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David W. Slayton,  
Executive Officer/Clerk of Court,  
By J. Covarrubias, Deputy Clerk

7 *Attorney for Plaintiff*

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF LOS ANGELES**

10 PERFORMANCE JET SKIS LLC,  
11 individually and on behalf of all others  
12 similarly situated,

13 Plaintiff,

14 v.

15 BANK AMERICA, N.A. and DOES 1-50,  
16 inclusive

17 Defendants.

Case No.: **24STCV03719**

**CLASS ACTION COMPLAINT**

**DEMAND FOR JURY TRIAL**

18 **CLASS ACTION COMPLAINT<sup>1</sup>**

19 Plaintiff Performance Jet Skis LLC (“Plaintiff”), individually and on behalf of all others  
20 similarly situated, alleges the following based on personal knowledge as to allegations regarding the  
21 Plaintiff and on information and belief as to other allegations.

22 **INTRODUCTION**

23 1. Plaintiff brings this action individually, and on behalf of the general public, and classes  
24 of all similarly situated business accountholders against Defendant Bank of America, N.A. (“BoFA”),  
25 arising from its routine practice of (a) assessing overdraft fees (“OD Fees”) on transactions that did

26  
27 <sup>1</sup> Pursuant to California Code of Civil Procedure § 638, Plaintiff is moving for an Order compelling  
28 judicial reference. Plaintiff’s Motion to Compel Judicial Reference and Memorandum is attached  
hereto as Exhibit D.

1 not actually overdraw the account, and (b) assessing two or more fees (“Multiple Fees”), including  
2 non-sufficient funds fees (“NSF Fees”) and OD Fees on a single item.

3 2. These practices have been deemed potentially unlawful, unfair and deceptive by  
4 federal regulators including the CFPB and FDIC.

5 3. BofA misleadingly and deceptively misrepresents the above practice in its publicly-  
6 available marketing materials, including its own account contracts. BofA also omits material facts  
7 pertaining to each of the above practices in its publicly-available marketing materials, including its  
8 account contracts.

9 4. In sum, BofA’s accountholders have been injured by BofA’s improper practices to the  
10 tune of millions of dollars bilked from their accounts in clear violation of their agreements with BofA.

11 **PARTIES**

12 5. Plaintiff, Performance Jet Skis LLC, is a California business entity, formed in the State  
13 of California with its principal place of business in Northridge, California and holds a BofA checking  
14 account.

15 6. Defendant BofA is one of the largest banks in the United States and is engaged in the  
16 business of providing retail banking services to millions of accountholders including to Plaintiff and  
17 members of the putative Classes. BofA operates locations, and thus conducts business, in California.  
18 Its headquarters are in North Carolina.

19 **JURISDICTION AND VENUE**

20 7. This Court has jurisdiction over this matter because the amount in controversy exceeds  
21 \$25,000.

22 8. Venue is proper in this Court pursuant to CCP § 395(b) because Plaintiff is a business  
23 in the State of California, with its principal place of business in the city of Northridge, County of Los  
24 Angeles, State of California.

25 9. BofA regularly and systematically provides banking services to California businesses.  
26 As such, it is subject to the personal jurisdiction of this Court.

27 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

1 **I. BOFA CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY**  
2 **OVERDRAW THE ACCOUNT**

3 **A. Overview of Claim**

4 10. Plaintiff brings this cause of action challenging BofA’s practice of charging OD Fees  
5 on what are referred to in this complaint as “Authorize Positive, Purportedly Settle Negative  
6 Transactions,” or “APPSN Transactions.”

7 11. Here’s how it works: at the moment debit card transactions are authorized on an  
8 account with positive funds to cover the transaction, BofA immediately reduces consumers’ checking  
9 accounts for the amount of the purchase, sets aside funds in a checking account to cover that  
10 transaction, and as a result, the consumer’s displayed “available balance” reflects that subtracted  
11 amount. As a result, customers’ accounts will always have sufficient available funds available to  
12 cover these transactions because BofA has already sequestered these funds for payment.

13 12. However, BofA still assesses crippling \$37 OD Fees on many of these transactions,  
14 and misrepresents its practices in its account documents.

15 13. Despite putting aside sufficient available funds for debit card transactions at the time  
16 those transactions are authorized, BofA later assesses OD Fees on those same transactions when they  
17 purportedly settle days later into a negative balance. These types of transactions are APPSN  
18 transactions.

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

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

1           When a consumer uses a debit card to make a purchase, a hold may be placed on funds  
2           in the consumer’s account to ensure that the consumer has sufficient funds in the  
3           account when the transaction is presented for settlement. This is commonly referred  
4           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.

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

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

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

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

16               A financial institution authorized an electronic transaction, which reduced a  
17               customer’s available balance but did not result in an overdraft at the time of  
18               authorization; settlement of a subsequent unrelated transaction that further lowered the  
19               customer’s available balance and pushed the account into overdraft status; and when  
20               the original electronic transaction was later presented for settlement, because of the  
21               intervening transaction and overdraft fee, the electronic transaction also posted as an  
22               overdraft and an additional overdraft fee was charged. Because such fees caused harm  
23               to consumers, one or more supervised entities were found to have acted unfairly when  
24               they charged fees in the manner described above. Consumers likely had no reason to  
25               anticipate this practice, which was not appropriately disclosed. They therefore could  
26               not reasonably avoid incurring the overdraft fees charged. Consistent with the  
27               deception findings summarized above, examiners found that the failure to properly  
28               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

1 not outweighed by countervailing benefits to consumers or competition), and because  
 2 consumers could not reasonably avoid the fees (given the misimpressions created by  
 3 the disclosures), the practice of assessing fees under these circumstances was found to  
 4 be unfair.

Consumer Financial Protection Bureau, Winter 2015 “Supervisory Highlights.”

5 19. There is no justification for these practices, other than to maximize BofA’s overdraft  
 6 fee revenue. APPSN Transactions only exist because intervening checking account transactions  
 7 supposedly reduce an account balance. But BofA is free to protect its interests and either reject those  
 8 intervening transactions or charge OD Fees on those intervening transactions—and it does the latter  
 9 to the tune of millions of dollars each year. But BofA was not content with these millions in OD Fees.  
 10 Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

11 20. This abusive practice is not universal in the banking industry. Indeed, major banks like  
 12 Wells Fargo—one of the largest consumer banks in the country and the largest in California—does  
 13 not charge OD Fees on APPSN transactions.

14 21. The federal government has condemned the APPSN practice. In Court of Circular  
 15 2022-06 (attached as Exhibit A), issued by the Consumer Financial Protection Bureau (the “CFPB”),  
 16 the CFPB flatly stated that accountholders “are likely to reasonably expect that a transaction that is  
 17 authorized at point of sale with sufficient funds will not later incur overdraft fees” and that such fees  
 18 were the result of “potentially unlawful patterns of financial institution practices” that “might trigger  
 19 liability” under the Consumer Financial Protection Act. *See* Ex. A at 6, 7.

20 22. The CFPB then provided an example of unanticipated overdraft fees involving a debit  
 21 card transaction with an intervening debit transaction. *Id.* at 9. Using the following chart, the CFPB  
 22 highlighted how an accountholder is charged an overdraft fee even though the available balance was  
 23 positive at the time the accountholder entered into the debit card transaction:

Description	Transaction	Available Balance	Ledger Balance
Day 1			
Opening Balance		\$100	\$100

1	Debit card transaction – authorized	-\$50	\$50	\$100
2	Day 2			
3	Preauthorized ACH debit – posted	-\$120	-\$70	-\$20
4	Overdraft fee	-\$34	-\$104	-\$54
5	Day 3			
6	Debit card transaction – posted	-\$50	-\$104	-\$104
7	Overdraft fee	-\$34	-\$138	-\$138
8				
9				

10           23. This is exactly what happened to Plaintiff here. According to the CFPB,  
11           accountholders may not reasonably expect to be charged the second overdraft fee in this example  
12           because the debit card transaction was authorized on Day 1 when the consumer had a sufficient  
13           account balance. *Id.* Accountholders “may reasonably expect that if their account balance shows  
14           sufficient funds for the transaction just before entering into the transaction, as reflected in their  
15           account balance in their mobile application, online, at an ATM, or by telephone, then that debit card  
16           transaction will not incur an overdraft fee.” *Id.* at 10.

17           This warning followed previous guidance issued by the CFPB which deemed the APPSN  
18           practice “unfair” and “deceptive”:

19  
20           **[A] financial institution authorized an electronic transaction, which reduced a**  
21           **customer’s available balance but did not result in an overdraft at the time of**  
22           **authorization; settlement of a subsequent unrelated transaction that further**  
23           **lowered the customer’s available balance and pushed the account into overdraft**  
24           **status; and when the original electronic transaction was later presented for**  
25           **settlement, because of the intervening transaction and overdraft fee, the**  
26           **electronic transaction also posted as an overdraft and an additional overdraft fee**  
27           **was charged. Because such fees caused harm to consumers, one or more**  
28           **supervised entities were found to have acted unfairly when they charged fees in**  
29           **the manner described above. Consumers likely had no reason to anticipate this**  
30           **practice, which was not appropriately disclosed. They therefore could not reasonably**  
31           **avoid incurring the overdraft fees charged. Consistent with the deception findings**  
32           **summarized above, examiners found that the failure to properly disclose the**  
33           **practice of charging overdraft fees in these circumstances was deceptive.**

34           Consumer Financial Protection Bureau, “Supervisory Highlights” (Winter 2015) (Ex. B at 8-9)

1 (emphasis added).

2 24. Besides being deceptive, unfair, and unconscionable, these practices breach contract  
3 promises made in BofA’s adhesion contracts—contracts which fundamentally misconstrue and  
4 mislead consumers about the true nature of BofA’s processes and practices. These practices also  
5 exploit contractual discretion to gouge consumers.

6 **B. Plaintiff’s Experience**

7 25. Similarly, and as an example, in January, 2020 and on other occasions, Plaintiff  
8 Performance Jet Ski was assessed OD Fees in the amount of \$37.00 for debit card transactions, despite  
9 the fact that positive funds were deducted and held immediately for each transaction on which it was  
10 assessed OD Fees.

11 **II. BOFA CHARGES MULTIPLE FEES ON THE SAME ITEM**

12 26. As alleged more fully herein, BofA’s Account Documents during the class period  
13 allowed it to charge a *single* \$37 NSF Fee when an item, including an electronic payment item, is  
14 returned for insufficient funds or a *single* \$37 OD Fee when the item is paid into insufficient funds.

15 27. BofA breaches its contract when it charges more than one \$37 NSF Fee and/or OD  
16 Fee on the same item, since the contract explicitly states—and reasonable consumers understand—  
17 that the same item can only incur a single NSF Fee or OD Fee.

18 28. This abusive practice is not universal in the financial services industry. Indeed, major  
19 banks like JP Morgan Chase—the largest consumer bank in the country—do not undertake the  
20 practice of charging more than one insufficient funds fees on the same item when it is reprocessed.  
21 Instead, Chase charges one NSF Fee even if an item is resubmitted for payment multiple times.<sup>2</sup>

22 29. BofA’s Account Agreement during the class period never disclosed this practice. To  
23 the contrary, the Account Agreement indicated it will only charge a single NSF Fee or OD Fee per  
24

25 \_\_\_\_\_  
26 <sup>2</sup> As indicated by Chase’s printed disclosures, an “item” maintains its integrity even if multiple  
27 processes are affected on it: “If we return the same item multiple times, we will only charge you one  
28 Returned Item Fee for that item within a 30-day period.”

1 item.

2 **A. Plaintiff Performance Jet Ski's Experience**

3 30. Plaintiff Performance Jet Ski was assessed more than one fee on the same item,  
4 wherein BofA reprocessed previously declined electronic or check transactions and charged an  
5 additional fee upon reprocessing.

6 31. As an example, Plaintiff Performance Jet Ski was assessed such fees in February, 2020  
7 and on other occasions.

8 **B. The Imposition of Multiple Fees on a Single Item Violates BofA's Express**  
9 **Promises and Representations.**

10 32. BofA's contract documents bar BofA from assessing multiple NSF Fees on the same  
11 instruction for payment. As BofA expressly promises: "An NSF-fee, returned item, overdraft or  
12 similar fee may also apply if you schedule payments or transfers and your available balance is not  
13 sufficient to process the transaction on the date scheduled." This provision expressly states "an"  
14 (singular) NSF or OD Fee may be assessed, not multiple fees. And the Bank also states that a fee  
15 "may" be charged if there are insufficient funds "on the date scheduled," but not on later dates when  
16 re-processing is attempted by the Bank at its sole discretion.

17 33. The Online Banking Agreement provides BofA the authority to charge only one NSF  
18 or OD Fee per item or instruction for payment. While that Agreement states that the bank "may"  
19 attempt again to process the transaction a single additional time, the Agreement does not state that  
20 such a single re-attempt will incur an additional NSF or OD Fee.

21 34. The Online Banking Agreement states that a single NSF or OD Fee will be charged if  
22 "you schedule payments of transfers" for which there are insufficient funds. But, as alleged herein,  
23 Plaintiff only scheduled their payments or transfers once, and took no action to request re-processing  
24 of their transactions. Because Plaintiff only scheduled a given payment once, BofA was only entitled  
25 to charge one OD or NSF on each payment. In other words, when a transaction is returned for  
26 insufficient funds, it cannot be the basis for another NSF or OD Fee without an additional action from  
27 the accountholder to again seek payment for the item. Any other interpretation would permit BofA  
28 to process a transaction repeatedly throughout the day, thus conceivably racking up myriad NSF or



1 OD fees at its sole discretion.

2 35. Moreover, the Online Banking Agreement’s terms are starkly binary: for a given  
3 transaction, the Bank may either pay or return it, but it cannot do both for the same transaction, and  
4 it cannot do the same thing more than once.

5 36. The Deposit Agreement makes similar representations. It defines “item” to encompass  
6 all submissions for payment of the same transaction. “Item” cannot mean each re-submission of the  
7 same transaction because it is defined to mean “all orders and instructions for the payment, transfer  
8 or withdrawal of funds” and there is no new order or instruction for payment of a re-submitted item.  
9 It is simply another attempt at the original order or instruction. Again, Plaintiff never took any action  
10 to re-submit or renew its original instructions for payments on its debit card accounts.

11 37. The Deposit Agreement’s terms also are also starkly binary: for a given transaction,  
12 the Bank may pay or return an item, but it cannot do both for the same transaction, and it cannot do  
13 the same thing more than once. And because NSF or OD Fees are charged on “items,” the Bank is  
14 not authorized to charge multiple fees on additional iterations of the same “item.”

15 38. The Debit Card Agreement makes a similarly binary promise: “For check, ACH,  
16 recurring debit card transaction and online bill payments, we may decline or return the transaction  
17 unpaid or complete it and overdraw your account.”

18 39. In the alternative, to the extent the account documents do not explicitly bar the policies  
19 described above, Bank of America exploits contractual discretion to the detriment of accountholders  
20 and breaches good faith and fair dealing when it uses these policies, by employing the following  
21 practices:

22 a. First, the Bank uses its discretion to define the meaning of “item” in an unreasonable  
23 way that violates common sense and reasonable consumer expectations. BofA uses  
24 its contractual discretion to choose a meaning of that term which directly causes more  
25 NSF Fees or OD Fees; and

26 b. Second, the Bank maintains it has huge amount of discretion not to charge or “deduct”  
27 NSF Fees on given transactions. Presumably, each separate time BofA exercises its  
28 option to reprocess a check or other payment or transfer, it views each reprocessing as

1 a separate “transaction” entitling it to another bite at the NSF/OD fee apple. By  
2 charging more than one NSF Fee on a given transaction, BofA engages in bad faith  
3 and contradicts reasonable consumer expectations.

4 40. For the same reasons, the contract documents also bar BofA from assessing both NSF  
5 Fees and OD Fees on the same item or transaction. *See Exhibit C* (bold emphasis added).

6 **C. The Imposition of Multiple NSF Fees or OD Fees on a Single Item Breaches**  
7 **BofA’s Duty of Good Faith and Fair Dealing.**

8 41. Parties to a contract are required not only to adhere to the express conditions in the  
9 contract, but also to act in good faith when they are invested with a discretionary power over the other  
10 party. In such circumstances, the party with discretion is required to exercise that power and discretion  
11 in good faith. This creates an implied promise to act in accordance with the parties’ reasonable  
12 expectations and means that BofA is prohibited from exercising its discretion to enrich itself and  
13 gouge its customers. Indeed, BofA has a duty to honor transaction requests in a way that is fair to  
14 Plaintiff and its other customers and is prohibited from exercising its discretion to pile on ever greater  
15 penalties. Here—in the adhesion agreements BofA foisted on Plaintiff and its other customers—  
16 BofA has provided itself numerous discretionary powers affecting customers’ credit union accounts.  
17 But instead of exercising that discretion in good faith and consistent with consumers’ reasonable  
18 expectations, BofA abuses that discretion to take money out of consumers’ accounts without their  
19 permission and contrary to their reasonable expectations that they will not be charged multiple fees  
20 for the same transaction.

21 42. BofA exercises its discretion in its own favor—and to the prejudice of Plaintiffs and  
22 its other customers—when it defines check or ACH in a way that directly leads to more NSF Fees  
23 and OD Fees. Further, BofA abuses the power it has over customers and their accounts and acts  
24 contrary to their reasonable expectations under the Account Agreement. This is a breach of BofA’s  
25 implied covenant to engage in fair dealing and act in good faith.

26 43. By exercising its discretion in its own favor—and to the prejudice of Plaintiff and other  
27 accountholders—by charging more than one NSF Fee and/or OD Fee on a single item, BofA breaches  
28 the reasonable expectation of Plaintiff and other accountholders and in doing so violates the implied

1 covenant to act in good faith and fair dealing.

2 44. It was bad faith and totally outside Plaintiff's reasonable expectations for BofA to use  
3 its discretion to assess two or more NSF Fees and/or OD Fees for a single attempted payment.

4 **D. Regulators Condemn the Retry NSF Fee Practice**

5 45. The Federal Deposit Insurance Corporation (the "FDIC") has expressed concern with  
6 the practice of assessing multiple fees on an item. In 2012, the FDIC determined that one bank's  
7 assessment of more than one NSF Fee on the same item was a "deceptive and unfair act." In the  
8 Matter of Higher One, Inc., Consent Order, Consent Order, FDIC-1 1-700b, FDIC-1 1- 704k, 2012  
9 WL 7186313. 16.

10 46. The FDIC also recently recommended that the multiple fee practice be halted entirely.  
11 See Barbarino, Al, FDIC Warns Banks About Risks of Bounced Check Fees, Law360 (Aug. 19,  
12 2022), [https://www.law360.com/articles/1522501/fdic-warns-banks-about-risks-tiedto-bounced-](https://www.law360.com/articles/1522501/fdic-warns-banks-about-risks-tiedto-bounced-check-fees)  
13 [check-fees](https://www.law360.com/articles/1522501/fdic-warns-banks-about-risks-tiedto-bounced-check-fees).

14 47. In its latest issue of Consumer Compliance Supervisory Highlights, the FDIC  
15 addressed the charging of multiple non-sufficient funds fees for transactions presented multiple times  
16 against insufficient funds in the customer's account. In the Supervisory Highlights, the FDIC  
17 discussed potential consumer harm from this practice in terms of both deception and unfairness under  
18 the Federal Trade Commission Act Section 5's prohibition on unfair or deceptive acts or practices,  
19 stating that "[t]his practice may also be unfair if there is the likelihood of substantial injury for  
20 customers, if the injury is not reasonably avoidable, and if there is no countervailing benefit to  
21 customers or competition. For example, there is risk of unfairness if multiple fees are assessed for the  
22 same transaction in a short period of time without sufficient notice or opportunity for consumers to  
23 bring their account to a positive balance. Consumer Compliance Supervisory Highlights, Federal  
24 Deposit Insurance Corporation, p. 8 (March 2022),  
25 [https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-](https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2022.pdf)  
26 [highlights/documents/ccs-highlights-march2022.pdf](https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2022.pdf) (last accessed May 25, 2022).

27 **E. Bank of America Fraudulently Concealed its Fee Practices with Impossible to**  
28

1                   **Decipher Bank Statements**

2           48.     Not only did BofA misrepresent the truth about its fee practices in its account contracts  
3 and adopt unfair, deceptive and unexpected fee practices, but BofA also fraudulently concealed its  
4 fee practices from its customers, such as Plaintiff.

5           49.     Specifically, BofA issued monthly statements to its accountholders that disguised and  
6 made it impossible for reasonable accountholders to discover its multiple fee and APPSN fee  
7 practices.

8           50.     Pursuant to federal law, Regulation E of the Electronic Funds Transfer Act, those  
9 monthly statements are the primary disclosure a bank provides its accountholders regarding the  
10 assessment of overdraft or NSF Fees on an account.

11           51.     However, the design of BofA’s bank statements made it difficult for Plaintiff to  
12 discover the truth about BofA’s practices.

13           52.     For example, BofA bank statements are formatted to separately list debits, credits, and  
14 bank fees, which makes difficult for a reasonable consumer to correlate transactions with any  
15 corresponding bank fees. As a result, BofA makes it difficult to determine from the statements that  
16 it even assesses multiple fees on the same item when it is resubmitted for payment multiple times, or  
17 fees on APPSN transactions.

18           53.     BofA designs its statements in this manner to make it difficult for reasonable  
19 consumers like Plaintiff to discover BofA true multiple NSF and OD fee practices.

20           54.     Plaintiff did not and could not discover BofA’s improper fee assessment practices, as  
21 described herein, on the bank statements issued by BofA.

22                                   **CLASS ACTION ALLEGATIONS**

23           55.     Plaintiff brings this action individually and on behalf of all others similarly situated.

24     The “Classes” include:

25           All holders of a BofA business checking account in the state of California who were  
26 charged OD Fees on transactions that were authorized into a positive available balance  
(the “APPSN Class”).

27           All holders of a BofA business checking account in the state of California who were  
28 charged Multiple Fees on the same item (the “Multiple Fee Class”).

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

5           57. Plaintiff reserves the right to modify or amend the definition of the proposed Classes  
6 and/or to add a Subclass(es) if necessary before this Court determines whether certification is  
7 appropriate.

8           58. The questions here are ones of common or general interest such that there is a well-  
9 defined community of interest among the members of the Classes. These questions predominate over  
10 questions that may affect only individual members of the Classes because BofA has acted on grounds  
11 generally applicable to the classes. Such common legal or factual questions include, but are not  
12 limited to:

- 13           a) Whether BofA improperly charged OD Fees on APPSN Transactions;
- 14           b) Whether BofA improperly charged Multiple Fees on the same item;
- 15           c) Whether such conduct enumerated above violates the contract;
- 16           d) Whether such conduct is deceptive or in bad faith;
- 17           e) Whether BofA violated the UCL; and
- 18           f) Whether Plaintiff and other members of the Classes have sustained damages as a result  
19           of BofA's wrongful business practices described herein, and the proper measure of  
20           damages.

21           59. The parties are numerous such that joinder is impracticable. Upon information and  
22 belief, and subject to class discovery, the Classes consist of thousands of members or more, the  
23 identity of whom are within the exclusive knowledge of and can be ascertained only by resort to  
24 BofA's records. BofA has the administrative capability through its computer systems and other  
25 records to identify all members of the Classes, and such specific information is not otherwise available  
26 to Plaintiff.

27           60. It is impracticable to bring the members of the Classes' individual claims before the  
28 Court. Class treatment permits a large number of similarly situated persons or entities to prosecute

1 their common claims in a single forum simultaneously, efficiently and without the unnecessary  
2 duplication of evidence, effort, expense, or the possibility of inconsistent or contradictory judgments  
3 that numerous individual actions would engender. The benefits of the class mechanism, including  
4 providing injured persons or entities with a method for obtaining redress on claims that might not be  
5 practicable to pursue individually, substantially outweigh any difficulties that may arise in the  
6 management of this class action.

7 61. Plaintiff's claims are typical of the claims of the other members of the Classes in that  
8 they arise out of the same wrongful business practices by BofA, as described herein.

9 62. Plaintiff is more than an adequate representative of the Classes in that it has a BofA  
10 checking account and has suffered damages as a result of BofA's and improper business practices. In  
11 addition:

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

20 63. Plaintiff knows of no difficulty to be encountered in the maintenance of this action  
21 that would preclude its maintenance as a class action.

22 64. BofA has acted or refused to act on grounds generally applicable to the Classes,  
23 thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to  
24 the Classes as a whole.

25 65. All conditions precedent to bringing this action have been satisfied and/or waived.

26 **CAUSES OF ACTION**

27 **FIRST CAUSE OF ACTION**  
28 **BREACH OF CONTRACT INCLUDING THE COVENANT**  
**OF GOOD FAITH AND FAIR DEALING**

**(On behalf of the Classes)**

1  
2           66. Plaintiff incorporates by reference each of the allegations set forth in the preceding  
3 paragraphs.

4           67. Plaintiff and BofA have contracted for account deposit, checking, ATM, and debit  
5 card services, as embodied in the Account Documents.

6           68. BofA has misconstrued in its Account Documents its true debit card processing and  
7 overdraft practices and breached the express terms of the Account Documents. No contractual  
8 provision authorizes BofA to charge OD Fees on APPSN Transactions, or to charge Multiple Fees on  
9 the same check or ACH.

10           69. Therefore, BofA breached the terms of its Account Documents by charging OD Fees  
11 on transactions that were authorized into a sufficient available balance, but whose available balances  
12 were allegedly insufficient at the time the transactions were settled.

13           70. BofA also breached the terms of the Account Documents by charging Multiple Fees  
14 on the same item.

15           71. Under the laws of the state of California where BofA does business, good faith is an  
16 element of every contract. Whether by common law or statute, all such contracts impose upon each  
17 party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with contracts  
18 and discharging performance and other duties according to their terms, means preserving the spirit –  
19 not merely the letter – of the bargain. Put differently, the parties to a contract are mutually obligated  
20 to comply with the substance of their contract in addition to its form.

21           72. Evading the spirit of the bargain and abusing the power to specify terms constitute  
22 examples of bad faith in the performance of contracts. Subterfuge and evasion violate the obligation  
23 of good faith in performance even when an actor believes their conduct to be justified. Bad faith may  
24 be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of  
25 bad faith are evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of  
26 a power to specify terms, and interference with or failure to cooperate in the other party's  
27 performance.

28           73. BofA has breached the covenant of good faith and fair dealing in the Account

1 Documents through its overdraft policies and practices as alleged herein.

2 74. Further, BofA uses its contractual discretion to cause APPSN Transactions to incur  
3 OD Fees by knowingly authorizing later transactions that it allows to consume available funds  
4 previously sequestered for APPSN Transactions.

5 75. Further, BofA uses its contractual discretion to cause Multiple Fees to be assessed on  
6 ACH and check items by treating them as separate items when they are not.

7 76. BofA uses these contractual discretion points to extract OD Fees and NSF Fees on  
8 transactions that no reasonable consumer would believe could cause such fees.

9 77. Plaintiff and members of the Classes have performed all, or substantially all, of the  
10 obligations imposed on them under the Account Documents.

11 78. Plaintiff and members of the Classes have sustained damages as a result of BofA's  
12 breaches of the contract and the covenant of good faith and fair dealing.

13 **SECOND CAUSE OF ACTION**  
14 **VIOLATION OF THE UNFAIR COMPETITION LAW**  
15 **Cal. Bus. & Prof. Code § 17200, et seq.**  
16 **(On behalf of the Classes)**

17 79. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

18 80. BofA's conduct described herein violates the Unfair Competition Law (the "UCL"),  
19 codified at California Business and Professions Code section 17200, *et seq.*

20 81. The UCL prohibits, and provides civil remedies for, unfair competition. Its purpose  
21 is to protect both consumers and competitors by promoting fair competition in commercial markets  
22 for goods and services. In service of that purpose, the Legislature framed the UCL's substantive  
23 provisions in broad, sweeping language.

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

28 83. BofA's conduct violates the UCL by charging OD Fees on APPSN Transactions and  
by charging Multiple Fees on the same check or ACH.



1 84. Defendant committed fraudulent business acts and practices in violation of Cal. Bus.  
2 & Prof. Code § 17200, *et seq.*, in the following respect, among others:

3 BofA’s practices of falsely indicating in Account Documents that OD Fees will not be  
4 charged on APPSN Transactions, and that only a single NSF Fee or OD Fee will be  
charged on a checks or ACH.

5 85. Specifically, Defendant’s conduct was not motivated by any business or economic  
6 need or rationale. The harm and adverse impact of BofA’s imposition of OD Fees on APPSN  
7 Transactions, and Multiple Fees on a check or ACH, was neither outweighed nor justified by any  
8 legitimate reasons, justifications, or motives.

9 86. The harm to Plaintiff and members of the Classes arising from BofA’s unfair practices  
10 relating to the imposition of OD Fees on APPSN Transactions and Multiple Fees on a check or ACH  
11 outweighs the utility, if any, of those practices.

12 87. BofA’s unfair business practice relating to OD Fees and NSF Fees as alleged herein  
13 are immoral, unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to  
14 Plaintiff and members of the Classes.

15 88. BofA’s conduct was substantially injurious to consumers in that they have been forced  
16 to pay OD Fees on APPSN Transactions and Multiple Fees on a check or ACH, which is not disclosed  
17 in the contract with BofA.

18 89. BofA’s deceptive conduct related to material omissions and/or material  
19 misrepresentations and conduct violates each of the statute’s “unfair,” “unlawful,” and “fraudulent”  
20 prongs.

21 90. As a result of BofA’s violations of the UCL, Plaintiff and members of the Classes have  
22 paid, and/or will continue to pay OD Fees and NSF Fees and thereby have suffered and will continue  
23 to suffer actual damages.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff demands judgment against Defendant for itself and the members of  
26 the Classes as follows:  
27  
28

- 1 (a) Declaring BofA's APPSN OD Fee and Multiple Fee policies and practices to be
- 2 wrongful, unfair, and a breach of contract;
- 3 (b) Public injunctive relief to remedy the illegal practices discussed herein;
- 4 (c) Restitution of all relevant OD Fees and NSF Fees paid to BofA by Plaintiff and the
- 5 Classes, as a result of the wrongs alleged herein in an amount to be determined at
- 6 trial;
- 7 (d) Disgorgement of the ill-gotten gains derived by BofA from its misconduct;
- 8 (e) Actual damages in an amount according to proof;
- 9 (f) Statutory, punitive, and exemplary damages, as permitted by law;
- 10 (g) Pre-judgment interest at the maximum rate permitted by applicable law;
- 11 (h) Costs and disbursements assessed by Plaintiff in connection with this action,
- 12 including reasonable attorneys' fees pursuant to applicable law; and
- 13 (i) Such other relief as this Court deems just and proper.

14 **DEMAND FOR JURY TRIAL**

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

17 Dated: February 13, 2024

*/s/ Scott Edelsberg*  
\_\_\_\_\_  
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