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21 **IN THE UNITED STATES DISTRICT COURT**
 22 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

23 LAVERNE SIMMONS, on behalf of
 24 herself and all others similarly situated,

25 Plaintiffs,

26 v.

27 BANK OF AMERICA, N.A.,

28 Defendant.

Case No. 2:22-cv-01126

CLASS ACTION COMPLAINT

(JURY TRIAL DEMANDED)

1 **CLASS ACTION COMPLAINT**

2 Plaintiff Laverne Simmons, on behalf of herself and all persons similarly
3 situated, alleges the following:

4 **INTRODUCTION**

5 1. The deadly COVID-19 pandemic created the worst economic crisis
6 since the Great Depression.¹ From the fourth quarter of 2019 through the second
7 quarter of 2020, the U.S. economy contracted by more than 19 percent, the worst
8 downturn ever recorded.² In March 2020 alone, business shutdowns and closures
9 designed to limit the spread of the coronavirus threw more than 22 million people
10 out of work, a mass layoff of record proportions.³ The impacts fell
11 disproportionately on low-income workers, with more than half of all job losses
12 occurring in industries with low average wages.⁴ In the months that followed and
13 throughout the pandemic, households—particularly people of color—have faced
14 significant economic hardship, including increased hunger and difficulty making
15 rent.⁵

16
17 ¹ See, e.g., David C. Wheelock, Fed. Reserve Bank St. Louis, *Comparing the COVID-19*
18 *Recession with the Great Depression*, 39 Economic Synopses 1, 4 (2020) (“By almost any
19 measure, the 2020 recession began with sharp declines in economic activity,
20 employment, and equity prices that rivaled or exceeded the initial declines of the
21 Great Depression.”).

22 ² Lucia Mutikani, *U.S. economy contracted 19.2% during COVID-19 pandemic recession*,
Reuters (July 29, 2021), [https://www.reuters.com/business/us-economy-
23 contracted-192-during-covid-19-pandemic-recession-2021-07-29/](https://www.reuters.com/business/us-economy-contracted-192-during-covid-19-pandemic-recession-2021-07-29/).

24 ³ *Id.*

25 ⁴ Ctr. on Budget & Policy Priorities, *Tracking the COVID-19 Economy’s Effects on Food,*
26 *Housing, and Employment Hardships* 9 (last updated Nov. 10, 2021),
27 <https://www.cbpp.org/sites/default/files/8-13-20pov.pdf>.

28 ⁵ *Tracking the COVID-19 Recession’s Effects on Food, Housing, and Employment Hardships*,
CENTER ON BUDGET & POLICY PRIORITIES (updated Aug. 9, 2021), available at
[https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-
recessions-effects-on-food-housing-and](https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and).

1 2. During the pandemic, many credit card customers facing these
2 financial difficulties were drawn into a cycle of high interest charges and late fees
3 that further threatened their well-being.

4 3. For example, if a customer does not make a credit card payment by the
5 due date set by Defendant Bank of America, N.A. (“BANA”), or pays below the
6 minimum payment required by BANA, BANA charges late fees of up to \$40 plus
7 interest on any balance—including interest on those late fees.

8 4. Through the imposition of these and other fees and penalties, BANA
9 makes billions of dollars. BANA’s profits remained high throughout the global
10 pandemic, due in no small part to these punitive late fees. In 2020 alone, BANA
11 had a revenue of \$33.3 billion in its consumer market, including \$7 billion in service
12 charges.⁶ BANA earned \$1.7 *billion* in non-interchange credit card fees in 2020,
13 including \$407 million such fees in just the last quarter of 2020, such as late fees.⁷

14 5. In its contract of adhesion with its customers, BANA has discretion to
15 require customers to pay their minimum payment balance by a date certain, or to
16 allow customers to omit a payment or make a reduced payment during a federally-
17 declared disaster. In order to obtain good publicity and thereby attract more
18 business and investors, as well as ensure that current customers did not move to a
19 friendly credit card company, BANA promised consumers that it would refund
20 punitive late fees and interest that hurt its most vulnerable customers during the
21 pandemic.

22 _____

23 ⁶ Bank of America Annual Report 2020 4, 51, *available at*
24 [https://d1io3yog0oux5.cloudfront.net/_99e328ac189326b79fa0a994ba998a52/ba
25 nkofamerica/db/867/9129/annual_report/BAC_2020_Annual_Report.pdf](https://d1io3yog0oux5.cloudfront.net/_99e328ac189326b79fa0a994ba998a52/bankofamerica/db/867/9129/annual_report/BAC_2020_Annual_Report.pdf).

26 ⁷ *See* Bank of America Supplemental Information: Fourth Quarter 2020 4, *available at*
27 [https://d1io3yog0oux5.cloudfront.net/_99e328ac189326b79fa0a994ba998a52/ba
28 nkofamerica/db/806/9028/supplemental_information/4Q20+Supplemental+Info
mation.pdf](https://d1io3yog0oux5.cloudfront.net/_99e328ac189326b79fa0a994ba998a52/bankofamerica/db/806/9028/supplemental_information/4Q20+Supplemental+Information.pdf).

1 6. BANA did not keep its promises. While hundreds of thousands of
2 consumers lost their jobs and went hungry, BANA reaped enormous profits. In
3 addition to collecting billions of dollars from its most vulnerable consumers,
4 BANA collected federal hand-outs. While earning up to \$767 million from
5 administering Paycheck Protection Program loans,⁸ BANA also benefitted from
6 Federal Reserve overdraft penalty waivers.

7 7. In an apparent bid at positive public relations, BANA told customers
8 that they could “request to defer payments,” and receive “refunds on late fees.”⁹
9 BANA also announced that it would “offer assistance to qualifying consumer . . .
10 clients facing hardships, including forbearance with certain fees.”¹⁰

11 8. Moreover, BANA’s Credit Card Agreement makes the bank’s
12 imposition of late fees discretionary—mandating that BANA exercise that
13 discretion to the benefit of its customers, as opposed to its own interests, under its
14 duty of good faith and fair dealing.

15 9. Notwithstanding these representations and contractual duties, BANA
16 never took the steps necessary to adhere to its promises and representations.
17 Instead, it rejected requests from its customers (including Ms. Simmons) for late
18 fee refunds, and never implemented any system to make good on its promises.

19
20 ⁸ Stacy Cowley, *Despite Billions in Fees, Banks Predict Meager Profits on P.P.P. Loans*, NY
21 TIMES (Oct 1, 2020), available at
<https://www.nytimes.com/2020/10/01/business/ppp-loans-bank-profits.html>.

22 ⁹ Press Release, Bank of America, N.A., Bank of America Announces Additional
23 Support for Consumer and Small Business Clients Experiencing Hardship From the
24 Impact of the Coronavirus (Mar. 19, 2020), available at
[https://newsroom.bankofamerica.com/press-releases/consumer-banking/bank-](https://newsroom.bankofamerica.com/press-releases/consumer-banking/bank-america-announces-additional-support-consumer-and-small)
25 [america-announces-additional-support-consumer-and-small](https://newsroom.bankofamerica.com/press-releases/consumer-banking/bank-america-announces-additional-support-consumer-and-small).

26 ¹⁰ Kelly Anne Smith & Daphne Foreman, *List of Banks Offering Relief to Customers*
27 *Affected by Coronavirus (COVID-19)*, FORBES (Apr. 3, 2020), available at
[https://www.forbes.com/sites/advisor/2020/04/03/list-of-banks-offering-relief-](https://www.forbes.com/sites/advisor/2020/04/03/list-of-banks-offering-relief-to-customers-affected-by-coronavirus-covid-19/?sh=4ca551ea4efa)
28 [to-customers-affected-by-coronavirus-covid-19/?sh=4ca551ea4efa](https://www.forbes.com/sites/advisor/2020/04/03/list-of-banks-offering-relief-to-customers-affected-by-coronavirus-covid-19/?sh=4ca551ea4efa).

1 10. Ms. Simmons maintained a personal credit card with BANA. She
2 experienced financial hardship during the pandemic that depleted her funds and
3 caused her to incur numerous late fees—exactly the types of fees that BANA
4 promised to waive or refund.

5 11. But BANA failed to waive or refund these fees, despite repeated
6 requests from Ms. Simmons. BANA told Ms. Simmons that there was no COVID-
7 specific relief program, despite BANA’s widely publicized public promises to waive
8 such fees for struggling customers.

9 12. In fact, upon information and belief, BANA maintained its pre-
10 COVID policy of allowing only a very limited number of fee refunds, and refusing
11 even to consider refunding any further fees, regardless of the customer’s
12 circumstances.

13 13. Numerous other customers were not even able to get through to
14 BANA. In response to an online post by BANA about its purported COVID-19
15 resources, many people made the same complaints: hold times were long, nobody
16 answered the phone, and when someone did answer, calls would be disconnected.¹¹
17 Despite promising to refund fees during COVID-19, BANA did not even set up a
18 system that would adequately allow its customers to request these promised
19 refunds.

20 14. And, as Ms. Simmons’ experiences confirm, customers who were able
21 to get through were denied the fee refunds that BANA promised. Even when
22 BANA did grant refunds, it was under its non-discretionary, pre-COVID policies,
23 meaning that the bank was not exercising discretion at all with regard to COVID-
24

25
26
27 ¹¹ Bank of America, N.A. Facebook Page (Mar. 13, 2020), *available at*
28 <https://www.facebook.com/BankofAmerica/posts/2800050740049144>.

1 related requests, despite the language of the contract and the promises it made to
2 customers to consider those requests and grant refunds.

3 15. These promises generated significant good press for BANA,¹² at a time
4 when people began to question whether, given bank profits and the financial strain
5 of bank fees on the most vulnerable among us, banks should even be allowed to
6 charge punishing fees on their poorest customers.¹³ Indeed, the Federal Reserve
7 recommended that banks waive late fees and allow customers to defer or skip
8 payments.¹⁴

9 16. Black and Hispanic customers are especially hard-hit, since they have
10 disproportionately borne the brunt of the COVID-19 pandemic, including higher
11 infection and death rates than whites, they have been likelier to lose their jobs and
12 have lower income, and they are most likely to get hit with overdraft and other
13 fees.¹⁵

14 17. However, BANA refused to even consider many of the fee refund
15 requests it had solicited. It thus misled its customers—as well as potential
16

17 ¹² See, e.g., Elizabeth Gravier, *Bank of America Waives Fees, Defers Payments on Credit*
18 *Cards, Some Mortgages and Auto Loans During Coronavirus*, CNBC (Aug. 30, 2020),
19 available at <https://www.cnbc.com/select/bank-of-america-coronavirus-assistance/>;
20 *BOA Offering Refunds on Fees, Loan Deferrals*, PAYMENTS DIVE (Apr. 10, 2020), available
21 at [https://www.paymentsdive.com/ex/mpt/news/boa-offering-refunds-on-fees-](https://www.paymentsdive.com/ex/mpt/news/boa-offering-refunds-on-fees-loan-deferrals/)
22 [loan-deferrals/](https://www.paymentsdive.com/ex/mpt/news/boa-offering-refunds-on-fees-loan-deferrals/) (hereinafter, Gravier, *Bank of America Waives Fees*).

23 ¹³ Chicago Sun Times Editorial Board, *Abolish Bank Overdraft Fees That Prey on People*
24 *Who Can Least Afford Them*, CHICAGO SUN TIMES (June 3, 2021), available at
25 [https://chicago.suntimes.com/2021/6/3/22507650/overdraft-fees-ally-financial-](https://chicago.suntimes.com/2021/6/3/22507650/overdraft-fees-ally-financial-elizabeth-warren-editorial)
26 [elizabeth-warren-editorial](https://chicago.suntimes.com/2021/6/3/22507650/overdraft-fees-ally-financial-elizabeth-warren-editorial).

27 ¹⁴ See Letter to the Officer in Charge of Supervision at Each Federal Reserve Bank
28 and to Institutions Supervised by the Federal Reserve (Mar. 13, 2020), available at
<https://www.federalreserve.gov/supervisionreg/srletters/SR2004.htm> (referencing
recommendations in *Supervisory Practices Regarding Banking Organizations and Their*
Borrowers and Other Customers Affected by a Major Disaster or Emergency (Mar. 29, 2013)).

¹⁵ *Id.*

1 customers—and exercised its discretion solely in its own favor, without taking into
2 consideration the circumstances of an unprecedented global pandemic and
3 corresponding economic disaster and the financial benefits it received from the
4 federal government as well as the promises it had made to its customers.

5 18. Ms. Simmons brings this action on behalf of herself and a class of all
6 similarly situated consumers against BANA. She challenges (1) BANA’s systematic
7 violation of its covenant of good faith and fair dealing, flowing from BANA’s
8 failure to consider requests for refunds of late fees, despite reserving the discretion
9 to charge or not charge these fees and despite promising customers that it would
10 exercise its discretion in *their* favor during the deadly COVID-19 pandemic; (2)
11 BANA’s unjust enrichment through its knowing retention of the benefit of late
12 fees, despite its promise to refund those fees to consumers; and (3) BANA’s
13 violation of California’s unfair trade practices laws by misrepresenting that it would
14 refund late fees levied during the COVID-19 pandemic.

15 19. It is a breach of the covenant of good faith and fair dealing for BANA
16 to (1) provide itself discretion as to whether to charge or waive late fees; (2) promise
17 customers that it would waive such fees; (3) refuse to take into consideration the
18 circumstances of a global pandemic and worst economy since the Great
19 Depression, the money that was provided to it by the federal government, and the
20 harm these fees would impose on vulnerable customers when determining not to
21 exercise discretion in customers’ favor; and (4) either fail to exercise discretion at
22 all by failing to setup a system for considering the financial hardship of customers
23 who request a waiver of those fees or consistently exercise its discretion in its own
24 favor. These actions deny BANA’s most vulnerable customers the full benefit of
25 the contract that BANA itself wrote.

26 20. It is likewise a violation of the California Unfair Competition Law,
27 California Business and Professions Code section 17200, *et seq.*, to deceive

1 customers by promising to refund late fees, and then systematically refuse to do so.
2 These false promises are misrepresentations that are likely to mislead the public as
3 to whether late fees will be refunded during the COVID-19 pandemic. Ms.
4 Simmons relied on and suffered financial harm from these promises because she
5 would have taken action to avoid these punitive fees had she known that BANA
6 was going to refuse to refund these fees, during this time of extraordinary financial
7 hardship.

8 21. BANA also unjustly enriched itself at the expense of its customers by
9 retaining the benefit of late fees, despite its promise to refund those fees to
10 struggling customers.

11 22. Ms. Simmons and other Class members have been injured by BANA's
12 improper practices. On behalf of herself and the Class, Ms. Simmons seeks
13 damages, restitution, and injunctive relief for BANA's violation of the covenant of
14 good faith and fair dealing and for the violation of the California Unfair
15 Competition Law, and disgorgement of the wrongful and inequitable proceeds
16 received by BANA due to its unjust practices.

17 **JURISDICTION AND VENUE**

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

23 24. This Court has jurisdiction over BANA because it regularly conducts
24 and/or solicits business in, engages in other persistent courses of conduct in,
25 and/or derives substantial revenue from products and/or services provided to
26 persons in this District and in this State.

1 25. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because
2 BANA is subject to personal jurisdiction here and regularly conducts business in
3 the District, and because a substantial part of the events or omissions giving rise to
4 the claims asserted herein occurred in this District.

5 **PARTIES**

6 26. Plaintiff Laverne Simmons is of majority age and a citizen and resident
7 of Inglewood, California. Ms. Simmons maintained a personal credit card with
8 BANA until December 2020, and continued to incur late fees on her BANA credit
9 card until at least July 2021.

10 27. Defendant Bank of America, N.A. is a national bank with its
11 headquarters and principal place of business in Charlotte, NC. Among other things,
12 BANA is engaged in the business of providing retail banking services to consumers.
13 BANA operates banking centers, and thus conducts business, throughout the State
14 of California, including within this District.

15 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

16 28. When a BANA credit card customer makes a payment below the
17 minimum payment balance set by BANA, or fails to make the payment by the
18 due date set by BANA, BANA retains the discretion to charge a late fee of up to
19 \$40.

20 29. This fee and how and when it is to be charged are discussed in
21 BANA's contract of adhesion with customers.

22 30. In that adhesion contract, BANA reserves itself the discretion to
23 charge or waive late fees.

24 31. In representing to customers that it would provide certain relief,
25 including refunds for late fees, BANA promised to exercise its discretion in favor of
26 its most vulnerable customers who had suffered financial difficulty during the
27 COVID-19 pandemic.

1 32. Nevertheless, BANA failed even to set up a system that would allow
2 customers to request pandemic-related late fee refunds and customer service
3 representatives to issue such refunds.

4 33. Its failure to do so, instead exercising its discretion to its own benefit to
5 collect astronomical profits from late fees while its most vulnerable customers
6 suffered, violated the duty of good faith and fair dealing that inheres in every
7 contract.

8 34. This refusal to abide by its own promise also misled customers and
9 tended to mislead the public.

10 **I. BANA PROMISES TO EXERCISE ITS DISCRETION FAIRLY**

11 **A. BANA’s Promises to Customers Impacted by COVID-19**

12 35. Regulators and the public alike called for banks to put a stop to
13 predatory late fees during the pandemic. For example, in the midst of the
14 pandemic, a November 2020 United States Federal Reserve study reported that,
15 “[a]s millions of Americans experienced a sudden loss of income, consumers
16 increasingly relied on sources of short-term liquidity, such as savings and credit
17 cards” to make ends meet.¹⁶ And, the study found, in the early days of the
18 pandemic, consumers who “recently experienced a loss of income and [were]
19 under financial stress” complained frequently about “late fees for credit cards.”¹⁷
20 Indeed, consumers complained about these credit cards more often than any other
21 financial product in May, June, and July 2020.¹⁸

22
23
24 ¹⁶ Bd. of Governors, U.S. Fed. Reserve Sys., *The Pandemic’s Early Effects on Consumers*
25 *and Communities*, 2 Consumer & Community Context 18 (Nov. 2020),
26 <https://www.federalreserve.gov/publications/files/consumer-community-context-20201118.pdf>.

27 ¹⁷ *Id.* at 19.

28 ¹⁸ *Id.* at 17 (Fig. 1).

1 36. Federal regulators also pushed banks to help their customers. On
2 March 13, 2020, the Office of the Controller of the Currency issued guidance
3 encouraging banks to “take steps to meet the financial services needs of customers
4 adversely affected by COVID-19-related issues,” and specifically asked that they
5 waive late payment fees on credit cards.¹⁹ The guidance explained that such relief
6 measures “serve the long-term interests of communities and the financial system”
7 and “are consistent with safe and sound banking practices and applicable laws.”²⁰

8 37. State officials also asked banks to provide relief from these fees. For
9 example, in March 2020, New York’s governor issued an executive order
10 instructing the state’s Department of Financial Services to require state-chartered
11 banks to waive late fees and other credit card fees to help lessen the financial
12 hardship of the pandemic on New Yorkers.²¹ That same month, the Secretary of
13 California’s Business, Consumer Services & Housing Agency and its
14 Commissioner of Business Oversight jointly issued guidance to financial
15 institutions in the state whose customers “may be suffering from loss of income
16 or other financial hardship as a result of the COVID-19 pandemic.”²² They
17 specifically encouraged banks to waive payment fees on credit cards during the
18

19 ¹⁹ U.S. Office of the Controller of the Currency, OCC Bulletin 2020-15, Pandemic
20 Planning: Working With Customers Affected by Coronavirus and Regulatory
21 Assistance (Mar. 13, 2020), [https://www.occ.gov/news-](https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-15.html)
22 [issuances/bulletins/2020/bulletin-2020-15.html](https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-15.html).

23 ²⁰ *Id.*

24 ²¹ Press Release, N.Y. Dep’t Fin. Servs., Governor Cuomo Signs Executive Order
25 Mandating Businesses That Require In-Office Personnel to Decrease In-Office
26 Workforce by 75 Percent (Mar. 19, 2020),
27 https://www.dfs.ny.gov/reports_and_publications/press_releases/pr20203191.

28 ²² Lourdes Castro Ramirez, Sec’y, Cal. Bus., Consumer Servs. & Housing Agency &
Manuel P. Alvarez, Comm’r, Cal. Bus. Oversight, *Guidance to Financial Institutions
During the COVID-19 Pandemic* 1 (Mar. 22, 2020),
https://www.bcsb.ca.gov/coronavirus19/dbo_banks.pdf.

1 state of emergency.²³ And also that same month, the Illinois Department of
2 Financial and Professional Regulation “strongly urge[d] banks and credit unions to
3 respond to borrowers affected by the current economic environment” by waiving
4 fees for “late payments on credit cards.”²⁴

5 38. In light of this ongoing public pressure and the threat of legislative
6 action, BANA promised that it would help its most vulnerable customers,
7 including by waiving late fees.

8 39. On March 19, 2020, BANA announced on its website that it is
9 “offering assistance to clients through its Client Assistance Program,” that it would
10 work with them “on a case-by-case basis,” and that credit card holders could
11 “request to defer payments, refunds on late fees.”

12 40. In that same timeframe, BANA also told customers on its website:
13 “Need assistance with your payments? We can help now. . . . Through our Client
14 Assistance Program, consumers and small business clients who need assistance
15 making credit card and loan payments can submit an online request . . . When you
16 request a payment deferral there will be no negative credit bureau reporting for
17 up-to-date clients.” This representation remained on BANA’s website through at
18 least June 17, 2020.

19 41. On March 12, 2020, BANA reported to Forbes that it “offer[ed]
20 assistance to qualifying consumer and small business clients facing hardships,
21 including forbearance with certain fees.” On March 24, 2020, its head of consumer,
22 _____

23 ²³ *Id.* at 2.

24 ²⁴ Press Release, Ill. Dep’t Fin. & Prof’l Regulation, Illinois Department of Financial
25 and Professional Regulation Announces Help for Consumers Struggling to Make
26 Payments on their Debts Due to the COVID-19 Crisis and Guidance for its
27 Regulated Financial Sectors 1 (Mar. 30, 2020),
<https://www.idfpr.com/News/2020/2020%2003%2030%20IDFPR%20financial%20guidance.pdf>.

1 small business, and wealth management client care told CNBC: “Our teams are
2 ready to help clients and small businesses, and we are especially focused on the
3 needs of those experiencing hardship due to the current situation. . . . If you have
4 been negatively impacted by coronavirus and need additional assistance related to
5 your account please visit our website or you can give us a call.”²⁵

6 42. Taken together, these representations indicate that BANA promised
7 customers that it would refund late fees that it had issued during the pandemic.

8 43. Because BANA failed to refund fees upon request and did not set up
9 a system that would allow customer service representatives to do so, these
10 promises deceived reasonable customers into believing that they could get their
11 late fees refunded during the COVID-19 pandemic.

12 **B. BANA’s Relevant Contracts**

13 44. Transactions involving credit card accounts at BANA are governed by
14 BANA’s Credit Card Agreement.

15 45. According to the Credit Card Agreement that was in effect at the start
16 of the pandemic, BANA promises to exercise discretion on whether to charge late
17 fees, and the amount of such fees, including promising to waive fees during global
18 crises:

19 Late Payment Fee: Up to \$39

20 * * *

21 We may allow you, from time to time, to omit a monthly payment or
22 make a reduced payment. We will notify you when these options are
23 available. This will only occur on an isolated basis, such as **when the**
24 **bank is working with borrowers affected by a federally declared**
25 **disaster.**

26 (emphases added).

27 ²⁵ Gravier, *Bank of America Waives Fees, supra.*

1 46. Similarly, the version of BANA’s Credit Card Agreement that went into
2 effect on December 31, 2021, and remains in effect, uses identical language, except
3 that it retains discretion to charge late fees of up to \$40 instead of \$39.

4 47. Consistent with BANA’s representations in its contracts, on its
5 website, and elsewhere, Ms. Simmons and reasonable consumers understand that
6 BANA has discretion over whether to charge, refund, or waive late fees. They
7 further understand that BANA agreed to exercise its discretion fairly, particularly
8 that this discretion would not be exercised solely to the detriment of its most
9 vulnerable customers, especially during the COVID-19 pandemic.

10 48. The contracts, together with the website promises, indicate that BANA
11 will exercise its discretion in favor of *customers*, not itself.

12 **II. BANA FAILED TO ABIDE BY ITS PROMISES TO REFUND**
13 **PLAINTIFF’S LATE FEES**

14 **A. Ms. Simmons’ Experiences**

15 49. Ms. Simmons is a mobile notary and owns a rental property. Prior to
16 the COVID-19 pandemic, she had rarely, if ever, incurred a credit card late fee.

17 50. During the pandemic, however, work dried up and her hours fell,
18 which made it difficult for her to keep up with her bills. Additionally, her tenant
19 was also not able to pay rent due to the COVID-19 pandemic, so Ms. Simmons
20 had very little income and no way to earn what she needed to cover her bills.

21 51. In April 2020, Ms. Simmons began incurring late fees on her BANA
22 credit card due to the impact of COVID-19 on her finances. BANA charged her
23 numerous late fees throughout 2020, and eventually closed her account in
24 December 2020.

25 52. In 2020, Ms. Simmons saw reports that large banks, including BANA,
26 were promising relief from fees to customers suffering from financial hardship.
27 This influenced the way she used her credit card. Had she understood that BANA
28

1 was not actually offering the promised refunds, she would have used a different
2 credit card that may have been more likely to waive, refund, or discount late fees.

3 53. In April 2020, Ms. Simmons called BANA to request the assistance
4 that she understood BANA was promising. The customer service representative
5 allowed her to temporarily defer her payment, but told her that this deferral was a
6 one-time program and was their standard hardship program, not related to the
7 COVID-19 pandemic.

8 54. As the pandemic continued, Ms. Simmons continued to have problems
9 making payments due to the impact of COVID-19 on her finances. She called
10 BANA throughout 2020 and 2021, requesting COVID-related relief due to her
11 financial situation as caused by the pandemic. After the one-time deferral around
12 April 2020, the BANA customer service representatives all informed Ms. Simmons
13 that they had no COVID-related relief, and that she was only entitled to the
14 standard one-time deferral that had existed since prior to the pandemic. BANA did
15 not refund any late fees or allow Ms. Simmons to defer any payments after the one-
16 time deferral period ended around June or July 2020.

17 55. The statements by the BANA representatives clearly indicated that
18 BANA had no process or program for considering or granting relief for its financial
19 customers' hardships during the pandemic, despite the explicit promises BANA
20 had made.

21 56. Despite closing her account, BANA continued to charge Ms. Simmons
22 late fees well into 2021. Although Ms. Simmons made no new purchases in 2021,
23 BANA charged her a late fee in February, March, April, May (despite accepting a
24 payment below the minimum payment amount for that pay cycle), and June of
25 2021. BANA charged her a total of \$223 in late fees solely during the first six
26 months of 2021. Upon information and belief, none of those fees were ever
27 refunded.

1 57. Ms. Simmons worked with a tight budget each month during the
2 pandemic because of its effects on her work hours. She never intentionally was
3 delinquent on her credit card bills, but the money coming in simply wasn't enough
4 to cover her bills. Had she known that BANA did not intend to keep its promises
5 to use its discretion to grant customers relief from late fees during the pandemic,
6 she would have used other credit cards to pay bills. But because of BANA's
7 promises to help, she did not believe that looking to these other companies, and
8 any risk of incurring their fees, was necessary.

9 **CLASS ALLEGATIONS**

10 58. Ms. Simmons brings this action on behalf of herself and all others
11 similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This
12 action satisfies the numerosity, commonality, typicality, adequacy, predominance
13 and superiority requirements of Rule 23.

14 59. The proposed classes are defined as:

15 **Nationwide class:** All BANA consumer credit card
16 customers in the United States who, after March 12, 2020,
17 were charged late fees by BANA after BANA promised to
18 consider waiving such fees due to the pandemic, attempted
to seek a refund, and did not receive a refund for such fees.

19 **Alternative California-only class:** All BANA consumer
20 credit card customers in California who, after March 12,
21 2020, were charged late fees by BANA after BANA
22 promised to consider waiving such fees due to the pandemic,
attempted to seek a refund, and did not receive a refund for
such fees.

23 The National Class and California Class are collectively referred to herein as
24 the "Classes."

25 60. Plaintiff reserves the right to modify or amend the definition of the
26 proposed Classes before the Court determines whether certification is appropriate.
27

1 61. Excluded from the Classes are BANA, its parents, subsidiaries,
2 affiliates, officers and directors, any entity in which BANA has a controlling
3 interest, all customers who make a timely election to be excluded, governmental
4 entities, and all judges assigned to hear any aspect of this litigation, as well as their
5 immediate family members.

6 62. The members of the Classes are so numerous that joinder is
7 impractical. Each Class consists of thousands of members, the identity of whom is
8 within the knowledge of and can be ascertained only by resort to BANA's records.

9 63. Ms. Simmons' claims are typical of the claims of those of the Classes
10 she seeks to represent in that she, like all Class members, was denied the benefit of
11 her contract with BANA when it promised to exercise its discretion to refund or
12 waive late fees in favor of its customers during the COVID-19 pandemic, and then
13 refused to even consider requests for waiver or refunds. Ms. Simmons, like all Class
14 members, has been damaged by BANA's misconduct in that she has been denied
15 the benefit of her contract with BANA through the unfair imposition of late fees,
16 to BANA's extremely profitable benefit, despite BANA's promise to exercise
17 discretion in the choice to refund or waive such fees. Her claims are also typical of
18 the Classes she seeks to represent in that BANA made misrepresentations to her
19 in promising to refund late fees and then systematically refusing to do so. Ms.
20 Simmons, like all Class members, has been harmed by these wrongful business
21 practices. Furthermore, the factual basis of BANA's misconduct is common to all
22 Class members and represents a common thread of refusal to exercise its discretion
23 fairly, resulting in injury to all members of the Classes.

24 64. There are numerous questions of law and fact common to the Classes
25 and those common questions predominate over any questions affecting only
26 individual Class members.

27 65. Among the questions of law and fact common to the Classes are:
28

- 1 a. Whether BANA breached its covenant of good faith and fair
- 2 dealing with Plaintiff and other members of the Classes
- 3 through its late fee policies and practices;
- 4 b. Whether BANA unjustly enriched itself through its late fee
- 5 policies and practices;
- 6 c. Whether BANA violated the California Unfair Competition
- 7 Law through its fraudulent misrepresentations;
- 8 d. The proper method or methods by which to measure damages;
- 9 and
- 10 e. Whether the Classes are entitled to declaratory and injunctive
- 11 relief.

12 66. Ms. Simmons' claims are typical of the claims of other Class members,

13 in that they arise out of the same wrongful BANA late fee policies and practices,

14 and concern BANA's form Credit Card Agreement and other related documents,

15 as well as BANA's promises to customers and to the public. Ms. Simmons has

16 suffered the harm alleged and has no interests antagonistic to the interests of any

17 other Class member.

18 67. Ms. Simmons is committed to the vigorous prosecution of this action

19 and has retained competent counsel experienced in the prosecution of class actions

20 and, in particular, class actions on behalf of consumers and against financial

21 institutions. Accordingly, Ms. Simmons is an adequate representative and will fairly

22 and adequately protect the interests of the Classes.

23 68. A class action is superior to other available methods for the fair and

24 efficient adjudication of this controversy. Since the amount of each individual Class

25 member's claim is small relative to the complexity of the litigation, and due to the

26 financial resources of BANA, few Class members could afford to seek legal redress

27 individually for the claims alleged herein. Therefore, absent a class action, the Class

1 members will continue to suffer losses and BANA's misconduct will proceed
2 without remedy.

3 69. Even if Class members themselves could afford such individual
4 litigation, the court system could not. Given the complex legal and factual issues
5 involved, individualized litigation would significantly increase the delay and
6 expense to all parties and to the Court. Individualized litigation would also create
7 the potential for inconsistent or contradictory rulings. By contrast, a class action
8 presents far fewer management difficulties, allows claims to be heard which might
9 otherwise go unheard because of the relative expense of bringing individual
10 lawsuits, and provides the benefits of adjudication, economies of scale and
11 comprehensive supervision by a single court.

12 70. Ms. Simmons knows of no difficulty to be encountered in the
13 maintenance of this action that would preclude its maintenance as a class action.

14 **COUNT I**

15 **Breach of the Covenant of Good Faith and Fair Dealing** 16 **(On Behalf Plaintiff and all Classes)**

17 71. Ms. Simmons repeats paragraphs 1 through 70 above.

18 72. Ms. Simmons and BANA have contracted for credit card services, as
19 embodied in BANA's Credit Card Agreement and related documentation.

20 73. Under the laws of California and the states in which BANA does
21 business, good faith is an element of every contract pertaining to the assessment
22 of late fees. Whether by common law or statute, all such contracts impose upon
23 each party a duty of good faith and fair dealing. Good faith and fair dealing, in
24 connection with executing contracts and discharging performance and other duties
25 according to their terms, means preserving the spirit—not merely the letter—of
26 the bargain. Put differently, the parties to a contract are mutually obligated to
27 comply with the substance of their contract in addition to its form. Evading the

1 spirit of the bargain and abusing the power to specify terms constitute examples
2 of bad faith in the performance of contracts.

3 74. A party to a contract violates the obligation of good faith in
4 performance by exercising discretion reserved to it solely in its own favor, and
5 contrary to the benefit of the other party or otherwise exercising it in bad faith.
6 Doing so exploits the discretion to their benefit, particularly when, as here, the
7 party exercising the discretion drafted the contract—thus reserving the discretion
8 to itself—and exercises that discretion consistently against the benefit of a less
9 powerful, less sophisticated consumer.

10 75. BANA has breached the covenant of good faith and fair dealing in the
11 Credit Card Agreement through its late fee policies and practices as alleged herein,
12 because it failed to exercise the discretion it retained for itself in its contracts of
13 adhesion to the benefit of its customers.

14 76. BANA’s Credit Card Agreement states that BANA “may allow
15 [customers], from time to time, to omit a monthly payment or make a reduced
16 payment[,]” particularly when “the bank is working with borrowers affected by a
17 federally declared disaster.” This provision gives BANA discretion to assess or
18 waive late fees.

19 77. Rather than use this discretion to provide relief to customers suffering
20 from financial hardship during the pandemic as promised, BANA instead
21 exercised its discretion in its own favor. In doing so, BANA has unfairly interfered
22 with Ms. Simmons’ and the Classes’ right to receive the benefits of the contract.

23 78. Ms. Simmons and members of the Classes have performed all, or
24 substantially all, of the obligations imposed on them under the Credit Card
25 Agreement.

26 79. Ms. Simmons and members of the Classes have sustained damages
27 from BANA’s breach of the covenant of good faith and fair dealing.

COUNT II

Unjust Enrichment
(On Behalf of Plaintiff and all Classes)

1
2
3 80. Ms. Simmons pleads this claim in the alternative. Ms. Simmons repeats
4 paragraphs 1 through 79 above.

5 81. Ms. Simmons, on behalf of herself and the Classes, asserts a common
6 law claim for unjust enrichment.

7 82. By means of BANA's wrongful conduct alleged herein, BANA
8 knowingly provided credit card services to Ms. Simmons and members of the
9 Classes that were unfair, unconscionable, and oppressive.

10 83. BANA knowingly received and retained wrongful benefits and funds
11 from Ms. Simmons and members of the Classes in the form of late fees and related
12 interest. In so doing, BANA acted with conscious disregard for the rights of Ms.
13 Simmons and members of the Classes.

14 84. As a result of BANA's wrongful conduct as alleged herein, BANA has
15 been unjustly enriched at the expense of, and to the detriment of, Ms. Simmons
16 and members of the Classes.

17 85. BANA's unjust enrichment is traceable to, and resulted directly and
18 proximately from, the conduct alleged herein.

19 86. Under the common law doctrine of unjust enrichment, it is inequitable
20 for BANA to be permitted to retain the benefits it received, and is still receiving,
21 without justification, from the imposition of late fees on Ms. Simmons and members
22 of the Classes in an unfair, unconscionable, and oppressive manner. BANA's
23 retention of such funds under circumstances making it inequitable to do so
24 constitutes unjust enrichment.

25 87. The financial benefits derived by BANA rightfully belong to Ms.
26 Simmons and members of the Classes. BANA should be compelled to disgorge in
27 a common fund for the benefit of Ms. Simmons and members of the Classes all

1 wrongful or inequitable proceeds received by it. A constructive trust should be
2 imposed upon all wrongful or inequitable sums received by BANA traceable to Ms.
3 Simmons and the members of the Classes.

4 88. Ms. Simmons and members of the Classes have no adequate remedy at
5 law.

6 **COUNT III**

7 **California Unfair Competition Law Business and Professions Code § 17200** 8 **(On Behalf of Plaintiff and the California Class)**

9 89. Ms. Simmons repeats paragraphs 1 through 88 above.

10 90. BANA's conduct described herein violates the Unfair Competition
11 Law (the "UCL"), codified at California Business and Professions Code section
12 17200, *et seq.*

13 91. The UCL prohibits, and provides civil remedies for, unfair
14 competition. Its purpose is to protect both consumers and competitors by
15 promoting fair competition in commercial markets for goods and services. In
16 service of that purpose, the Legislature framed the UCL's substantive provisions
17 in broad, sweeping language.

18 92. By defining unfair competition to include any "any unlawful, unfair or
19 fraudulent business act or practice," the UCL permits violations of other laws to
20 be treated as unfair competition that is independently actionable and sweeps within
21 its scope acts and practices not specifically proscribed by any other law.

22 93. Ms. Simmons and the California Class bring this claim under the third
23 prong, that of "fraudulent business act or practice."

24 94. BANA committed fraudulent business acts and practices in violation
25 of Cal. Bus. & Prof. Code § 17200, *et seq.*, when affirmatively and knowingly
26 misrepresenting that it would refund late fees incurred due to the COVID-19
27 pandemic. Such representations are likely to mislead the public.

1 95. As a direct and proximate result of BANA's violations of the UCL's
2 "deceptive" prong, Ms. Simmons and members of the California Class have been,
3 and will continue to be charged excessive late fees, and thereby have suffered and
4 will continue to suffer actual damages.

5 96. Ms. Simmons and the California Class request equitable relief to
6 restore to them all money acquired by means of BANA's unlawful conduct, an
7 injunction on behalf of the general public to prevent BANA from continuing to
8 misrepresent its fee and waiver practices, and an award of attorneys' fees and costs
9 under Cal. Code of Civ. Proc. § 1021.5.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Ms. Simmons and the Classes demand a jury trial on all
12 claims so triable and judgment as follows:

13 1. Granting an injunction requiring BANA to disclose the actual
14 circumstances, if any, under which pandemic-related refunds will be provided to its
15 customers;

16 2. Granting an injunction requiring BANA to set up a system that will
17 allow the issuance of refunds when a fee was incurred due to circumstances related
18 to the COVID-19 pandemic or any other injunctive relief that the Court finds
19 proper;

20 3. Restitution of all late fees paid to BANA by Ms. Simmons and
21 members of the Classes, as a result of the wrongs alleged herein in an amount to
22 be determined at trial;

23 4. Disgorgement of the ill-gotten gains derived by BANA from its
24 misconduct;

25 5. Actual damages in an amount according to proof;

26 6. Pre-judgment interest at the maximum rate permitted by applicable law;

27 7. Treble damages and attorneys' fees as provided by law;

1 8. Costs and disbursements assessed by Ms. Simmons in connection with
2 this action; and

3 9. Such other relief as this Court deems just and proper.

4 **DEMAND FOR JURY TRIAL**

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

7
8 Dated: February 18, 2022

Respectfully submitted,

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20 **pro hac vice application forthcoming*