactions that have posted to your account, **any holds that may be in place on deposit you have made and pending transactions (such as pending debit card purchases) that have been authorized but not yet posted to your account**." (Emphasis added.) EECU's Opt-in Agreement explains for five-pages on the same form requiring signature pursuant to Regulation E for overdraft coverage, including on page two, that "My available balance takes into account holds that have been placed on deposits and pending transactions (such as pending debit card transactions) that the credit union has authorized but that have not yet posted to my account. **In other words, the available balance is my actual balance less any**

pending ATM withdrawals, debit card purchases, ACH transaction, checks being processed or other pending withdrawals from my account and less any deposits that are not yet available due to the credit union's funds availability policy." (Emphasis in original.) There are countless other examples of financial institutions explaining in the Opt-In Agreement accurately on what basis the financial institution will impose overdraft fees.

60. The CFPB in a recent Federal Interagency Compliance Discussion regarding improper overdraft fees, condemned exactly the sort of conduct being challenged by Plaintiff in this lawsuit, and called what Defendant was doing here during the relevant class period an "Unfair Practice":



(Excerpts from Interagency Overdraft Services Consumer Compliance Discussion, dated Nov. 9, 2016.)

61. As shown, the CFPB has actually condemned as deceptive one of the very practices at issue in this case.

62. Plaintiff did not and could not have, exercising reasonable diligence, discovered both that he had been injured and the actual cause of that injury until he met with his attorneys in 2020. While Plaintiff understood that he was assessed fees, he did not understand the cause of

those fees until 2020 because BayPort hid its actual practice from its members by describing a different practice in its contracts and other materials disseminated to its members. This not only reasonably delayed discovery, but BayPort's affirmative representations and actions also equitably toll any statute of limitations, and also additionally equitably estop BayPort.

63. Therefore, Plaintiff, on behalf of himself and all others similarly situated, seeks relief as set forth below.

64. Plaintiff and the Class Members were harmed by BayPort's policy and practice of charging overdraft and NSF fees when there was money in members' accounts to cover the transaction, and also when BayPort charged an NSF fee more than once for the same "item." By doing so, BayPort breached its contracts with Plaintiff and the absent Class Members. It will be necessary to obtain BayPort's records to determine each instance of such a wrongful overdraft and NSF fee; however, Plaintiff has already uncovered some examples. On or about May 28, 2019, Plaintiff had a positive balance in his account. He made a payment for $6.97 which resulted in a positive balance of $111.02, yet he was still assessed what is labeled a "Paid NSF Fee." Moreover, Plaintiff's balance appears to have been positive after each debit card transaction occurring on May 27, 2019. Regarding repeat NSF fees, on or about January 2, 2020, BayPort charged Plaintiff a $29.00 NSF fee when it was presented with a PayPal item in the amount of $7.54. BayPort then charged a second $29 NSF fee for the same item on January 8, 2020. These are just a couple of examples for illustrative purposes. Plaintiff has a reasonable belief that discovery and a complete review of BayPort's records, including Plaintiff's monthly statements and transaction history, will show multiple instances in which BayPort improperly charged Plaintiff overdraft and NSF fees for transactions despite the fact that he had enough money in his account to cover the transactions, and repeat NSF fees for the same items.

65. Moreover, the assessment and unilateral taking of improper overdraft fees and NSF fees further reduces the balance and amount of funds in an account, resulting in and aggressively causing subsequent, otherwise non-overdraft transactions to be improperly treated as transactions for which BayPort assesses further overdraft or NSF fees. This practice was deemed to be deceptive and substantially harmful to customers by the CFPB, which made the following conclusions in its studies:

> Examiners also observed at one or more institutions the following sequence of events after the institutions switched balance-calculation methods: a financial institution authorized an electronic transaction, which reduced a customer's available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer's available balance and pushed the account into overdraft status; and when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic 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 reason to anticipate this practice, which was not appropriately disclosed. They therefore could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive.

(Supervisory Highlights, Winter 2015 at pp. 8-9.) A complete evaluation of BayPort's records is necessary to determine the full extent of Plaintiff's harm from this practice.

66. Additionally, because the Opt-In Agreement did not describe BayPort's actual overdraft service, let alone in a "clear and readily understandable" manner as required by 12 C.F.R. §205.4 (a)(1), BayPort violated Regulation E by charging overdraft fees on ATM and non-recurring debit card transactions. Because it failed to provide the full and accurate disclosures to Plaintiff required by Regulation E, BayPort failed to obtain Plaintiff's fully informed consent as required by Regulation E in order for BayPort to be authorized to charge

such overdraft fees. Because BayPort was not legally authorized to enroll Plaintiff into the overdraft program for non-recurring debit card and ATM transactions, BayPort violated Regulation E when it assessed *any* overdraft fees against Plaintiff for non-recurring debit card and ATM transaction, and Plaintiff was harmed as a result. A complete evaluation of BayPort's records is necessary to determine the full extent of Plaintiff's harm from this practice as well.

67. Plaintiff was harmed by these practices when he was assessed overdraft fees and NSF fees when he should not have been. A complete review of BayPort's records is necessary to determine the full extent of Plaintiff's harm from this practice as well.

CLASS ACTION ALLEGATIONS

68. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

69. Plaintiff brings this case, and each of his respective causes of action, as a class action pursuant to Federal Rules of Civil Procedure, Rule 23(a), (b)(1), (b)(2) and (b)(3) on behalf of the following Class.

70. The "Class" is composed of three classes:

The Account Balance Class – Pre-December 2018:

> **All United States residents who have or have had accounts with BayPort who incurred an overdraft or NSF fee when the balance in the checking account was sufficient to cover the transaction during the period beginning five years preceding the filing of this Complaint, and ending on November 30, 2018.**

The Account Balance Class – Post December 2018:

> **All United States residents who have or have had accounts with BayPort who incurred an overdraft or NSF fee when the balance in the checking account was sufficient to cover the transaction during the period beginning December 1, 2018, and ending on the date the Class is certified.**

The Regulation E Class:

> **All United States residents who have or have had accounts with BayPort who incurred an overdraft fee or overdraft fees for ATM or non-recurring debit card transaction(s) during the period beginning August 15, 2010, and ending on the date the Class is certified.**

The Repeat NSF Class:

> **All United States residents who have or have had accounts with BayPort who incurred an NSF fee more than once for the same item during the period beginning five years preceding the filing of this Complaint and ending on the date the Class is certified.**

71. Excluded from the Class are: (1) any entity in which Defendant has a controlling interest; (2) officers or directors of Defendant; (3) this Court and any of its employees assigned to work on the case; and (4) all employees of the law firms representing Plaintiff and the Class Members.

72. This action has been brought and may be properly maintained on behalf of each member of the Class pursuant to Federal Rules of Civil Procedure, Rule 23.

73. **Numerosity (Federal Rules of Civil Procedure, Rule 23(a)(1))** – The members of the Class are so numerous that a joinder of all members would be impracticable. While the exact number of Class Members is presently unknown to Plaintiff, and can only be determined through appropriate discovery, Plaintiff believes that the Class is likely to include thousands of members based on the fact that BayPort has approximately $1.7 billion in assets and operates approximately 23 branches with over 144,000 members.

74. Upon information and belief, Defendant has databases, and/or other documentation, of its customers' transactions and account enrollment. These databases and/or documents can be analyzed by an expert to ascertain which of BayPort's members have been harmed by its practices and thus qualify as Class Members. Further, the Class definitions identify groups of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover. Other

than by direct notice by mail or email, alternatively proper and sufficient notice of this action may be provided to the Class Members through notice published in newspapers or other publications.

75. **Commonality (Federal Rules of Civil Procedure, Rule 23(a)(2)) –** This action involves common questions of law and fact. The questions of law and fact common to both Plaintiff and the Class Members include, but are not limited to, the following:

a. Whether, pursuant to the Opt-In Agreement, Defendant promised to Plaintiff and the Class Members that it would not charge an overdraft fee if there was enough money in the account to cover the transaction;

b. Whether, pursuant to the Account Agreement, Defendant promised to Plaintiff and the Class Members that it would not charge an overdraft fee or NSF fee if there was enough money in the account to cover the transaction;

c. Whether, pursuant to the Account Agreement, Defendant promised to Plaintiff and the Class Members that it would only charge "a" fee for an NSF "item" rather than charge repeat NSF fees each time the same "item" was presented for payment;

d. Whether Defendant breached the Opt-In Agreement and/or Account Agreement by assessing overdraft fees for transactions when members' accounts contained enough money to cover the transaction;

e. Whether Defendant breached the Account Agreement by assessing NSF fees for transactions when members' accounts contained enough money to cover the transactions;

f. Whether, pursuant to the Account Agreement, Defendant

contracted it would charge an NSF fee "per item;"

g. Whether Defendant breached the Account Agreement by assessing repeat NSF fees each time the same "item" was presented for payment;

h. Whether the language in the Opt-In Agreement described Defendant's overdraft service pursuant to which Defendant assessed overdraft fees;

i. Whether the language in the Account Agreement is ambiguous;

j. Whether the language in the Opt-In Agreement is ambiguous;

k. Whether Defendant is liable under claims of good faith and fair dealing, unjust enrichment, and money had and received; and

l. Whether Defendant's conduct violated 12 C.F.R. § 1005.17 (Regulation E).

76. **Typicality (Federal Rules of Civil Procedure, Rule 23(a)(3))** – Plaintiff's claims are typical of all of the members of the Class. The evidence and the legal theories regarding Defendant's alleged wrongful conduct committed against Plaintiff and all of the Class Members are substantially the same because all of the relevant contracts between Defendant and its members, including the Account Agreement and Opt-In Agreement, were identical as to all relevant terms, and also because the challenged practices of charging members for overdraft fees or NSF fees when there were sufficient funds in the accounts to pay for the transactions at issue, and of assessing multiple NSF fees for the same electronic item, are uniform for Plaintiff and all Class Members. Accordingly, in pursuing his own self-interest in litigating his claims, Plaintiff will also serve the interests of the other Class Members.

77. **Adequacy (Federal Rules of Civil Procedure, Rule 23(a)(4))** – Plaintiff will fairly and adequately protect the interests of the Class Members. Plaintiff has retained competent counsel experienced in class action litigation to ensure such protection. There are no material conflicts between the claims of the representative Plaintiff and the members of the Class that would make class certification inappropriate. Plaintiff and his counsel intend to prosecute this action vigorously.

78. **Predominance and Superiority (Federal Rule of Civil Procedure, Rule 23(b)(3))** – The matter is properly maintained as a class action under Rule 23(b)(3) because the common questions of law or fact identified herein and to be identified through discovery predominate over questions that may affect only individual Class Members. Further, the class action is superior to all other available methods for the fair and efficient adjudication of this matter. Because the injuries suffered by the individual Class Members are relatively small, the expense and burden of individual litigation would make it virtually impossible for Plaintiff and Class Members to individually seek redress for Defendant's wrongful conduct. Even if any individual person or group(s) of Class Members could afford individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. The class action device is preferable to individual litigation 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 would lead to repetitious trials of the numerous common questions of fact and law. 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 Defendant's violations of law to proceed without remedy and allowing Defendant to retain the proceeds of their ill-gotten gains.

79. Plaintiff is not aware of any separate litigation instituted by any of the Class Members against Defendant. Plaintiff does not believe that any other Class Members' interest in individually controlling a separate action is significant, in that Plaintiff has demonstrated above that her claims are typical of the other Class Members and that she will adequately represent the Class. This particular forum is a desirable forum for this litigation because both Plaintiff and Defendant reside in this District, and because the claims arose from activities which occurred primarily in this District. Plaintiff does not foresee significant difficulties in managing the class action in that the major issues in dispute are susceptible to class proof.

80. Plaintiff anticipates the issuance of notice, setting forth the subject and nature of the instant action, to the proposed Class Members. Upon information and belief, Defendant's own business records and/or electronic media can be utilized for the contemplated notices. To the extent that any further notices may be required, Plaintiff anticipates the use of additional media and/or mailings.

81. This matter is properly maintained as a class action pursuant to Rule 23(b) of the Federal Rules of Civil Procedure, in that:

a. Without class certification and determination of declaratory, injunctive, statutory and other legal questions within the Class format, prosecution of separate actions by individual members of the Class will create the risk of:

1. Inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the parties opposing the Class; or

2. Adjudication with respect to individual members of the Class, which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests. The parties opposing the Class have acted or refused to act on grounds generally applicable to each member of the Class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the Class as a whole.

b. Common questions of law and fact exist as to the members of the Class and predominate over any questions affecting only individual members, and a class action is superior to other available methods of the fair and efficient adjudication of the controversy, including consideration of:

1. The interests of the members of the Class in individually controlling the prosecution or defense of separate actions;

2. The extent and nature of any litigation concerning controversy already commenced by or against members of the Class;

3. The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

4. The difficulties likely to be encountered in the management of a class action.

FIRST CAUSE OF ACTION
(Breach of The Opt-in Agreement)

82. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

83. Plaintiff and Class Members entered into the Opt-in Agreement with Defendant covering the subject of overdraft fees. This contract was drafted by and is binding upon Defendant.

84. In the Opt-in Agreement, Defendant promised that it would assess overdraft fees only when there was not enough money in the account to cover the transaction.

85. The contract incorporated by reference all applicable laws regarding its subject matter, including 12 C.F.R. § 1005.17, which mandates that all Opt-in Agreements for assessing overdraft fees for ATM and non-recurring debit card transactions be separate from the Account Agreement and accurately describe the overdraft fee practice, and bars financial institutions from assessing fees for non-recurring debit card and ATM transactions if they have not fully complied with that section's requirements.

86. Plaintiff and the Class Members have performed 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 Opt-in Agreement, except for those they were prevented from performing or which were waived or excused by Defendant's misconduct.

87. Defendant breached the express terms of the Opt-in Agreement by, *inter alia*, assessing overdraft fees when there was money in the account to cover the transaction or transactions at issue.

88. As a proximate result of Defendant's breach of the Opt-in Agreement, Plaintiff and the Class Members have been damaged in an amount to be proven at trial and seek relief as set forth in the Prayer below.

SECOND CAUSE OF ACTION
(Breach of the Account Agreement)

89. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

90. Plaintiff and each of the Class Members entered into the Account Agreement, with Defendant covering the subject of overdraft and NSF fees. This contract was drafted by and is binding upon Defendant.

91. In the Account Agreement, Defendant promised that BayPort would not charge overdraft or NSF fees for any type of transaction when there was enough money in the account to pay for the transaction. It stated in the section called "Overdrafts" that an overdraft is determined on the "*account balance,*" which is all of the money in the account – not a subset of the account that artificially factors in pending holds on deposits or debits. In another section called "Payment Order of Items," when discussing how the order of items may affect whether an account is overdrawn, it states that "[t]he order in which items are paid is important *if there is not enough money in your account* to pay all of the items that are presented." Again, enough money in the account refers to all of the money in the account. Further, it states "[i]f any item is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item (NSF)." "Sufficient funds" without further explanation also means all of the funds in the account as reflected in the account balance. In fact, nowhere did the Account Agreement explain what it means for an account to be "overdrawn" or state that BayPort would create an artificial system by which it would deduct all

pending debit card transactions or holds on deposits for purposes of determining whether an account was overdrawn such that an overdraft or NSF fee would be assessed.

92. Further, nowhere did the Account Agreement state that BayPort would assess an additional NSF fee every time an electronic item was presented for processing, or submitted as a "retry." BayPort wrongfully treated a "retry" as a new and separate "item" in violation of the terms of the Account Agreement.

93. Plaintiff and the Class Members have performed 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 Account Agreement, except for those they were prevented from performing or which were waived or excused by Defendant's misconduct.

94. Defendant breached the express terms of the Account Agreement by, *inter alia*, assessing overdraft or NSF fees when there were sufficient funds in the account to cover the transaction or transactions at issue, and by assessing multiple NSF fees for the same electronic transaction or item.

95. As a proximate result of Defendant's breach of the Account Agreement, Plaintiff and the Class Members have been damaged in an amount to be proven at trial and seek relief as set forth in the Prayer below.

THIRD CAUSE OF ACTION
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

96. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

97. Plaintiff and each of the Class Members entered into contracts with Defendant covering the subject of overdraft and/or NSF transactions, which have been identified herein as the Opt-in Agreement and Account Agreement contract which covers overdraft fees and NSF

fees. The contracts were drafted by and are binding upon Defendant.

98. In the contracts, Defendant promised that it would only assess "a fee" (singular) when it determined a member did not have enough money in his or her account to cover an "item," not multiple NSF "fees" for the same "item." Defendant also promised that it would only assess overdraft or NSF fees when there was a "negative balance."

99. Further, good faith is an element of every contract. Whether by common law or statute, all 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. Thus, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms, constitute examples of bad faith in the performance of contracts.

100. The material terms of the contracts therefore included the implied covenant of good faith and fair dealing, whereby Defendant covenanted that it would, in good faith and in the exercise of fair dealing, deal with Plaintiff and each Class Member fairly and honestly and do nothing to impair, interfere with, hinder, or potentially injure Plaintiff's and the Class Members' rights and benefits under the contracts.

101. Plaintiff and the Class Members have performed 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 Defendant's misconduct.

102. Defendant breached the implied covenant of good faith and fair dealing based, *inter alia*, on its practices of assessing multiple NSF fees for the same electronic item, and of

assessing fees when there was more than a "negative balance" in the account. Defendant could easily have avoided acting in this manner by simply changing the programing in its software to charge only an NSF "per item," and to charge overdraft fees and NSF fees only when there really was a "negative balance" as its contracts stated. Instead, Defendant unilaterally elected to and did program its software to create accounting gimmicks which would maximize its overdraft and NSF fees. In so doing, and in implementing its overdraft and NSF fee programs for the purpose of increasing and maximizing overdraft fees, Defendant executed its contractual obligations in bad faith, depriving Plaintiff and the Class Members of the full benefit of the contracts.

103. As a proximate result of Defendant's breach of the implied covenant of good faith and fair dealing, Plaintiff and the Class Members have been damaged in an amount to be proven at trial and seek relief as set forth in the Prayer below.

FOURTH CAUSE OF ACTION
(Unjust Enrichment/Restitution)

104. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

105. As a result of the wrongful misconduct alleged above, Defendant unjustly received millions of dollars in overdraft and NSF fees.

106. Because Plaintiff and the Class Members paid the erroneous overdraft and NSF fees and repeat NSF fees assessed by Defendant, Plaintiff and the Class Members have conferred a benefit on Defendant, albeit undeservingly. Defendant has knowledge of this benefit, as well as the wrongful circumstances under which it was conveyed, and yet has voluntarily accepted and retained the benefit conferred. Should it be allowed to retain such funds, Defendant would be unjustly enriched. Therefore, Plaintiff and the Class Members seek relief as set forth in the Prayer below.

FIFTH CAUSE OF ACTION
(Money Had and Received)

107. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

108. Defendant has obtained money from Plaintiff and the Class Members by the exercise of undue influence, menace or threat, compulsion or duress, and/or mistake of law and/or fact.

109. As a result, Defendant has in its possession money which, in equity, belongs to Plaintiff and the Class Members, and thus, this money should be refunded to Plaintiff and the Class Members. Therefore, Plaintiff and the Class Members seek relief as set forth in the Prayer below.

FIFTH CAUSE OF ACTION
(Violation of Electronic Fund Transfer Act (Regulation E), 12 C.F.R. §§ 1005, *et seq*. (authority derived from 15 U.S.C. §§ 1693, *et seq*.))

110. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

111. By charging overdraft fees on ATM and nonrecurring transactions, BayPort violated Regulation E, 12 C.F.R. §§ 1005, *et seq*., whose "primary objective" is "the protection of individual consumers," 12 C.F.R. § 1005.1(b), and which "carries out the purposes of the Electronic Fund Transfer Act [15 U.S.C. §§ 1693, *et seq*.], the 'EFTA,'" 12 C.F.R. § 1005.1(b)).

112. Specifically, the charges violated what is known as the "Opt In Rule" of Regulation E. 12 C.F.R. § 1005.17. The Opt In Rule states: "a financial institution . . . *shall not assess a fee or charge* . . . pursuant to the institution's overdraft service, *unless* the institution: (i) [p]rovides the consumer with a notice in writing [the opt-in notice] . . . *describing the institution's overdraft service*" and (ii) "[p]rovides a reasonable opportunity for the consumer to

affirmatively consent" to enter into the overdraft program. *Id*. (emphasis added). The notice "shall be clear and readily understandable." 12 C.F.R. § 1005.4(a)(1). To comply with the affirmative consent requirement, a financial institution must provide a segregated description of its overdraft practices that is accurate, non-misleading and truthful and that conforms to 12 C.F.R. § 1005.17 prior to the opt-in, and must provide a reasonable opportunity to opt-in after receiving the description. The affirmative consent must be provided in a way mandated by 12 C.F.R. § 1005.17, and the financial institution must provide confirmation of the opt-in in a manner that conforms to 12 C.F.R. § 1005.17. Furthermore, choosing not to "opt-in" cannot adversely affect any other feature of the account.

113. The intent and purpose of this Opt-In Agreement is to "assist customers in understanding how overdraft services provided by their institutions operate . . . by explaining the institution's overdraft service . . . in a clear and readily understandable way"—as stated in the Official Staff Commentary, 74 Fed. Reg. 59033, 59035, 59037, 5940, 5948, which is "the CFPB's official interpretation of its own regulation," "warrants deference from the courts unless 'demonstrably irrational,'" and should therefore be treated as "a definitive interpretation" of Regulation E. *Strubel v. Capital One Bank (USA)*, 179 F. Supp. 3d 320, 324 (S.D. N.Y. 2016) (quoting *Chase Bank USA v. McCoy*, 562 U.S. 195, 211 (2011)) (so holding for the CFPB's Official Staff Commentary for the Truth In Lending Act's Reg Z).

114. BayPort failed to comply with Regulation E, 12 C.F.R. § 1005.17, which requires affirmative consent before a financial institution is permitted to assess overdraft fees against customers' accounts through an overdraft program for ATM and non-recurring debit card transactions. BayPort has failed to comply with the 12 C.F.R. § 1005.17 opt-in requirements, including failing to provide its customers in a "clear and readily understandable way" a valid

description of the overdraft program which meets the strictures of 12 C.F.R. § 1005.17. BayPort's opt-in method fails to satisfy 12 C.F.R. § 1005.17 because, *inter alia*, it states that an overdraft occurs when there is not enough money in the account to cover a transaction but BayPort pays it anyway, when, in fact, BayPort assesses overdraft fees when there is enough money in the account to pay for the transaction at issue.

115. As a result of violating Regulation E's prohibition against assessing overdraft fees on ATM and non-recurring debit card transactions without obtaining affirmative consent to do so, BayPort has harmed Plaintiff and the Class Members.

116. As the result of BayPort's violation of Regulation E, 12 C.F.R. § 1005.17, Plaintiff and members of the Class are entitled to actual and statutory damages, as well as attorneys' fees and costs of suit, pursuant to 15 U.S.C.A. § 1693m.

PRAYER

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

1. For an order certifying this action as a class action;

2. For compensatory damages on all applicable claims and in an amount to be proven at trial;

3. For an order requiring Defendant to disgorge, restore, and return all monies wrongfully obtained together with interest calculated at the maximum legal rate;

4. For statutory damages;

5. For an order enjoining the wrongful conduct alleged herein;

6. For costs;

7. For pre-judgment and post-judgment interest as provided by law;

8. For attorneys' fees under the Electronic Fund Transfer Act, the common fund

doctrine, and all other applicable law; and

9. For such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff and the Class Members demand a trial by jury on all issues so triable.

Dated: April 17, 2020

Respectfully Submitted,

/s/ Justin M. Sheldon

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**Pro Hac Vice* applications to be submitted