

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

EASTERN DIVISION

MATTHEW J. SHARP, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.; and BANK OF
AMERICA CORPORATION,

Defendants.

Case No. 1:19-cv-5223

CLASS ACTION

(JURY TRIAL DEMANDED)

CLASS ACTION COMPLAINT

Plaintiff Matthew J. Sharp, individually and on behalf of all others similarly situated, complains and alleges as follows based on personal knowledge as to himself, on the investigation of his counsel, and on information and belief as to all other matters:

NATURE OF ACTION

1. Plaintiff brings this Class Action Complaint against Bank of America, N.A. and Bank of America Corporation (collectively, “Bank of America” or “Defendant”) for legal and equitable remedies resulting from Bank of America’s practices of improperly assessing \$35.00 fees to its customers for overdrafts triggered by non-recurring transactions initiated with “decoupled” debit cards issued by Target, Speedway, and numerous other convenience stores, grocery stores, retailers, and other companies nationwide.

2. At all times relevant to this action, Bank of America’s relationship with Plaintiff and all of its other personal deposit account holders has been governed by a standardized set of contractual documents, comprised of the “Deposit Agreement and Disclosures” and the incorporated “Personal Schedule of Fees” and “Card Agreement and Disclosures” – the terms of which are drafted by Bank of America, amended by Bank of America from time to time at its convenience and complete and sole discretion, and uniformly imposed by Bank of America on all

of its accountholders. *See* Compl., Exhibit A (“Deposit Agreement and Disclosures” (hereinafter, the “Deposit Agreement”)), at 2 (“You understand that these terms, as we may change or supplement them periodically, are a binding contract between you and us for your deposit account and your deposit relationship.”); *see id.*, Exhibit B (“Personal Schedule of Fees” (hereinafter, the “Schedule of Fees”)), at 1 (“Your account and deposit relationship with us are governed by this schedule of fees and the Deposit Agreement and Disclosures. . . . These agreements are part of the binding contract between you and us for your account and deposit relationship.”); *see id.*, Exhibit C (“Card Agreement and Disclosure” (hereinafter “Card Agreement”)), at 1 (“This Card Agreement and the applicable Schedule of Electronic Fees and Dollar Limits on Transactions are a contract between you and us (‘Card Agreement’) regarding your Bank of America debit card or ATM card, Business ATM card, or Access Device. It describes the electronic banking services you can use with your Card (defined below) and includes information about our rights and obligations. This Card Agreement, which is part of the Deposit Agreement and Disclosures and related Personal Schedule of Fees or Business Schedule of Fees (collectively, the ‘Deposit Agreement’) apply to each Bank of America deposit account that you link to your Card.”).

3. Since June of 2010, in the Deposit Agreement, Schedule of Fees, and Card Agreement, Bank of America has promised its accountholders that any “non-recurring” transaction initiated with any type of “debit card” is absolutely immune from the assessment of an overdraft fee – and yet over that same period of time has systematically assessed \$35.00 fees to its accountholders for overdrafts triggered by numerous types of “non-recurring” transactions initiated with numerous types of “debit cards.” By assessing fees for overdrafts caused by one-time, “non-recurring” transactions initiated with “debit cards,” Bank of America breached the Deposit Agreement and Schedule of Fees, the covenant of good faith and fair dealing, and various other legal obligations owed to its accountholders, and unjustly enriched itself.

4. For people living paycheck to paycheck, like Plaintiff and other members of the Class (defined below), the improper overdraft fees at issue in this case not only damaged them monetarily but have had a serious effect on their everyday lives.

5. On behalf of themselves and the other members of the Class, Plaintiff brings this action to recover all of the improperly-assessed overdraft fees at issue in this case, and for other legal and equitable remedies.

JURISDICTION AND VENUE

6. The Court has original jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2) & (6), because there are greater than 100 members of the putative class; because the claims of the putative class members far exceed \$5 million in the aggregate, exclusive of interest and costs; and because at least one of the members of the proposed class is a citizen of a state different from Bank of America.

7. Personal jurisdiction and venue are proper in Illinois and within this District because Plaintiff Sharp is a resident and citizen of Illinois and maintains a personal deposit account with Bank of America at a Bank of America financial institution located in Glendale Heights, Illinois, within this District; because Plaintiff's claims alleged herein arose in substantial part in Illinois and within this District; and because Bank of America does substantial business in Illinois and throughout this District.

PARTIES

8. Plaintiff Sharp is, and at all times mentioned herein was, a resident and citizen of Illinois. At all times mentioned herein, Plaintiff Sharp maintained a personal checking account with Bank of America that was opened at a Bank of America branch in Glendale Heights, Illinois.

9. Bank of America is a national bank with its headquarters and principal place of business in Charlotte, North Carolina. Bank of America provides, inter alia, retail banking products and services to consumers, including personal deposit accounts. Bank of America operates banking centers throughout Illinois and the United States.

BACKGROUND

10. Fee-based overdraft programs cost American consumers at least \$23.7 billion each year in the aggregate — more than the loans extended in exchange for such fees, which amount to

approximately \$21.3 billion annually.¹ Transactions initiated with debit cards, the most common triggers of overdraft fees, cause an average overdraft of approximately \$17.00 yet trigger an average fee of approximately \$35.00.² Most consumers do not learn of an overdraft for two or more days, exposing them to heightened risks of additional overdraft fees in the interim.³

11. The overwhelming majority of overdraft fees are paid by chronic overdrafters, who are typically those least able to afford such fees or recover from them once incurred.⁴ These “heavy overdrafters” generally have household incomes below the U.S. average and pay nearly a full week’s worth of those incomes on overdraft fees each year.⁵

12. Seniors, young adults, military families, and the unemployed are hit particularly hard.⁶ Americans aged 55 and older pay over \$6.2 billion in overdraft fees annually⁷ — \$2.5

¹ Leslie Parrish, *Overdraft Explosion: Bank fees for overdrafts increase 35% in two years*, Center for Responsible Lending, Oct. 6, 2009, available at <http://www.responsiblelending.org/overdraftloans/research-analysis/crl-overdraft-explosion.pdf>.

² Eric Halperin, Lisa James, and Peter Smith, *Debit Card Danger: Banks offer little warning and few choices as customers pay a high price for debit card overdrafts*, Center for Responsible Lending, at 25, Jan. 25, 2007, available at <http://www.responsiblelending.org/overdraftloans/research-analysis/Debit-Card-Danger-report.pdf>.

³ The Pew Charitable Trusts, *Overdrawn: Persistent Confusion and Concern About Bank Overdraft Practices*, June 2014, at 9-10, available at http://www.pewtrusts.org/~media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf.

⁴ Consumer Financial Protection Bureau, *Data Point: Checking Account Overdraft*, at 18, July 2014, available at http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

⁵ The Pew Charitable Trusts, *Heavy Overdrafters: A Financial Profile*, at 1, Apr. 2016, available at <http://www.pewtrusts.org/~media/assets/2016/04/heavyoverdrafters.pdf>.

⁶ See FDIC Study of Bank Overdraft Programs (Nov. 2008), at v.; Leslie Parrish, *Consumers Want Informed Choice on Overdraft Fees and Banking Options*, CRL Research Brief, Apr. 16, 2008, available at <http://www.responsiblelending.org/overdraft-loans/research-analysis/final-caravan-survey-4-16-08.pdf>; see also Comments of the Center for Responsible Lending to Board of Governors of the Federal Reserve System on Proposed Rule to Amend Regulation E—Overdraft Practices, Part II.B.1(b), pp. 10-12, Mar. 30, 2009, available at http://www.responsiblelending.org/overdraft-loans/policylegislation/regulators/comments-regulation-e_overdraft-practices.pdf.

⁷ Leslie Parrish and Peter Smith, *Shredded Security: Overdraft practices drain fees from older Americans*, Center for Responsible Lending, June 18, 2008, available at <http://www.responsiblelending.org/overdraftloans/research-analysis/shredded-security.pdf>.

billion for transactions initiated with debit cards and ATM transactions alone.⁸ Those who depend the most on Social Security pay \$1.4 billion in overdraft fees each year.⁹

13. As the financial toll of fee-based overdraft programs has increasingly and disproportionately fallen on the shoulders of our most vulnerable citizens, big banks have steadily become more and more reliant on overdraft fees as a revenue source. By way of illustration, big banks in the United States with assets exceeding \$1 billion reported \$11.16 billion in overdraft fee revenue in 2015 – a sum that constituted nearly two-thirds of all consumer deposit account revenue for those banks that year.

14. For Bank of America in particular, overdraft has evolved from an occasional courtesy into a product that it depends upon for revenue. In 2016, for instance, Bank of America generated more than \$1.7 billion in revenue attributable to \$35.00 overdraft fees, paid largely by its poorest customers (as discussed above). On average, each Bank of America deposit account holder pays \$497.18 on overdraft fees each year.¹⁰

15. Faced with heightened regulatory scrutiny in recent years, Bank of America has implemented various new strategies to feed its insatiable appetite for overdraft fee and other fee-based revenue.¹¹ This case concerns one such strategy, executed by Bank of America in clear breach of its standardized contract with (as well as various other legal obligations owed to) its accountholders over the past decade.

⁸ *Id.*

⁹ *Id.* At 6, Table 1.

¹⁰ Byrne, John, *Bank Fees rise to all-time high – and nobody can stop them*, New York Post, Mar. 12, 2017, available at <https://nypost.com/2017/03/12/bank-fees-rise-to-all-time-high-and-nobody-can-stop-them/>.

¹¹ *See, e.g., Farrell v. Bank of America, N.A.*, Case No. 3:16-cv-00492-L-WVG (S.D. Cal.) (\$66.6 million settlement for improper extended overdraft fees); *Bodnar v. Bank of America, N.A.*, Case No. 5:14-cv-3224-EGS (E.D. Pa.) (\$27.5 million settlement for improper overdraft fees charged despite sufficient available funds); *Pantelyat v. Bank of America, N.A.*, Case No. 1:16-cv-8964-AJN (S.D.N.Y.) (\$22 million settlement for improper overdraft fees charged on non-recurring transactions with Uber).

FACTUAL ALLEGATIONS

I. Decoupled Debit Cards Linked to Personal Deposit Accounts at Bank of America

16. Bank of America issues “debit cards” to its personal deposit account holders. These devices are linked to account holders’ deposit accounts at Bank of America and may be used to initiate transactions from the personal deposit accounts to which they are linked, including to initiate transactions for the purchase of goods and services at stores where such devices are accepted.

17. Additionally, over the past decade, numerous merchants throughout the country (including many retail stores, gas stations, grocers, and convenience stores) have also issued “debit cards” to their customers that are capable of being linked to personal deposit accounts at Bank of America and other financial institutions. This “decoupled” type of “debit card” is also a device capable of being linked to an account holder’s deposit account at Bank of America and may likewise be used to initiate transactions from the personal deposit account at Bank of America to which it is linked, including to initiate transactions for the purchase of goods and services at stores where such device is accepted. Companies that have issued such “debit cards” to their customers since 2010 include, by way of example and without limitation, Speedway, Target, Citgo, 7-Eleven, Royal Farms, Murphy USA, Flash Foods, Ricker’s, Cumberland Farms, and CircleK, among numerous others.

18. Between June 2010 and the present, millions of Bank of America account holders have linked such companies’ decoupled “debit cards” to their personal deposit accounts at Bank of America.

II. The Deposit Agreement and Incorporated Documents Govern the Assessment of Fees for Overdrafts Triggered by any Transactions Initiated with any “Debit Cards”

19. The Deposit Agreement defines “debit card” as, inter alia, any card “use[d] . . . to pay for purchases at merchants that accept debit cards[.]” (Ex. A at 1.)

20. Likewise, the document titled “Card Agreement and Disclosure,” which is provided to all personal deposit account holders at Bank of America, defined “Card” as follows: “Card’

means a personal Bank of America debit card, personal ATM card, Business ATM Card, mini card, mobile tag or any other Access Device that is linked to at least one deposit account with us.” (Ex. C at 1 (hereinafter, the “Card Agreement”) (emphasis added).) “Access Device” is in turn defined in the Card Agreement and Disclosures as follows: “‘Access Device’ means a card, code or other means of access to a customer’s account or any combination that may be used to initiate electronic funds transfers. Electronic Funds Transfers include all transfers resulting from debit cards, ATM cards, electronic payments, credits and transfers, telephone transfers, and online banking transactions.” (*Id.* (emphasis added).)

21. Thus, any type of “debit card” linked to and capable of initiating a transaction that debits a Bank of America personal deposit account constitutes a “Card” within the meaning of the Card Agreement and a “debit card” within the meaning of the Card Agreement, Deposit Agreement, and Schedule of Fees. (*See id.* at 1 (definitions of “Card” and “Access Device”); *see also id.* (“This Card Agreement and the applicable Schedule of Electronic Fees and Dollar Limits on Transactions are a contract between you and us (‘Card Agreement’) regarding your Bank of America debit card or ATM card, Business ATM card, or Access Device. It describes the electronic banking services you can use with your Card (defined below) and includes information about our rights and obligations. This Card Agreement, which is part of the Deposit Agreement and Disclosures and related Personal Schedule of Fees or Business Schedule of Fees (collectively, the ‘Deposit Agreement’) apply to each Bank of America deposit account that you link to your Card. If this Card Agreement and any other provisions of the Deposit Agreement are inconsistent, this Card Agreement governs. . . . You agree to the terms of this Card Agreement by activating, using a Card or allowing another person to use a Card.”) (emphasis added).)

III. In Early 2010, Bank of America Publicly Promises its Customers, in Articles in *The New York Times* and Elsewhere, that “Non-Recurring” Transactions Initiated with “Debit Cards” Would Henceforth be Immune from Overdraft Fees

22. In early 2010, Bank of America suddenly promised its account holders that, effective June 1, 2010, it would cease charging \$35.00 overdraft fees as a result of “one-time,” “non-recurring” transactions initiated with a “debit card” where there are insufficient available

funds to cover any such transactions in the personal deposit accounts linked to any such card. At the same time, however, Bank of America told its account holders that it would continue charging \$35.00 overdraft fees as a result of “recurring” transactions initiated with a “debit card” where there are insufficient available funds to cover any such transactions in the personal deposit accounts linked to any such card. Thus, in early 2010, Bank of America for the first time adopted a radical distinction, which had significant implications on its overdraft fee-assessment policies, between two categories of transactions initiated with a “debit card”: (1) transactions initiated on a one-time “non-recurring” basis with a “debit card” (which it promised would be absolutely protected from overdraft fees); and (2) transactions initiated on a “recurring” basis with a “debit card” (which it said could be subjected to overdraft fees).

23. Bank of America seized upon the distinction it had draw between non-recurring transactions initiated with “debit cards” and recurring transactions initiated with “debit cards” to publicly tout, through a massive media effort at the time, its supposedly pro-consumer decision not to assess fees as a result of overdrafts triggered by the former category of transactions. Susan Faulkner, an executive at Bank of America, was quoted by CNN in 2010 as follows: “Our customers have been clear that they want to know if a purchase is going to overdraw their account.”¹²

24. Around the same time, an article in *The New York Times* stated: “In a move that could bring an end to the \$40 cup of coffee, Bank of America said on Tuesday that it was doing away with overdraft fees on purchases made with debit cards[.] Bank [of America] officials said that effective this summer, customers who try to make purchases with their debit cards without enough money in their checking accounts will simply be declined.”¹³ Faulkner was quoted in the

¹² Hibah Yousuf, *BofA to scrap overdraft fees on debit purchases*, CNN Money, Mar. 10 , 2010, *available at* http://money.cnn.com/2010/03/10/news/companies/Bank_of_America_overdraft_fees/ (emphasis added).

¹³ Andrew Martin, *Bank of America to End Debit Card Overdraft Fees*, The New York Times, Mar. 9, 2010, *available at* <http://www.nytimes.com/2010/03/10/your-money/credit-and-debit-cards/10overdraft.html> (emphasis added).

piece in *The New York Times* as well: “What our customers kept telling me is ‘just don’t let me spend money that I don’t have’. . . . We wanted to help them avoid those unexpected overdraft fees.”¹⁴ Critically, Bank of America’s promises of immunity for one-time, non-recurring transactions initiated with “debit cards” were not limited solely to such transactions initiated with Bank of America-issued “debit cards,” but rather broadly encompassed any and all one-time, “non-recurring” transactions initiated with any and all “debit cards” linked to personal deposit accounts at Bank of America.

25. Accordingly, as Bank of America clearly intended, the new distinction it had publicly announced between “non-recurring” and “recurring” “debit card”-initiated transactions led its customers nationwide to begin initiating one-time, “non-recurring” transactions with various types of “debit cards” linked to their deposit accounts with the expectation, given to them by Bank of America, that such transactions could not possibly trigger any overdraft fees.

IV. In June 2010, Bank of America Amends the Deposit Agreement to Incorporate its Promise of Overdraft-Fee Immunity for Non-Recurring Transactions Initiated with “Debit Cards”

26. On or about June 1, 2010, after repeatedly making these promises to the American public, in *The New York Times* and elsewhere, Bank of America took pen to paper and memorialized these significant, material promises in its standardized Deposit Agreement with its personal deposit account holders, including Plaintiff and members of the Class. Specifically, Bank of America revised the Deposit Agreement, effective June 1, 2010, to include the following contractual provisions:

OVERDRAFT AND DECLINED OR RETURNED ITEMS

When we determine that you do not have enough available funds in your account to cover a check or other item, then we consider the check or other item an insufficient funds item. If you have enrolled in one of the optional Overdraft Protection plans and have enough available funds in the linked account under the Overdraft Protection plan, we transfer funds to cover the item. Otherwise, without notice to you, we either authorize or pay the insufficient funds item and

¹⁴ *Id.* (emphasis added).

overdraw your account (an overdraft item) or we decline or return the insufficient funds item without payment (a returned item). . . .

PERSONAL ACCOUNTS - OVERDRAFT PRACTICES AND SETTINGS

With our Standard Overdraft Setting, we do not authorize overdrafts for everyday non-recurring debit card transactions and ATM transactions. This means that we decline everyday non-recurring debit card transactions and ATM transactions when we determine that at the time of the transaction you may not have enough available funds in your account (or in any applicable Overdraft Protection plan) to cover the transaction With this overdraft setting, we may authorize and pay overdrafts for other types of transactions. Other types of transactions include checks and other transactions made using your checking account number, recurring debit card transactions, ACH transactions, preauthorized payments, and automatic and online bill payments.

Ex. A at 11-13, 21-22 (emphasis added). Thus, consistent with its public statements in *The New York Times* and elsewhere, the immunity for non-recurring transactions initiated with “debit cards” that Bank of America had incorporated into the Deposit Agreement was not limited solely to such transactions initiated with Bank of America-issued “debit cards,” but rather broadly encompassed any and all one-time, “non-recurring” transactions initiated with any and all “debit cards” linked to personal deposit accounts at Bank of America.

27. At all times since June 1, 2010, the Deposit Agreement explained this distinction between “non-recurring” and “recurring” transactions initiated with “debit cards” as follows:

What are everyday non-recurring debit card transactions and what are recurring debit card transactions? Everyday non-recurring debit card transactions are usually purchases made with your debit card or debit card number on a one-time or day-today basis. As examples, you use your debit card for purchases of groceries, gas, or coffee in the morning. Recurring debit card transactions are usually transactions that you set up to occur automatically, such as automatic bill payments. As examples, you give merchants your debit card number to use for rent, mortgage, car, or utility payments.

Id. at 12.

28. Similarly, at all times since June 1, 2010, the Schedule of Fees has stated in pertinent part:

We do not charge you an Overdraft Item fee on an everyday non-recurring debit card transaction. We also do not charge you an Overdraft Item fee on a ATM transaction unless you agreed to our

overdraft practices for that particular ATM transaction. We do charge you an Overdraft Item fee each time we authorize and pay any other type of overdraft transaction. These other types of transactions include checks and other transactions made using your checking account number, recurring debit card transactions, Online and automatic bill payments, and ACH transactions.

See Ex. B, at 13 (emphasis added). Again, Bank of America’s promise of immunity for one-time, non-recurring transactions initiated with “debit cards” was not limited solely to such transactions initiated with Bank of America-issued “debit cards,” but rather broadly encompassed any and all one-time, “non-recurring” transactions initiated with any and all “debit cards” linked to personal deposit accounts at Bank of America.

29. And notably, at all times since June 1, 2010, the Card Agreement has expressly and unequivocally promised accountholders that “everyday non-recurring debit card purchases,” initiated with the “use of your Card” (Ex. C at 4-5) – i.e., any type of “Access Device” linked to a Bank of America personal deposit account, including any type of “card” that “may be used to initiate electronic funds transfers” (*id.* at 1) – “will not be subject to overdraft fees” (*id.* at 4-5). Here too, Bank of America’s promise of immunity for one-time, non-recurring transactions initiated with “debit cards” was not limited solely to such transactions initiated with Bank of America-issued “debit cards,” but rather broadly encompassed any and all one-time, “non-recurring” transactions initiated with any and all “debit cards” linked to personal deposit accounts at Bank of America.

30. Thus, at all times since June 1, 2010, in the Deposit Agreement, Schedule of Fees, and Card Agreement, Bank of America has promised its personal checking account holders, including Plaintiffs and the other members of the Class defined below, that it would only assess fees for overdrafts triggered by “recurring” transactions initiated with “debit cards,” and that it would under no circumstances assess fees for overdrafts triggered by “non-recurring” transactions initiated with “debit cards.”

V. Since June 2010, Bank of America has Systematically Assessed Fees for Overdrafts Caused by “Non-Recurring” Transactions Initiated with Decoupled “Debit Cards” Linked to Personal Bank of America Deposit Accounts

31. Despite these contractual promises in effect between June 1, 2010 and the present, Bank of America has systematically assessed fees for “non-recurring” transactions initiated with decoupled “debit cards” that have resulted in overdrafts over that same period of time.

32. For example, on or about May 7, 2018, Plaintiff Sharp used a debit card issued by Speedway and linked to his personal deposit account at Bank of America to initiate a one-time transaction in the amount of \$31.62 at Speedway. This purchase constituted a “non-recurring” transaction made with a “debit card” within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement in effect at that time because the transaction occurred on a one-time, day-to-day basis and had not been set up to occur automatically at a pre-set interval of time, and because the purchase had been initiated with a “card” linked to a Bank of America personal deposit account that was capable of being “used to initiate electronic funds transfers” (Ex. C at 1). Because the \$31.62 purchase that Plaintiff Sharp initiated at Speedway with a “debit card” linked to his Bank of America personal deposit account on or about May 7, 2018 constituted an “everyday non-recurring debit card transaction” within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement (Ex. B at 13), Bank of America was prohibited from assessing a fee to Plaintiff Sharp’s personal deposit account as a result of an overdraft caused by this purchase pursuant to the Deposit Agreement, Schedule of Fees, and Card Agreement. Nevertheless, on May 7, 2018, Bank of America assessed a \$35.00 fee to Plaintiff Sharp’s checking account attributable to an overdraft caused by the \$31.62 purchase he had initiated with his Speedway-issued “debit card” linked to such account.

33. As another example, on or about January 3, 2017, Plaintiff Sharp used a debit card issued by Target and linked to his personal deposit account at Bank of America to initiate three one-time transactions in the amounts of \$68.91, \$34.26, and \$20.41 at Target. Each of these purchases constituted a “non-recurring” transaction made with a “debit card” within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement in effect at that time because

each of these transactions occurred on a one-time, day-to-day basis and had not been set up to occur automatically at a pre-set interval of time, and because each of these purchases had been initiated with a “card” linked to a Bank of America personal deposit account that was capable of being “used to initiate electronic funds transfers” (Ex. C at 1). Because the \$68.91, \$34.26, and \$20.41 purchases that Plaintiff Sharp initiated at Target with a “debit card” linked to his Bank of America personal deposit account on or about January 3, 2017 constituted “everyday non-recurring debit card transactions” within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement (Ex. B at 13), Bank of America was prohibited from assessing a fee to Plaintiff Sharp’s personal deposit account as a result of an overdraft caused by any of these three purchases pursuant to the Deposit Agreement, Schedule of Fees, and Card Agreement. Nevertheless, on January 3, 2017, Bank of America assessed three separate \$35.00 fees to Plaintiff Sharp’s checking account attributable to overdrafts caused by the \$68.91, \$34.26, and \$20.41 purchases he had initiated with his Target-issued “debit card” linked to such account.

34. As a further example, on or about June 13, 2016, Plaintiff Sharp used a debit card issued by Target and linked to his personal deposit account at Bank of America to initiate a one-time transaction in the amount of \$102.54 at Target. This purchase constituted a “non-recurring” transaction made with a “debit card” within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement in effect at that time because the transaction occurred on a one-time, day-to-day basis and had not been set up to occur automatically at a pre-set interval of time, and because the purchase had been initiated with a “card” linked to a Bank of America personal deposit account that was capable of being “used to initiate electronic funds transfers” (Ex. C at 1). Because the \$102.54 purchase that Plaintiff Sharp initiated at Target with a “debit card” linked to his Bank of America personal deposit account on or about June 13, 2016 constituted an “everyday non-recurring debit card transaction” within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement (Ex. B at 13), Bank of America was prohibited from assessing a fee to Plaintiff Sharp’s personal deposit account as a result of an overdraft caused by this purchase pursuant to the Deposit Agreement, Schedule of Fees, and Card Agreement. Nevertheless, on June

13, 2016, Bank of America assessed a \$35.00 fee to Plaintiff Sharp's checking account attributable to an overdraft caused by the \$102.54 purchase he had initiated with his Target-issued "debit card" linked to such account.

35. As a final example, on or about November 2, 2015, Plaintiff Sharp used a debit card issued by Target and linked to his personal deposit account at Bank of America to initiate a one-time transaction in the amount of \$66.25 at Target. This purchase constituted a "non-recurring" transaction made with a "debit card" within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement in effect at that time because the transaction occurred on a one-time, day-to-day basis and had not been set up to occur automatically at a pre-set interval of time, and because the purchase had been initiated with a "card" linked to a Bank of America personal deposit account that was capable of being "used to initiate electronic funds transfers" (Ex. C at 1). Because the \$66.25 purchase that Plaintiff Sharp initiated at Target with a "debit card" linked to his Bank of America personal deposit account on or about November 2, 2015 constituted an "everyday non-recurring debit card transaction" within the meaning of the Deposit Agreement, Schedule of Fees, and Card Agreement (Ex. B at 13), Bank of America was prohibited from assessing a fee to Plaintiff Sharp's personal deposit account as a result of an overdraft caused by this purchase pursuant to the Deposit Agreement, Schedule of Fees, and Card Agreement. Nevertheless, on November 2, 2015, Bank of America assessed a \$35.00 fee to Plaintiff Sharp's checking account attributable to an overdraft caused by the \$66.25 purchase he had initiated with his Target-issued "debit card" linked to such account.

36. The practices alleged above were not only directly contrary to Bank of America's contractual obligations to its account holders, they also flew in the face of its so-called "consumer friendly" overdraft fee policies, which were supposedly designed "to help [customers] avoid . . . unexpected overdraft fees" by "[not] let[ting] [them] spend money that [they] don't have."¹⁵

¹⁵ Andrew Martin, *Bank of America to End Debit Card Overdraft Fees*, The New York Times, Mar. 9, 2010, available at <http://www.nytimes.com/2010/03/10/your-money/credit-and-debit-cards/10overdraft.html> (quoting Bank of America officer Susan Faulkner).

37. By assessing \$35.00 fees for overdrafts caused by one-time, “non-recurring” transactions initiated with decoupled “debit cards” linked to Bank of America deposit accounts, including debit cards issued by such companies as Speedway, Target, Citgo, 7-Eleven, Royal Farms, Murphy USA, Flash Foods, Ricker’s, Cumberland Farms, and CircleK, Bank of America breached the Deposit Agreement and the other documents incorporated therein and the covenant of good faith and fair dealing, engaged in substantively and procedurally unconscionable practices, unlawfully converted funds belonging to its accountholders, and unjustly enriched itself, damaging Plaintiff Sharp and the members of the Class (defined below) monetarily.

CLASS ALLEGATIONS

38. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff Sharp brings this action on behalf of himself and all other similarly-situated individuals (the “Class”), defined as follows:

All individuals in the United States who, at any time between June 1, 2010 and the date of any order granting class certification, held a personal deposit account with Bank of America that was assessed a \$35.00 fee (or any other then-applicable overdraft fee amount) by Bank of America for an overdraft caused by a transaction that (1) the individual had initiated using a decoupled debit card linked to his or her personal deposit account; and (2) the individual had not set up in advance to occur automatically at a preset interval of time.

39. Excluded from the Class are Bank of America, its parents, subsidiaries, affiliates, officers and directors, any entity in which Bank of America has a controlling interest, all customers who make a timely election to be excluded, governmental entities, counsel for the parties, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

40. Plaintiff reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

41. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23.

42. The members of the Class are so numerous that joinder is impractical. On information and belief, the Class consists of at least tens of thousands of members, the identities

of whom are within the knowledge of Bank of America and can be ascertained only by resort to Bank of America's records.

43. The claims of the representative Plaintiff are typical of the claims of the Class in that the representative Plaintiff, like all Class members, was assessed one or more fee by Bank of America between June 1, 2010 and the present as a result of an overdraft caused by a non-recurring transaction initiated through the use of a decoupled debit card. Plaintiff, like each Class member, has been damaged by Bank of America's misconduct in that he was assessed unlawful overdraft fees in breach of the governing Deposit Agreement and related contractual documents and in breach of various other legal obligations owed by Bank of America to its accountholders. Furthermore, the factual basis of Bank of America's misconduct is common to all Class members and represents a common thread of unlawful, unfair, and unconscionable conduct resulting in injury to all members of the Class.

44. There are numerous questions of law and fact common to the Class which predominate over any questions affecting only individual Class members. Among the questions of law and fact common to Class are:

- (i) whether Bank of America assessed fees as a result of overdrafts caused by "non-recurring" transactions (i.e., transactions not set up in advance to occur automatically at preset intervals of time) initiated with decoupled debit cards;
- (ii) whether Bank of America assessed any such fees between June 1, 2010 and the present;
- (iii) whether Bank of America's assessment of such fees breached the Deposit Agreement and Schedule of Fees;
- (iv) the proper method or methods by which to measure damages;
- (v) whether Class members are entitled to interest that have accrued on any improperly assessed fees and/or withheld interest; and
- (vi) the declaratory relief to which Class members are entitled.

45. Plaintiff's claims are typical of the claims of other Class members in that they arise out of the same overdraft fee policies governed by Bank of America's Deposit Agreement and other related contractual documents in effect from June 1, 2010 through the present, and out of the same conduct and practices of Bank of America in assessing fees as a result of "non-recurring" transactions initiated with "debit cards" within the meaning of the Deposit Agreement and other related contractual documents in effect over that period of time. Plaintiff has no interests antagonistic to the interests of any other Class member.

46. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of consumer class actions. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

47. 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, and due to the enormity of the financial resources of Bank of America, no Class member could afford to seek legal redress individually for the claims alleged herein, such that, absent a class action, Class members would lose their rights by attrition.

48. Even if Class members could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved in this action, individualized litigation would significantly delay and cause expense to all parties and 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 claims to be heard 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.

CLAIMS FOR RELIEF

**FIRST CLAIM FOR RELIEF
BREACH OF CONTRACT**

(By Plaintiff Individually and On Behalf of the Class)

49. Plaintiff repeats and incorporates herein all allegations from paragraphs 1-48 above.

50. Plaintiff and all members of the Class contracted with Bank of America for personal deposit account services, as embodied in Bank of America's Deposit Agreement, Schedule of Fees, Card Agreement, and other related account documentation in effect between June 1, 2010 and the present.

51. In plain, clear, and simple language, in the Deposit Agreement, Schedule of Fees, Card Agreement, and other related account documentation in effect between June 1, 2010 and the present, Bank of America promised Plaintiff and all other members of the Class (1) that it would not assess a fee for any overdraft caused by a "non-recurring" transaction initiated with a "debit card"; and (2) that it would assess a fee for any overdraft caused by a "recurring" transaction initiated with a "debit card." *See* Ex. A, at 12-13.

52. Between June 1, 2010 and the present, Bank of America systematically breached these contractual promises to Plaintiff and the other members of the Class by routinely assessing fees for overdrafts caused by "non-recurring" transactions initiated with decoupled "debit cards" linked to personal Bank of America deposit accounts between June 1, 2010 and the present, including "non-recurring" transactions initiated with decoupled "debit cards" issued by the following non-exhaustive list of companies: Speedway, Target, Citgo, 7-Eleven, Royal Farms, Murphy USA, Flash Foods, Ricker's, Cumberland Farms, and CircleK.

53. At all times between June 1, 2010 and the present, the transactions at issue in this case, to such companies as Speedway, Target, Citgo, 7-Eleven, Royal Farms, Murphy USA, Flash Foods, Ricker's, Cumberland Farms, CircleK, and numerous other companies, and initiated with decoupled debit cards issued by these companies that were linked to Bank of America personal deposit accounts, constituted "non-recurring" transactions initiated with "debit cards" within the

meaning of the Deposit Agreement, Schedule of Fees, Card Agreement, and other related account documentation in effect between June 1, 2010 and the present.

54. At no time between June 1, 2010 and the present did any contractual provision exist authorizing Bank of America to charge fees to Plaintiff or any other member of the Class for overdrafts caused by “non-recurring” transactions initiated with any type of “debit cards,” including without limitation the decoupled “debit cards” at issue in this case that were linked to personal deposit accounts at Bank of America.

55. Plaintiff and the other members of the Class have performed all of the obligations imposed on them under the Deposit Agreement, Schedule of Fees, Card Agreement, and other related account documentation in effect between June 1, 2010 and the present.

56. Plaintiff and the other members of the Class sustained monetary damages between June 1, 2010 and the present as a result of Bank of America’s breaches of the Deposit Agreement and related account documentation in effect between June 1, 2010 and the present.

SECOND CLAIM FOR RELIEF
BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
(By Plaintiff Individually and
On Behalf of the Class)

57. Plaintiff repeats and incorporates herein all allegations from paragraphs 1-48 above.

58. Under the laws of the states where Bank of America does business, good faith is an element of every contract pertaining to the assessment of overdraft fees. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

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

60. Between June 1, 2010 and the present, Bank of America systematically breached the covenant of good faith and fair dealing in the Deposit Agreement, Schedule of Fees, Card Agreement, and related account-related documentation through its overdraft policies and practices as alleged herein.

61. Plaintiff and the members of the Class have performed all, or substantially all, of the obligations imposed on them under the Deposit Agreement, Schedule of Fees, Card Agreement, and related account-related documentation between June 1, 2010 and the present.

62. Plaintiff and members of the Class have sustained damages as a result of Bank of America's breaches of the covenant of good faith and fair dealing between June 1, 2010 and the present.

THIRD CLAIM FOR RELIEF
UNCONSCIONABILITY
(By Plaintiff Individually and On Behalf of the Class)

63. Plaintiff repeats and incorporates herein all allegations from paragraphs 1-48 above.

64. Bank of America's overdraft policies and practices are substantively and procedurally unconscionable in the following respects, among others:

- a. Bank of America does not adequately disclose or reasonably disclose to customers the circumstances in which they will be assessed overdraft fees, including that they will be assessed fees as a result of overdrafts caused by non-recurring transactions initiated with decoupled "debit cards," or that non-recurring transactions initiated with such "debit cards" may be processed as ACH transactions;

b. The Deposit Agreement, Schedule of Fees, Card Agreement, and other account-related documentation provided to customers are ineffective, ambiguous, deceptive, unfair, and misleading in that they do not unambiguously state that the Bank will assess fees as a result of overdrafts caused by non-recurring transactions initiated with decoupled “debit cards,” or that non-recurring transactions initiated with such “debit cards” may be processed as ACH transactions;

c. Bank of America does not obtain affirmative consent from checking account customers prior to processing a non-recurring transaction initiated with a decoupled “debit card” that will overdraw the account, including any such transactions initiated with any such “debit cards” that may be processed as ACH transactions;

d. Bank of America does not alert its customers that a transaction initiated with a “debit card” will trigger an overdraft, and does not provide the customer the opportunity to cancel that transaction, before assessing an overdraft fee; and

e. The Deposit Agreement, Schedule of Fees, Card Agreement, and other account-related documentation are contracts of adhesion in that they are standardized forms, imposed and drafted by Bank of America, which is a party of vastly superior bargaining strength, and only relegates to the customer the opportunity to adhere to them or reject the agreement in its entirety.

65. Considering the great business acumen and experience of Bank of America in relation to Plaintiffs and the members of the Class, the great disparity in the parties’ relative bargaining power, the inconspicuousness and incomprehensibility of the contract language at issue, the oppressiveness of the terms, the commercial unreasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns, these provisions are unconscionable and, therefore, unenforceable as a matter of law.

66. Plaintiffs and members of each of the Classes have sustained damages as a result of Bank of America's unconscionable policies and practices between June 1, 2010 and the present as alleged herein.

FOURTH CLAIM FOR RELIEF
CONVERSION
(By Plaintiff Individually and On Behalf of the Class)

67. Plaintiff repeats and incorporates herein all allegations from paragraphs 1-48 above.

68. Bank of America had and continues to have a duty to maintain and preserve its customers' checking and savings accounts and to prevent their diminishment through its own wrongful acts.

69. Bank of America has wrongfully collected overdraft fees from Plaintiff and the members of the Class, and has taken specific and readily identifiable funds from their accounts in payment of these fees in order to satisfy them.

70. Bank of America has, without proper authorization, assumed and exercised the right of ownership over these funds, in hostility to the rights of Plaintiff and the members of the Class, without legal justification.

71. Bank of America continues to retain these funds unlawfully without the consent of Plaintiff or the members of the Class.

72. Bank of America intends to permanently deprive Plaintiff and the members of the Class of these funds.

73. These funds are properly owned by Plaintiff and the members of the Class, not Bank of America, which now claims that it is entitled to their ownership, contrary to the rights of Plaintiff and the members of the Class.

74. Plaintiff and the members of the Class are entitled to the immediate possession of these funds.

75. Bank of America has wrongfully converted these specific and readily identifiable funds.

76. Bank of America's wrongful conduct is continuing.

77. As a direct and proximate result of this wrongful conversion, Plaintiff and the members of the Class have suffered and continue to suffer damages.

78. By reason of the foregoing, Plaintiff and the members of the Class are entitled to recover from Bank of America all damages and costs permitted by law, including all amounts that Bank of America has wrongfully converted.

FIFTH CLAIM FOR RELIEF
UNJUST ENRICHMENT
(By Plaintiff Individually and On Behalf of the Class)

79. Plaintiff repeats and incorporates herein all allegations from paragraphs 1-48 above.

80. Plaintiff, on behalf of himself and the members of the Class, asserts a common law claim for unjust enrichment.

81. By means of Bank of America's wrongful conduct alleged herein, Bank of America knowingly provides banking services to Plaintiff and members of the Class that are unfair, unconscionable, and oppressive.

82. Bank of America knowingly received and retained wrongful benefits and funds from Plaintiff and members of the Class. In so doing, Bank of America acted with conscious disregard for the rights of Plaintiff and members of the Class.

83. As a result of Bank of America's wrongful conduct as alleged herein, Bank of America has been unjustly enriched at the expense of, and to the detriment of, Plaintiff and members of the Class.

84. Bank of America's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

85. Under the common law doctrine of unjust enrichment, it is inequitable for Bank of America to be permitted to retain the benefits it received, and is still receiving, without justification, from the imposition of overdraft fees in an unfair, unconscionable, and oppressive

manner. Bank of America's retention of such funds under circumstances making it inequitable to do so constitutes unjust enrichment.

86. The financial benefits derived by Bank of America rightfully belong to Plaintiff and members of the Class. Bank of America should be compelled to disgorge in common funds for the benefit of Plaintiff and members of the Class all wrongful or inequitable proceeds received by them. A constructive trust should be imposed upon all wrongful or inequitable sums received by Bank of America traceable to Plaintiff and the members of the Class.

87. Plaintiff and members of the Class have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Matthew J. Sharp, individually and on behalf of the proposed Class, demands a trial by jury on all claims so triable and judgment as follows:

A. Declaring Bank of America's overdraft fee assessment practices between June 1, 2010 and the present, as described above, to be wrongful, unfair, and unconscionable, and in breach of the Deposit Agreement, Schedule of Fees, Card Agreement, and other account-related documentation;

B. Certifying the proposed Class;

C. Awarding restitution of all improperly-collected fees attributable to the wrongful conduct alleged herein;

D. Awarding actual damages in amounts according to proof;

E. Disgorgement of the ill-gotten gains derived by Bank of America from its misconduct alleged herein;

F. Awarding punitive and exemplary damages;

G. Awarding pre-judgment interest at the maximum rates permitted by applicable law;

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

I. Awarding such other relief as this Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff, on behalf of himself and the Class, hereby demand a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all claims so triable.

Dated: August 1, 2019

Respectfully submitted,

MCGUIRE LAW, P.C.

By: s/ Eugene Y. Turin

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* *Pro Hac Vice* Application Forthcoming

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