STATE OF MAINE
PENOBSCOT, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.: PENSC-CIV-2021-00014

ETHAN A. CHURCHILL and RHONDA YORK, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

BANGOR SAVINGS BANK,

Defendant

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs Ethan Churchill and Rhonda York ("Plaintiffs"), on behalf of themselves and all persons similarly situated, allege the following based on personal knowledge as to allegations regarding themselves and on information and belief as to others.

NATURE OF THE ACTION

1. Plaintiffs bring this action on behalf of themselves and class of all similarly situated consumers against Defendant Bangor Savings Bank ("Bangor" or "the Bank"), arising from (1) its routine practice of charging two or more non-sufficient funds fees ("NSF Fee") or overdraft fees ("OD Fees") on a single item.; and (2) charging OD Fees on accounts that were not actually overdrawn.

2. These practices breach contractual promises and violate the covenant of good faith and fair dealing.

3. With respect to the first practice, Plaintiffs do not dispute Bangor's right to either (a) reject a transaction and charge a single NSF Fee or (b) pay a transaction and charge a single overdraft fee on a transaction, but Bangor unlawfully maximizes its already profitable account

fees with unlawful practices that violate its contract.

4. Specifically, Bangor unlawfully assesses *multiple* NSF Fees and OD Fees on a single Automated Clearing House ("ACH") transaction or check.

5. In Bangor's sole and undisclosed view, each time the Bank processes an ACH transaction or check for payment after a having been rejected for insufficient funds, it becomes a new, unique item that is subject to another NSF Fee. But Bangor's Account Documents never even hint that this counterintuitive result could be possible.

6. Bangor's Account Documents indicate that only a single NSF Fee will be charged per item no matter how many times the request for payment is reprocessed. An electronic item reprocessed after an initial return for insufficient funds cannot and does not fairly become a new, unique item for NSF fee assessment purposes.

7. Bangor breaches its contract when it charges more than one fee on the same item, because the contract states—and reasonable consumers understand—that the same item can only incur a single NSF Fee.

8. Second, in plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that Bangor will only charge OD Fees on transactions where there are insufficient funds to cover them.

9. As happened to Plaintiffs, however, Bangor, in breach of its contract and the covenant of good faith and fair dealing, charges OD Fees even when there are sufficient funds to cover a debit card transaction.

10. Plaintiffs and other Bangor customers have been injured by these practices. On behalf of themselves and the Class, Plaintiffs seek damages, restitution and injunctive relief for Bangor's breach of contract and breach of the covenant of good faith and fair dealing.

11. Bangor's improper scheme to extract excessive funds from accountholders already struggling to make ends meet has victimized Plaintiffs and thousands of other accountholders.

PARTIES

12. Plaintiff Ethan Churchill is a citizen and resident of the City of Bangor, County of Penobscot and State of Maine.

13. Plaintiff Rhonda York is a citizen and resident of Skowhegan, Maine.

14. Defendant Bangor Savings Bank is a corporation duly organized and existing under the laws of the State of Maine and is one of Maine's largest banks which maintains its principal place of business in the City of Bangor, County of Penobscot and State of Maine.

I. BANGOR CHARGES TWO OR MORE FEES ON THE SAME ITEM

15. As alleged more fully herein, Bangor's Account Documents allow it to take certain steps when an accountholder attempts a transaction but does not have sufficient funds to cover it. Specifically, Bangor may (a) authorize the transaction and charge a *single* OD Fee; or (b) reject the transaction and charge a *single* NSF Fee.

16. In contrast to its Account Documents, however, Bangor regularly assesses two or more fees on the *same* item.

17. This abusive practice is not universal in the financial services industry. Indeed, major banks like Chase—the largest consumer bank in the country—do not undertake the practice of charging more than one NSF Fee on the same item when it is reprocessed. Instead, Chase charges one NSF Fee even if a transaction is reprocessed for payment multiple times.

18. Bangor's Account Documents never disclose this practice. To the contrary, Bangor's Account Documents indicate it will only charge a single NSF Fee on an item.

A. Plaintiff Churchill's Experience

19. As an example, on June 3, 2020 Plaintiff Churchill attempted to make a $55 payment via an ACH transaction to United Financial Casualty Company.

20. Bangor rejected payment of that item due to insufficient funds and charged Plaintiff a $32 Return Item Fee.

21. Unbeknownst to Plaintiff Churchill and without his request to Bangor to retry the transaction, six days later, on June 9, 2020, Bangor processed the same item again. Bangor again rejected the payment and charged Plaintiff another $32 Return Item Fee. Bangor knew the second payment attempt was the same item as the first, as it was labeled as a "RETRY PYMT" on his statement.

22. In sum, *Bangor charged Plaintiff $64 in fees to process a single $55 item*.

23. Plaintiff Churchill understood his transaction to be a single transaction, an understanding consistent with what is laid out in Bangor's Account Documents, capable at most of receiving a single NSF Fee (if Bangor returned it) or OD Fee (if Bangor paid it).

24. The same pattern occurred again on August 4, 2020 and August 10, 2020 with respect to different attempted payment to United Financial Casualty Company.

B. The Imposition of Multiple Fees on a Single Item Violates Bangor's Express Promises and Representations

25. The Account Agreement provides the general terms of Plaintiffs' relationship with Bangor and makes explicit promises and representations regarding how transactions will be processed, as well as when NSF Fees and OD Fees may be assessed.

26. The Account Documents contain explicit terms indicating that NSF Fees and OD Fees will only be assessed once per item—defined as a customer request for payment or transfer—but in fact Bangor regularly charges two or more fees per item even though a customer only

requested the payment or transfer once.

27. Bangor's Account Documents state that it will assess a single fee per item that is returned due to insufficient funds.

28. According to the Account Agreement, at most a single fee will be assessed per "item" returned for insufficient funds.

OVERDRAFT/RETURNED:

Overdraft/NRB[1]--- $32.00 per item

NSF, Returned, Uncollected[1] ------------------------- $32.00 per item

[1] Includes any withdrawal, check, ATM and ACH

Ex. A at 1.

29. The same check or ACH transaction cannot conceivably become a new one each time it is rejected for payment then reprocessed, especially when—as here—Plaintiff Churchill took no action to resubmit them.

30. There is zero indication anywhere in the Account Documents that the same item is eligible to incur multiple fees.

31. Even if Bangor reprocesses an instruction for payment, it is still the same item. Bangor's reprocessing is simply another attempt to effectuate an accountholder's original order or instruction.

32. The disclosures described above never discuss a circumstance where Bangor may assess multiple fees for a single check or ACH transaction that was returned for insufficient funds and later reprocessed one or more times and returned again.

33. In sum, Bangor promises that one NSF Fee will be assessed per item, and this must mean all iterations of the same instruction for payment. As such, Bangor breached the contract

when it charged more than one fee per item.

34. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same transaction will be treated as the same "item," which Bangor will either authorize (resulting in an overdraft item) or reject (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere does Bangor disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor do Bangor customers ever agree to such fees.

35. Customers reasonably understand, based on the language of the Account Documents, that Bangor's reprocessing of checks or ACH payments are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger additional fees. In other words, it is always the same item or transaction.

36. Banks and credit unions like Bangor that employ this abusive practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that do engage in this abusive practice disclose it expressly to their accountholders—something Bangor here never did.

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

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

(emphasis added).

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

> YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT **MULTIPLE FEES MAY BE**

> **CHARGED TO YOU AS A RESULT OF A RETURNED ITEM AND RESUBMISSION**.

(emphasis added).

39. Central Pacific Bank, a leading bank in Hawai'i, states in its Fee Schedule under the "MULTIPLE NSF FEES" subsection:

> 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**.[1]

40. Regions Bank likewise 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**.[2]

41. First Financial Bank states:

> "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**."[3]

42. Andrews Federal Credit Union states:

> You understand and agree that a merchant or other entity may make multiple attempts to resubmit a returned item for payment. **Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item.** 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 use for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

---

1 *Miscellaneous Fee Schedule*, Central Pacific Bank 1 (Feb. 15, 2019), https://www.centralpacificbank.com/PDFs/Miscellaneous-Fee-Schedule.aspx.

2 https://www.regions.com/virtualdocuments/Deposit_Agreement_6_1_2018.pdf.

3 Special Handling/Electronic Banking Disclosures of Charges, First Financial Bank 2 (Aug. 2018), https://www.bankatfirst.com/content/dam/first-financial-bank/eBanking_Disclosure _of_ Charges.pdf.

When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft.[4]

43. Consumers Credit Union states:

Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. 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.[5]

44. Wright Patt Credit Union states:

Consequently, **because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item**. Therefore, multiple fees may be charged to you as a result of a returned item and represented regardless of the number of times an item is presented or represented to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.[6]

45. Railroad & Industrial Federal Credit Union states:

Consequently, **because we may charge an NSF fee for an NSF item each time it is presented, we may charge you more than one NSF fee for any given item**. Therefore, multiple fees may be charged to you as a result of a returned item and resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.[7]

46. 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.[8]

47. Members First Credit Union states:

---

4 https://www.andrewsfcu.org/AndrewsFCU/media/Documents/Terms-and-Conditions_REBRANDED_Dec2019-Update.pdf
5 https://www.myconsumers.org/docs/default-source/default-document-library/ccu_membership_booklet_complete.pdf?sfvrsn=6
6 https://www.wpcu.coop/en-us/PDFDocuments/Important%20Account%20Information%20Disclosure%20-%20WPCU.pdf
7 https://www.rifcu.org/Documents/Disclosures/Account-Terms-Conditions.aspx
8 https://www.partners1stcu.org/uploads/page/Consumer_Account_Agreement.pdf

> 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 [.][9]

48. Community Bank, N.A. states:

> We cannot dictate whether or not (or how many times) a merchant will submit a previously presented item. **You may be charged more than one Overdraft or NSF Fee if a merchant submits a single transaction multiple times after it has been rejected or returned**.[10]

49. RBC Bank states:

> **We may also charge against the Account an NSF fee for each item returned or rejected, including for multiple returns or rejections of the same item**.[11]

50. Diamond Lakes Credit Union states:

> **Your account may be subject to a fee for each item regardless of whether we pay or return the item**. We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.[12]

51. Parkside Credit Union states:

> If the Credit Union returns the item, you will be assessed an NSF Fee. Note that the Credit Union has no control over how many times an intended payee may resubmit the same check or other item to us for payment. **In the event the same check or other item is presented for payment on more than one occasion, your account will be subject to an additional charge on each occasion that the item is presented for payment**. There is no limit to the total fees the Credit Union may charge you for overdrawing your account.[13]

---

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

10 https://cbna.com/u/header/2019-Overdraft-and-Unavailable-Funds-Practices-Disclosure.pdf

11 https://www.rbcbank.com/siteassets/Uploads/pdfs/Service-Agreement-for-Personal-Accounts.pdf

12 https://www.diamondlakesfcu.org/termsconditions.html

13 https://www.parksidecu.org/_/kcms-doc/1043/44277/Membership-and-Account-Agreement.pdf?__cf_chl_captcha_tk__=add6ebea42df3385074decd4b16c1f86a8359dc9-1580434763-0-AfXmB7FcyYTqzK9oMNbMSKM6k5fnKS5Xf-z7p3Tv-Pt951tDs7wM8yaaIV06w718t2nomyWR1Q8COwgpfgE07FJWZUeFkJN6lxbXDZG1SvidTWhYm9l85AbCd5afw2imyGdtdzKhXl9bQ9TYkjOlTVM4w8OFJOtE3wVIHrEITnQnSfoR5mZxM5O0bu4f_FHoHiJj0XsjNkVoGblk0-lti6-gMn-Wcu_o87SGQW6dOUF2i6rHGiM_CkdI-ULanKI2NS3KlhkYAuNatN9Jdwr7Plc6oJozMbZQeczuO7VlbRnuCFD0tjzkw1lsnof7uaRvLRAkfKYi3wh0tUU1c_Y6N4aH1qN8SPftOn8TYJHO7OoILvpMfamNTqv_djpbUl3GVA

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

C. The Imposition of Multiple Fees on a Single Item Breaches Bangor's Duty of Good Faith and Fair Dealing

53. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are invested with a discretionary power over the other party. In such circumstances, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties' reasonable expectations and means that Bangor is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Bangor has a duty to honor transaction requests in a way that is fair to Plaintiffs and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties on the depositor. Here—in the adhesion agreements Bangor foisted on Plaintiffs and its other customers—Bangor has provided itself numerous discretionary powers affecting customers' accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, Bangor abuses that discretion.

54. Specifically, Bangor maintains complete discretion not to assess fees on transactions at all. By exercising its discretion in its own favor—and to the prejudice of Plaintiffs and other customers—by charging more than one fee on a single item, Bangor breaches the reasonable expectation of Plaintiffs and other customers and in doing so violates the implied covenant to act in good faith.

55. It was bad faith and totally outside Plaintiffs' reasonable expectations for Bangor to use its discretion to assess two or three fees for a single attempted payment.

56. When Bangor charges multiple NSF Fees and OD Fees, Bangor uses its discretion

to define the meaning of an "item" in an unreasonable way that violates common sense and reasonable consumer expectations. Bangor uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more fees.

II. BANGOR CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT

A. Overview of Claim

57. Bangor issues debit cards to its checking account customers, including Plaintiffs, which allows its customers to have electronic access to their checking accounts for purchases, payments, withdrawals and other electronic debit transactions.

58. Pursuant to its Account Documents, Bangor charges fees for debit card transactions that purportedly result in an overdraft.

59. Plaintiffs bring this cause of action challenging Bangor's practice of charging OD Fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions" ("APPSN Transactions").

60. Here's how it works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Bangor immediately reduces accountholders checking accounts for the amount of the purchase, sets aside funds in a checking account to cover that transaction, and as a result, the accountholder's displayed "available balance" reflects that subtracted amount. As a result, customers' accounts will always have sufficient available funds to cover these transactions because Bangor has already sequestered these funds for payment.

61. However, Bangor still assesses crippling OD Fees on many of these transactions and mispresents its practices in its Account Documents.

62. Despite putting aside sufficient available funds for debit card transactions at the

time those transactions are authorized, Bangor later assesses OD Fees on those same transactions when they purportedly settle days later into a negative balance. These types of transactions are APPSN Transactions.

63. Bangor maintains a running account balance in real time, tracking funds accountholders have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, Bangor sequesters the funds needed to pay the transaction, subtracting the dollar amount of the transaction from the customer's available balance. Such funds are not available for any other use by the accountholder, and such funds are specifically associated with a given debit card transaction.

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

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

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

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

66. Still, despite keeping those held funds off-limits for other transactions, Bangor improperly charges OD Fees on those APPSN Transactions, although the APPSN Transactions ***always*** have sufficient available funds to be covered.

67. Indeed, the Consumer Financial Protection Bureau ("CFPB") has expressed concern with this very issue, flatly calling the practice "unfair" and/or "deceptive" when:

> 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. At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer's available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that 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. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing fees under these circumstances was found to be unfair.

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

68. There is no justification for these practices, other than to maximize Bangor's OD Fee revenue. APPSN Transactions only exist because intervening checking account transactions

supposedly reduce an account balance. But Bangor is free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year. But Bangor was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

69. Besides being unfair and unjust, these practices breach contract promises made in Bangor's adhesion contracts—contracts which fail to inform accountholders about, and in fact, misrepresent, the true nature of Bangor's processes and practices. These practices also exploit contractual discretion to gouge accountholders.

70. In plain, clear, and simple language, the checking account contract documents covering OD Fees promise that Bangor will only charge OD Fees on transactions that have insufficient funds to "cover" that debit card transaction.

71. In short, Bangor is not authorized by contract to charge OD Fees on transactions that have not overdrawn an account, but it has done so and continues to do so.

D. Mechanics of a Debit Card Transaction

72. A debit card transaction occurs in two parts. First, authorization for the purchase amount is instantaneously obtained by the merchant from Bangor. When a merchant physically or virtually "swipes" a customer's debit card, the credit card terminal connects, via an intermediary, to Bangor, which verifies that the customer's account is valid and that sufficient available funds exist to "cover" the transaction amount.

73. At this step, if the transaction is approved, Bangor immediately decrements the funds in an accountholder's account and sequesters funds in the amount of the transaction but does not yet transfer the funds to the merchant.

74. Indeed, the entire purpose of the immediate debit and hold of positive funds is to

ensure that there are enough funds in the account to pay the transaction when it settles, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

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

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

75. Sometime thereafter, the funds are actually transferred from the customer's account to the merchant's account.

76. Bangor (like all credit unions and banks) decides whether to "pay" debit card transactions at authorization. After that, Bangor is obligated to pay the transaction no matter what. For debit card transactions, that moment of decision can only occur at the point of sale, at the instant the transaction is authorized or declined. It is at that point—and only that point—when Bangor may choose to either pay the transaction or decline it. When the time comes to actually settle the transaction, it is too late—the financial institution has no discretion and must pay the charge. This "must pay" rule applies industry wide and requires that, once a financial institution authorizes a debit card transaction, it "must pay" it when the merchant later makes a demand, regardless of other account activity. *See* Electronic Fund Transfers, 74 Fed. Reg. 59033-01, 59046 (Nov. 17, 2009).

77. There is no change—no impact whatsoever—to the available funds in an account when this step occurs.

E. <u>Bangor's Account Documents</u>

78. Amongst the Account Documents which governs Plaintiffs' relationship with Bangor is a document entitled, Important Information About Your Account ("Deposit Agreement"), attached hereto as Exhibit B.

79. The Deposit Agreement misrepresent to customers that OD Fees will only be charged when there is not enough money in the account to pay a transaction:

> An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway

Ex. B at 26.

80. The Deposit Agreement further links "authorization" with when the Bank determines overdraft fees:

> What are the standard overdraft practices that come with my account?
> We do ***authorize and pay*** overdrafts for the following types of transactions:
> • Checks and other transactions made using your checking account number including electronic funds transfers.
> • Automatic bill payments and payments authorized by you.
> We do not *authorize and pay* overdrafts for the following types of transactions unless you ask us to (see consent form below):
> • ATM transactions
> • Everyday debit card transactions
> We pay overdrafts at our discretion, which means we do not guarantee that we will always *authorize and pay* any type of transaction. If we do not *authorize and pay* an overdraft, your transaction will be declined.

Id.

81. For APPSN Transactions, which are immediately deducted from a positive account balance and held aside for payment of that same transaction, there are always funds to cover those transactions—yet Bangor assesses OD Fees on them anyway.

82. The above promises mean that transactions are only overdraft transactions when they are authorized into a negative account balance. Of course, that is not true for APPSN

Transactions.

83. APPSN transactions are always *initiated* at the time the customer swipes the debit card when there are sufficient available funds in the account.

84. In fact, Bangor actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to settle those same transactions. Instead, it uses a secret posting process described below.

85. All the above representations and contractual promises are untrue. In fact, Bangor charges OD Fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. No express language in any document states that Bangor may impose OD Fees on any APPSN Transactions.

86. For debit card transactions, the credit union decides whether to "authorize and pay" a debit card transaction at the moment of authorization. Bangor represents to its customers that it is one step, just like consumers using debit cards believe.

87. For APPSN Transactions, which are immediately deducted from a positive account balance and held aside for payment of that same transaction, there are *always* funds to "cover" those transactions—yet Bangor assesses OD Fees on them anyway.

88. The Disclosures misconstrue Bangor's true debit card processing and overdraft practices.

89. First, and most fundamentally, Bangor charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions. That is despite contractual representations that Bangor will only charge OD Fees on transactions with insufficient available funds to cover a given transaction.

90. Bangor assesses OD Fees on APPSN Transactions that *do* have sufficient funds

available to cover them throughout their lifecycle.

91. Bangor's practice of charging OD Fees even when sufficient available funds exist to cover a transaction violates a contractual promise not to do so. This discrepancy between Bangor's actual practice and the contract causes accountholders like Plaintiffs to incur more OD Fees than they should.

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

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

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

95. At the time of settlement, however, an available balance *does not change at all* for these transactions previously authorized into good funds. As such, Bangor cannot then charge an OD Fee on such transaction because the available balance has not been rendered insufficient due to the pseudo-event of settlement.

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

97. This secret step allows Bangor to charge OD Fees on transactions that never should

have caused an overdraft—transactions that were authorized into sufficient funds, and for which Bangor specifically set aside money to pay them.

98. This discrepancy between Bangor's actual practices and the contract causes accountholders to incur more OD Fees than they should.

99. In sum, there is a huge gap between Bangor's practices as described in the Account Documents and Bangor's practices in reality.

C. Bangor Abuses Contractual Discretion

100. Bangor's treatment of debit card transactions to charge OD Fees is more than a breach of the express terms of the numerous Account Documents. In addition, Bangor exploits contractual discretion to the detriment of accountholders when it uses these policies.

101. The term "overdraft" is not defined in the account documents. Bangor uses its discretion to define "overdraft" in a manner contrary to any reasonable, common sense understanding of that term. In Bangor's implied definition, a balance is insufficient even if Bangor sequesters sufficient available funds for that transaction at the time it is made.

102. Bangor uses these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable accountholder would believe could cause OD Fees.

D. Reasonable Accountholders Understand Debit Card Transactions are Debited Immediately

103. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with immediate withdrawal of funds for debit card transactions. That is because if funds are immediately debited, they cannot be depleted by intervening transactions (and it is that subsequent depletion that is the necessary condition of APPSN Transactions). If funds are immediately debited, then, they are necessarily applied to the debit card transactions for which they are debited.

104. Bangor was and is aware that this is precisely how accountholders reasonably

understand debit card transactions to work.

105. Bangor knows that many accountholders prefer debit cards for these very reasons. Research indicates that accountholders prefer debit cards as a budgeting device because they don't allow debt like credit cards do, and because the money comes directly out of a checking account.

106. Consumer Action, a national nonprofit consumer education and advocacy organization, advises consumers determining whether they should use a debit card that "[t]here is no grace period on debit card purchases the way there is on credit card purchases; the money is immediately deducted from your checking account. Also, when you use a debit card you lose the one or two days of 'float' time that a check usually takes to clear." *What Do I Need to Know About Using a Debit Card?*, ConsumerAction (Jan. 14, 2019), https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card.

107. Further, Consumer Action informs consumers that "Debit cards offer the convenience of paying with plastic without the risk of overspending. When you use a debit card, you do not get a monthly bill. You also avoid the finance charges and debt that can come with a credit card if not paid off in full." *Understanding Debit Cards*, ConsumerAction, http://www.consumer-action.org/english/articles/understanding_debit_cards (last visited March 29, 2020).

108. This understand is a large part of the reason that debit cards have risen in popularity. The number of terminals that accept debit cards in the United States has increased by approximately 1.4 million in the last five years, and with that increasing ubiquity, consumers have (along with credit cards) viewed debit cards "as a more convenient option than refilling their wallets with cash from an ATM." Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases,* MarketWatch, Mar. 23, 2016, http://www.marketwatch.com/story/more-people-are-

using-debit-cards-to-buy-a-pack-of-gum-2016-03-23.

109. Not only have accountholders increasingly transitioned from cash to debit cards, but they believe that a debit card purchase is the fundamental equivalent of a cash purchase, with the swipe of a card equating to handing over cash, permanently and irreversibly.

110. Bangor was aware of the accountholder perception that debit transactions reduce an available balance *in a specified order*—namely, the moment they are actually initiated—and its account agreement only supports this perception.

D. Plaintiff York's Debit Card Transactions

111. Plaintiff York was charged numerous fees on debit card transactions that settled on the day the fee was assessed, despite the fact that the transactions had been authorized, prior to that day, on a sufficient available balance and sufficient available funds had been placed on hold at that time.

CLASS ALLEGATIONS

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

113. The proposed "Classes" are defined as:

> All Bangor account holders in the state of Maine who, during the applicable statute of limitations, were charged multiple fees on a single item (the "Multi-Fee Class") (Proposed Class Representative: Churchill)
>
> All Bangor account holders in the state of Maine who, during the applicable statute of limitations, were charged OD Fees on APPSN transactions (the "APPSN Class") (Proposed Class Representative: York).

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

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

116. The members of the Class are so numerous that joinder is impractical. The Class consist of thousands of members, the identities of whom are within the exclusive knowledge of Bangor and can be readily ascertained only by resort to Bangor's records.

117. The claims of the representative Plaintiffs are typical of the claims of the Class in that the representative Plaintiffs, like all members of the Class, were charged multiple fees on a single item and were charged OD Fees on APPSN transactions. The representative Plaintiffs, like all members of the Class, has been damaged by Bangor's misconduct in that he has been assessed unfair and unconscionable NSF and OD Fees. Furthermore, the factual basis of Bangor's misconduct is common to all members of the Class and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Class. Plaintiffs has suffered the harm alleged and has no interests antagonistic to the interests of any other members of the Class.

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

119. Among the questions of law and fact common to the Class include:

a. Whether Bangor violated contract provisions by charging multiple fees on the same item and by charging OD Fees on APPSN transactions;

b. Whether Bangor breached its covenant of good faith and fair dealing with Plaintiffs and other members of the Class through its NSF Fee and OD Fee policies and practices;

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

d. The declaratory and injunctive relief to which the Class are entitled.

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

121. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual class member's claim is small relative to the complexity of the litigation, no class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members of the Class will continue to suffer losses and Bangor's misconduct will proceed without remedy.

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

CAUSES OF ACTION
COUNT I

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

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

124. Plaintiffs and Bangor have contracted for bank account services, as embodied in Bangor's Account Agreement and related documentation.

125. Bangor's Account Documents state that it may assess one OD or NSF Fee per "item." Bangor regularly violates its contractual promises by charging multiple NSF Fees and OD Fees on a single item. Additionally, Bangor's Account Documents state that it may only assess an OD Fee when an overdraft occurs, and Bangor regularly violates its contractual promises by charging OD Fees on transactions that do not overdraw the account.

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

127. Instead of exercising that discretion in good faith and consistent with Plaintiffs'

reasonable expectations, Bangor breaches the covenant of good faith and fair dealing by charging more than one fee on a single item.

128. By exercising its discretion to enrich itself by gouging its consumers, Bangor consciously and deliberately frustrates the agreed common purposes of the contract and disappoints the reasonable expectations of Plaintiffs and members of the Class, thereby depriving them of the benefit of their bargain.

129. Plaintiffs and members of the Class have performed all, or substantially all, of the obligations imposed on them under the Account Documents.

130. Plaintiffs and members of the Class have sustained damages as a result of Bangor's breaches of the Account Documents.

PRAYER FOR RELIEF

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

a. certifying the proposed Class;

b. declaring Bangor's practices alleged in this Complaint to be in breach of Bangor's contract;

c. awarding all NSF Fees and OD Fees paid to Bangor by Plaintiffs and the Class, as a result of the wrongs alleged herein, in an amount to be determined at trial;

d. granting disgorgement of the ill-gotten gains derived by Bangor from its misconduct;

e. awarding actual damages in an amount according to proof;

f. awarding pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;

g. awarding costs and disbursements assessed by Plaintiffs in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and

h. awarding such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

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

Dated: April 14, 2022

/s/ Dov Sacks, Esq.
Dov Sacks, Esq.
Maine Bar No. 5500
Berman & Simmons, P.A.
P.O. Box 961
Lewiston, ME 04243-0961
(207) 784-3576
SacksService@bermansimmons.com

Sophia Gold, Esq. (*pro hac vice*)
KALIELGOLD PLLC
1100 15th Street NW, 4th Floor
Washington, D.C. 20005
(202) 350-4783
sgold@kalielgold.com

Attorneys for Plaintiffs and the Putative Class