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13 UNITED STATES DISTRICT COURT  
14 SOUTHERN DISTRICT OF CALIFORNIA

15 ROY SALCEDO, on behalf of himself  
and all others similarly situated,

16 Plaintiff,

17 vs.

18 AXOS BANK,

19 Defendant.  
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**CLASS ACTION COMPLAINT**

CASE NO. '21CV1651 AJB KSC

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**CLASS ACTION COMPLAINT**

Plaintiff Roy Salcedo (“Plaintiff”), individually and on behalf of all persons similarly situated, for complaint against Defendant Axos Bank (“Axos”), alleges as follows:

**INTRODUCTION**

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

2. Axos misleadingly and deceptively misrepresents the fee practices challenged herein in its publicly-available marketing materials, including its own account contracts. Axos also omits material facts pertaining to each of those practices in its publicly-available marketing materials, including its account contracts.

3. Research shows that fees are the most important factor influencing consumers’ selection of a new banking provider. See Ron Shevlin, “How Consumers Choose a Bank: A Tale of Two Surveys.” Insight Vault, Cornerstone Advisors, 23 Aug. 2018, <https://www.cornstone.com/insightvault/2018/08/23/how-consumers-choose-a-bank-a-tale-of-two-surveys/> (summarizing two consumer surveys that revealed that the most important factor influencing consumers’ selection of a new banking provider is the amount of fees charged).

4. Axos customers have been injured by Axos’ improper practices to the tune of millions of dollars bilked from their accounts in clear violation of their agreements with Axos.

5. To this day, Axos continues to deceive the general public regarding its fee practices challenged herein. Axos’s account contracts and marketing materials are publicly available online and in Axos branches to all current and prospective

1 accountholders. The general public relies on representations in these documents to  
2 make important financial decisions regarding which financial institution they would  
3 open a checking account with. These unsuspecting consumers would have no way of  
4 knowing about the fee practices challenged herein that Axos assesses on its customers  
5 prior to establishing a banking relationship with Axos. Consumers who have already  
6 opened Axos accounts also rely on the misrepresentations and omissions in the  
7 publicly-available account documents when making every day financial transactions.

8 6. The Pew Charitable Trusts has emphasized the importance of transparent  
9 checking account fee disclosures for both comparison shopping for checking accounts  
10 and for effective fee avoidance:

11 Bank accounts are an essential financial product, used by 9 in 10  
12 American households, and need to be safe and transparent. Account  
13 agreements and fee schedules provide customers with account costs,  
14 terms, and conditions. Among the largest U.S. banks, however, the median  
15 length of checking account disclosure documents is 40 pages, and the  
information is presented in varied formats with inconsistent wording,  
making it difficult for consumers to easily find the information they need  
to comparison shop, avoid overdraft and other fees, and manage their  
money.

16 The Pew Trusts, “The Benefits of Uniform Checking Account Disclosures.”

17 7. Members of the public considering opening a checking account have the  
18 right to accurate information regarding the checking accounts they are considering.  
19 Reasonable consumers would not agree to open Axos checking accounts if they were  
20 informed, for example, that they could be assessed the account fees challenged herein.

21 8. On behalf of himself and the Classes (defined below), Plaintiff seeks  
22 damages, restitution, and injunctive relief on behalf of the general public for Axos’s  
23 breach of contract and the covenant of good faith and fair dealing and violations of  
24 California’s consumer protection laws.

25 9. Axos wrongfully charged Plaintiff and the class members fees related to  
26 their checking accounts due to Axos’s policy and practice of maximizing the account  
27 fees it imposes on customers. The conduct has the overwhelming common denominator  
28 of breaching its customers’ contracts and violating laws so as to maximize Axos’s fee

1 income at the expense of its customers. Specifically, Axos assesses an overdraft fee  
2 (“OD Fee”) on debit card transactions when by Axos’s own calculations there was  
3 enough available money in the checking account to cover the transaction at issue when  
4 authorized and the money was specifically held for that transaction but was assessed  
5 an OD Fee anyway.

6 10. Additionally, Axos unlawfully assesses two or more fees (“Multiple  
7 Fees”), including OD Fees and non-sufficient funds fees (“NSF Fees”), on a single  
8 Automated Clearing House (“ACH”) transaction or check. In Axos’s sole and  
9 undisclosed view, each time Axos processes an ACH transaction or check for payment  
10 after having been rejected for insufficient funds, it becomes a new, unique item or  
11 transaction that is subject to another fee. But Axos’s contract never even hints that this  
12 counterintuitive result could be possible.

13 11. The charging of such OD Fees and NSF Fees breaches Axos contracts  
14 with its customers, which includes Plaintiff and the members of the Classes.

15 12. Though it first opened for business in 2000 and touts itself as leading the  
16 way in digital banking, Axos implemented OD Fee and NSF Fee policies that are no  
17 different than other financial institutions have used to generate billions in accounts fees  
18 to maximize profits.

19 **JURISDICTION AND VENUE**

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

25 14. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Axos  
26 is subject to personal jurisdiction here and regularly conducts business in the Southern  
27 District of California, and because a substantial part of the events or omissions giving  
28 rise to the claims asserted herein occurred in this district.

1 **PARTIES**

2 15. Plaintiff is a citizen of the State of Iowa. At all times relevant, Plaintiff  
3 was a customer and accountholder at Axos.

4 16. Axos is primarily a national online bank with its headquarters and  
5 principal place of business located in San Diego, California. It has brick and mortar  
6 branches in California, Nevada, and Ohio. Among other things, Axos is engaged in the  
7 business of providing retail banking services, including Plaintiff and members of the  
8 putative classes, which includes the issuance of debit cards for use by its customers in  
9 conjunction with their checking accounts. Axos conducts business, throughout the  
10 State of California and the United States.

11 **FACTUAL BACKGROUND**

12 **A. Axos Assesses OD Fees on Accounts That Were Not Actually Overdrawn**

13 17. Axos offers checking account services. One of the features of a Axos  
14 checking account is a debit card, which can be used for a variety of transactions  
15 including the purchasing of goods and services. In addition to receiving a debit card,  
16 other features of a Axos checking account include the ability to write checks; withdraw  
17 money from ATMs; schedule Automated Clearing House (ACH) transactions (certain  
18 recurring payments); and other types of transactions that debit from a checking account.

19 18. In connection with its processing of debit transactions (debit card, ATM,  
20 check, ACH, and other similar transactions), Axos assesses OD Fees to customer  
21 accounts when it claims to have determined that a customer's account has been  
22 overdrawn. As alleged further below, these fees were not at all permitted to be charged  
23 by any Axos contract during the class period and as such breached the contracts and  
24 the implied covenant of good faith and fair dealing.

25 19. OD Fees constitute the primary fee generators for banks and credit unions.  
26 According to a banking industry market research company, Moebs Services, in 2018  
27 alone, banks generated an estimated \$34.5 billion from OD Fees.

28 20. Since 2000, the average dollar amount of a checking account transaction

1 has become much lower because customers, and especially younger customers, use  
2 debit cards instead of cash or credit cards for everyday purchases. In 2016, the number  
3 of terminals that accept debit cards in the United States had increased by approximately  
4 1.4 million compared to 2011.<sup>1</sup> That has translated to the average dollar amount of  
5 overdraft transactions being lower than in 2000. However, while the average overdraft  
6 transaction is substantially lower and provides much less risk and exposure to the bank,  
7 the average cost of OD Fees per transaction has gone up.

8       21. The high cost of an OD Fee is usually unfairly punitive. In a 2012 study,  
9 more than 90% of customers who were assessed OD Fees overdrew their account by  
10 mistake. (May 2012 Pew Charitable Trust report entitled “Overdraft America:  
11 Confusion and Concerns about Bank Practices”, at p. 4). More than 60% of the  
12 transactions that resulted in a large OD Fee were for less than \$50. (June 2014 Pew  
13 Charitable Trust report entitled “Overdrawn”, at p. 8). More than 50% of those who  
14 were assessed OD Fees do not recall opting into an overdraft program (*Id.* at p. 5), and  
15 more than two-thirds of customers would have preferred the financial institution  
16 decline their transaction rather than paying the transaction into overdraft and charging  
17 a very large fee (*Id.* at p. 10).

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

24       23. As a result of banks and credit unions taking advantage of millions of  
25 customers through the unfair practice of charging OD Fees through methodologies that

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27 <sup>1</sup> Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*, MarketWatch, Mar. 23,  
28 2016, <http://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23> (last visited Sept. 17, 2021).

1 maximize the possible number of expensive OD Fees to be charged, there has been a  
2 substantial amount of litigation for more than a decade. The rulings of these cases have  
3 predominantly fallen in favor of consumers, forcing the banks and credit unions to  
4 repay their customers significant amounts of wrongfully collected OD Fees.

5         24. An accounting gimmick used by some financial institutions, which on  
6 information and belief financial institutions including Axos may use, is an “authorize  
7 positive – purportedly settle negative” (“APPSN”) method of calculation. It works as  
8 follows. At the moment debit card transactions are swiped and authorized on an account  
9 with positive funds to cover the transaction, Axos immediately reduces customers’  
10 checking accounts for the amount of the purchase, sets aside funds in a checking  
11 account to cover that transaction, and as a result, the customer’s displayed “available  
12 balance” reflects that subtracted amount. As a result, customers’ accounts will always  
13 have sufficient available funds available to cover these transactions.

14         25. However, Axos still assesses \$25 OD Fees on these transactions and  
15 misrepresents its practices in its Account Agreement. Despite putting aside sufficient  
16 available funds for debit card transactions at the time those transactions are authorized,  
17 Axos later assesses OD Fees on those same transactions when they purportedly settle  
18 days later into a negative balance. These types of transactions are “APPSN  
19 Transactions.”

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

27         27. That means when any *subsequent*, intervening transactions are initiated  
28 on a checking account, they are compared against an account balance that has already

1 been reduced to account for any earlier debit card transactions. Accordingly, many  
2 subsequent transactions incur OD Fees due to the unavailability of the funds  
3 sequestered for those debit card transactions.

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

7 29. The Consumer Financial Protection Bureau in its Consumer Financial  
8 Protection Bureau, Winter 2015 “Supervisory Highlights” has expressed concern with  
9 this very issue, calling the practice “unfair” and/or “deceptive” when:

10 A financial institution authorized an electronic transaction, which reduced  
11 a customer’s available balance but did not result in an overdraft at the time  
12 of authorization; settlement of a subsequent unrelated transaction that  
13 further lowered the customer’s available balance and pushed the account  
14 into overdraft status; and when the original electronic transaction was later  
15 presented for settlement, because of the intervening transaction and  
16 overdraft fee, the electronic transaction also posted as an overdraft and an  
17 additional overdraft fee was charged. Because such fees caused harm to  
18 consumers, one or more supervised entities were found to have acted  
19 unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which was not  
20 appropriately disclosed. They therefore could not reasonably avoid  
21 incurring the overdraft fees charged. Consistent with the deception  
22 findings summarized above, examiners found that the failure to properly  
23 disclose the practice of charging overdraft fees in these circumstances was  
24 deceptive. At one or more institutions, examiners found deceptive  
25 practices relating to the disclosure of overdraft processing logic for  
26 electronic transactions. Examiners noted that these disclosures created a  
27 misimpression that the institutions would not charge an overdraft fee with  
28 respect to an electronic transaction if the authorization of the transaction  
did not push the customer’s available balance into overdraft status. But  
the institutions assessed overdraft fees for electronic transactions in a  
manner inconsistent with the overall net impression created by the  
disclosures. Examiners therefore concluded that the disclosures were  
misleading or likely to mislead, and because such misimpressions could  
be material to a reasonable consumer’s decision-making and actions,  
examiners found the practice to be deceptive. Furthermore, because  
consumers were substantially injured or likely to be so injured by  
overdraft fees assessed contrary to the overall net impression created by  
the disclosures (in a manner not outweighed by countervailing benefits to  
consumers or competition), and because consumers could not reasonably  
avoid the fees (given the misimpressions created by the disclosures), the  
practice of assessing fees under these circumstances was found to be  
unfair.

30. There is no justification for these practices, other than to maximize Axos’s

1 OD Fee revenue. APPSN Transactions only exist because intervening checking  
2 account transactions supposedly reduce an account balance. Axos is free to protect its  
3 interests and either reject those intervening transactions or charge OD Fees on those  
4 intervening transactions—and it does the latter to the tune of millions of dollars each  
5 year. But Axos was not content with these millions in OD Fees. Instead, it sought  
6 millions *more* in OD Fees on these APPSN Transactions.

7 31. Besides being deceptive, unfair, and unconscionable, these practices  
8 breach contract promises made in Axos’s adhesion contracts—contracts which  
9 fundamentally misconstrue and mislead consumers about the true nature of Axos’s  
10 processes and practices. These practices also exploit contractual discretion to gouge  
11 consumers in violation of the implied covenant of good faith and fair dealing. In short,  
12 Axos is not authorized by contract to charge OD Fees on APPSN Transactions, but it  
13 has done so.

14 **i. Mechanics of a Debit Card Transaction**

15 32. A debit card transaction occurs in two parts. First, authorization for the  
16 purchase amount is instantaneously obtained by the merchant from Axos. When a  
17 merchant physically or virtually “swipes” a customer’s debit card, the card terminal  
18 connects, via an intermediary, to Axos, which verifies that the customer’s account is  
19 valid and that sufficient available funds exist to “cover” the transaction amount.

20 33. At this step, if the transaction is approved, Axos immediately reduces the  
21 funds in a customer’s account and sequesters funds in the amount of the transaction but  
22 does not yet transfer the funds to the merchant.

23 34. Indeed, the entire purpose of the immediate debit and hold of positive  
24 funds is to ensure that there are enough funds in the account to pay the transaction when  
25 it settles, as discussed in the Federal Register notice announcing revisions to certain  
26 provisions of the Truth in Lending Act regulations: “When a consumer uses a debit  
27 card to make a purchase, a hold may be placed on funds in the consumer’s account to  
28 ensure that the consumer has sufficient funds in the account when the transaction is

1 presented for settlement. This is commonly referred to as a ‘debit hold.’ During the  
2 time the debit hold remains in place, which may be up to three days after authorization,  
3 those funds may be unavailable for the consumer’s use for other transactions.” Federal  
4 Reserve Board, Office of Thrift Supervision, and National Credit Union  
5 Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 25, 2009).

6 35. Sometime thereafter, the funds are actually transferred from the  
7 customer’s account to the merchant’s account. Axos decides whether to “pay” debit  
8 card transactions at authorization. If it decides to pay, after that, Axos is obligated to  
9 pay the transaction no matter what. For debit card transactions, that moment of decision  
10 can only occur at the point of sale, at the instant the transaction is authorized or  
11 declined. It is at that point—and only that point—when Axos may choose to either pay  
12 the transaction or decline it. When the time comes to actually settle the transaction, it  
13 is too late—the bank has no discretion and must pay the charge. This “must pay” rule  
14 applies industry wide and requires that, once a financial institution authorizes a debit  
15 card transaction, it “must pay” it when the merchant later makes a demand, regardless  
16 of other account activity. See Electronic Fund Transfers, 74 Fed. Reg. 59033-01, 59046  
17 (Nov. 17, 2009). Notably, there is no change—no impact whatsoever—to the available  
18 funds in an account when this step occurs.

19 **ii. Axos’s Account Agreement**

20 36. Plaintiff has an Axos checking account, which during the class period was  
21 covered by the Personal Deposit Account Agreement and Schedule of Fees (“Account  
22 Agreement”), attached as *Exhibit A*. The Account Agreement, a contract of adhesion  
23 that applies to all Axos checking accountholders, does not allow Axos to charge OD  
24 Fees for transactions submitted to APPSN calculations.

25 37. The Account Agreement states that transactions are only overdraft  
26 transactions when they are authorized into a negative account balance. Thus, for  
27 APPSN Transactions, which are immediately deducted from a positive account balance  
28 and held aside for payment of that same transaction, there are always funds to cover

1 those transactions—those that were held aside and sequestered at the time of  
2 authorization. Yet Axos assesses OD Fees on them anyway.

3 38. In fact, Axos actually authorizes transactions on positive funds, sets those  
4 funds aside on hold, then fails to use those same funds to settle those same transactions.  
5 Instead, it uses the secret posting process alleged herein. Axos assesses OD Fees even  
6 when sufficient funds exist to cover transactions that are “authorized and paid” into a  
7 positive balance. No express language in any document states that Axos may impose  
8 OD Fees on any APPSN Transactions.

9 39. The Account Agreement misconstrues Axos’s true debit card processing  
10 and overdraft practices. First, and most fundamentally, Axos charges OD Fees on debit  
11 card transactions for which there are sufficient funds available to use to cover the  
12 transactions.

13 40. Axos assesses OD Fees on APPSN Transactions that *do* have sufficient  
14 funds available to cover them throughout their lifecycle. Axos’s practice of charging  
15 OD Fees even when sufficient available funds exist to cover a transaction violates a  
16 contractual promise not to do so. This discrepancy between Axos’s actual practice and  
17 the contract causes consumers like Plaintiff to incur more OD Fees than they should.

18 41. Sufficient funds for APPSN Transactions are actually debited from the  
19 account immediately, consistent with standard industry practice. These withdrawals  
20 take place upon initiation and thus they cannot be re-debited later. But that is what  
21 Axos does when it re-debits the account during a secret batching posting process.

22 42. In reality, Axos’s actual practice is to attempt the same debit card  
23 transaction twice to determine if the transaction overdraws an account—both at the  
24 time a transaction is authorized and later at the time of settlement. At the time of  
25 settlement, however, an available balance *does not change at all* for these transactions  
26 previously authorized into available funds. As such, Axos cannot then charge an OD  
27 Fee on such a transaction because the available balance has not been rendered  
28 insufficient due to the pseudo-event of settlement.

1           43.     Something more is going on: at the moment a debit card transaction is  
2 getting ready to settle, Axos does something new and unexpected, during the middle  
3 of the night, during its nightly batch posting process. Specifically, Axos releases the  
4 hold placed on funds for the transaction for a split second, putting money back into the  
5 account, and then re-debits the same transaction a second time.

6           44.     This secret step allows it to charge OD Fees on transactions that never  
7 should have been subject to them—debit card transactions that were authorized into  
8 sufficient funds, and for which Axos specifically set aside money to pay them. This  
9 discrepancy between Axos’s actual practices and the contract causes accountholders to  
10 incur more OD Fees than they should. In sum, there is a huge gap between Axos’s  
11 practices as described in the Account Agreement and Axos’s practices in reality.

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

18           46.     Axos was and is aware that this is precisely how its customers reasonably  
19 understand debit card transactions to work. Axos knows that many consumers prefer  
20 debit cards for these very reasons. Consumer research indicates that consumers prefer  
21 debit cards as a budgeting device because they do not allow debt like credit cards do.

22           47.     On information and belief, although access to Axos’s database will be  
23 sought by Plaintiff to confirm, Plaintiff was charged such inappropriate OD Fees due  
24 to the APPSN calculation.

25           48.     For example, on May 1, 2019, Plaintiff was charged a \$25 OD Fee, what  
26 Axos calls a “NSF Item Fee,” for a point-of-sale debit card transaction that was  
27 authorized prior to this day on a sufficient available balance.

28           49.     Axos had no authority to use an APPSN calculation to assess OD Fees in

1 its Account Agreement with its customers during the class period, and such practices  
2 breach its contracts with its customers. These practices exploit any contractual  
3 discretion Axos may have in its contracts with its customers in an unreasonable way  
4 that adds to Axos's profits and harms its customers. Axos does not describe this APPSN  
5 procedure in its contracts. Instead, the Account Agreement describes those funds in the  
6 available balance for authorized debits will be held and sequestered until posting, and  
7 that subsequent debits will not be authorized on those sequestered funds:

8 **Available Balance**

9 *Available Balance is the amount of funds available for withdrawal and*  
10 *authorizing transactions. Your Available Balance may be different*  
11 *than your ledger Balance or Collected Balance. The Available Balance*  
12 *is reduced by 1) the amount of pending transactions, such as a point-*  
13 *of-sale transaction; 2) funds on hold in accordance with our funds*  
14 *availability policy; 3) our receipt of notice that a transaction will be*  
15 *presented or returned; 4) our receipt of legal process relating to your*  
16 *account; or 5) your use of your account as a security for a loan.*

17 Ex. A at 8 (emphasis added).

18 50. When Axos authorizes debit card transactions on positive available funds  
19 and places a hold for the amount of the transaction, not allowing it to be used for  
20 anything else, it then violates the Account Agreement terms when it later charges OD  
21 Fees on such debit card transactions.

22 51. The Account Agreement further states as to OD Fees:

23 **Overdrafts and Nonsufficient Funds**

24 When we determine that you do not have enough available funds in  
25 your account to cover an Item (including an ATM or Debit Card  
26 transaction), then we consider the Item an insufficient funds item. If  
27 you have enrolled in our optional Overdraft Line of Credit Program and  
28 have enough funds in the linked account under the Overdraft Line plan,  
we transfer funds to cover the item. You may also establish a link from  
your checking account to a savings account or money market account  
to cover the shortfall in your checking account. *Otherwise, without  
notice to you, we either authorize or pay the insufficient item and  
overdraw your account (an overdraft item) or we decline or return the  
insufficient item without payment (a returned item).* All types of Items,  
including Bank fees, may overdraw your account.

*We pay overdrafts at our discretion, which means we do not guarantee  
that we will always, or ever, authorize and pay them. If we authorize or  
pay an item and create an overdraft, you must pay back any overdraft  
immediately. Each Owner will be jointly and severally liable to pay  
back any overdraft created by any account Owner, even if the Owner*

1 did not write the check, initiate the transaction, benefit from it or make  
2 any deposits to the account. If we overdraw your account to pay items  
3 on one or more occasions, we are not obligated to continue to paying  
4 future insufficient funds items. We may also close your account due to  
overdraft activity. See Closing an Account. You agree that we may  
apply deposits (including, but not limited to, Social Security and similar  
benefits) to overdrafts without notice to or consent from you, unless the  
law states otherwise.

5 Ex. A at 24 (emphasis added).

6 52. The EFT Agreement, a disclosure that is part of the Account Agreement,  
7 further supports Axos’s promise not to charge OD Fees on APPSN Transactions,  
8 stating:

9 **Preauthorization Payments Holds**

10 When you use your Card at a point of sale location or when you use the  
11 Visa or other network enhancement feature of the Cards to obtain goods  
12 or services or to obtain cash, the merchant may attempt to obtain  
13 preauthorization from us for the transaction. *When the preauthorization  
14 is approved by us, we immediately debit the preauthorized amount from  
15 your designated Account.* The amount you actually approved or signed  
16 for may vary in some cases from the amount of the actual purchase,  
17 depending on the merchant's request. If the preauthorization request  
18 varies from the amount of the actual transaction, payment of the  
transaction (which usually occurs within two to five days) will adjust  
the amount previously deducted from your designated Account. This  
process may affect the availability of funds from your designated  
Account to pay checks or for other electronic fund transfers. Since all  
transactions are immediately posted to your designated Account, please  
check your current balance on the Website. We will not be responsible  
for damages for wrongful dishonor if any items are not paid because  
the amount requested by the merchant was different from the actual  
amount you approved.

19 Ex. A at 27 (emphasis added).

20 53. When Axos pays overdrafts, including ones that are APPSN Transactions,  
21 it charges a \$25 OD Fee as specified in the Fee Schedule:

22 Non-sufficient/uncollected funds- Paid or Returned Item  
23 (includes checks, ACH and bill payments), per item \$25.00

24 Ex. A at 35.

25 54. Given the settlement (a/k/a posting) process for APPSN Transactions and  
26 the fact that a fee in such circumstances is counterintuitive to accountholders, some  
27 financial institutions other than Axos that charge OD Fees on APPSN Transactions  
28

1 expressly represent in the contract that those transactions can incur OD Fees as well as  
2 explain and show examples of how such fees occur.

3 55. For example, Bank of America’s deposit agreement states:

4 Debit card transactions and related authorization holds may impact  
5 your available balance. It is important to know that your available funds  
6 may change between the time you authorize a transaction and when the  
7 transaction is paid. . . . **The amount being held is not applied to the  
8 debit card transaction. . . . If other account activity has caused the  
9 funds available in your account to drop below zero before the debit  
10 card transaction is paid, you may no longer have sufficient funds to  
11 pay the merchant. . . .**

9 Here is an example of how that may happen: On Monday we authorize  
10 a debit card transaction because you have enough available funds at the  
11 time. A hold is then placed on your funds until the merchant presents  
12 the transaction for payment. On Tuesday we process and post another  
13 transaction (such as a check you wrote) that reduces your available  
14 funds below zero. If the merchant presents the original debit card  
15 transaction for payment on Wednesday, and your available funds are  
16 now below the amount needed to pay the transactions, the debit card  
17 transaction will overdraw your account and you may incur an overdraft  
18 fee.

14 <https://bit.ly/3g6IyEW> (emphasis added) (last visited Sept. 20, 2021).

15 56. As another example, Canvas Credit Union states:

16 Available balance **at the time transactions are posted (not when they  
17 are authorized)** may be used to determine when your account is  
18 overdrawn. The following example illustrates how this works:

18 Assume your actual and available balance are both \$100, and you swipe  
19 your debit card at a restaurant for \$60. As a result, your available  
20 balance will be reduced by \$60 so your available balance is only \$40.  
21 Your actual balance is still \$100. Before the restaurant charge is sent to  
22 us for posting, a check that you wrote for \$50 clears. Because you have  
23 only \$40 available. . . . your account will be overdrawn by \$10, even  
24 though your actual balance was \$100 before the check posted. . . Also,  
25 when the \$60 restaurant charge is presented to the Canvas and posted  
26 to your account, you will not have enough money in your available  
27 balance because of the intervening check, and you will be charged a fee  
28 for that transaction as well, even though your available balance was  
positive when it was authorized.

25 <https://bit.ly/2FoxAOv> (emphases in original) (last visited Sept. 20, 2021).

26 57. Capital One’s deposit agreement similarly states:

27 Other intervening transactions that occur while authorized debit card  
28 transactions are pending may create overdrafts on your account. Here  
is an example of how that could happen:

1 You're enrolled in our optional overdraft service. Your account balance  
2 is \$100.00. On Monday, you go to the store and use your debit card to  
3 make a purchase for \$80.00. We authorize the transaction; however, the  
4 merchant doesn't send us the transaction for payment and posting to  
5 your account on that day. On Tuesday, you withdraw \$30.00 from an  
6 ATM, reducing your account balance to \$70. **On Wednesday, the  
7 merchant requests payment for the \$80.00 transaction authorized  
8 on Monday, and you're charged a fee because the balance in your  
9 account is insufficient to pay the transaction at that time.**

10 <https://capital.one/312vrjW> (emphasis added) (last visited Sept. 20, 2021).

11 58. Axos provided no such disclosure at the time of the operative transactions,  
12 and in so doing, promised not to charge OD Fees on APPSN Transactions and  
13 otherwise misrepresented its true practices to its accountholders.

14 59. Plaintiff and the class members have performed all conditions, covenants,  
15 and promises required by each of them in accordance with the terms and conditions of  
16 the contracts. Plaintiff did not and could not have, exercising reasonable diligence,  
17 discovered both that he had been injured and the actual cause of that injury until he met  
18 with his attorneys in or about 2021. While Plaintiff understands that he was assessed  
19 fees, he did not understand the cause of those fees until then, because Axos hid its  
20 actual practice from its customers by describing a different practice in its contracts.

21 60. Plaintiff and the class members were harmed by these practices when they  
22 were assessed such fees when they should not have been. A complete evaluation of  
23 Axos's records is necessary to determine the full extent of Plaintiff's harms from these  
24 practices.

25 **B. Axos Charges Multiple Fees on the Same Item**

26 61. As alleged more fully herein, the second unlawful fee assessment practice  
27 that Axos has for years implement is the charging of Multiple Fees.

28 62. Axos Account Agreement allow it to take certain steps when an  
accountholder attempts a transaction but does not have sufficient funds to cover it.  
Specifically, Axos may: (a) authorize the transaction and charge a single OD Fee; or  
(b) reject the transaction and charge a single NSF Fee.

63. In contrast to its Account Agreement, however, Axos regularly assesses

1 Multiple Fees on the same item or transaction.

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

7 65. Axos never disclosed this practice. To the contrary, Axos indicated it will  
8 only charge a single fee on an item or per transaction.

9 **i. Plaintiff's Experience**

10 66. As an example, on February 1, 2019, Plaintiff attempted to make a  
11 payment to LOAN REPAR TIAA, via ACH transaction.

12 67. Axos rejected payment of that item due to insufficient funds and charged  
13 Plaintiff a \$25 NSF Fee.

14 68. Unbeknownst to Plaintiff and without his request to Axos to retry the  
15 transaction, six days later, on February 7, 2019, Axos processed the same item again,  
16 and again rejected the item and again charged Plaintiff a \$25.00 NSF Fee.

17 69. In sum, Axos charged Plaintiff \$50.00 in fees to process a single payment.

18 70. Plaintiff understood the above transactions to each be a single transaction,  
19 an understanding consistent with what is laid out in Axos's Account Agreement,  
20 capable at most of receiving a single NSF Fee (if Axos returned it) or single OD Fee  
21 (if Axos paid it).

22 **ii. The Imposition of Multiple Fees on a Single Transaction Violates**  
23 **Axos's Express Promises and Representations**

24 71. Again, the Account Agreement provide the general terms of Plaintiff's  
25 and the class members' relationship with Axos and makes explicit promises and  
26 representations regarding how transactions will be processed, as well as when NSF  
27 Fees and OD Fees may be assessed.

28 72. The Account Agreement contained explicit terms indicating that OD Fees

1 and NSF Fees will only be assessed once per item, when in fact Axos regularly charges  
2 Multiple Fees per item even though a customer only requested the payment or transfer  
3 once:

4 **Overdrafts**

5 If any Item or other debit presented to us will overdraw the available  
6 account balance, including any balance in an overdraft protection account  
7 (“ODP Account”) we have established for you, *we will charge you a fee,  
8 whether we pay the Item or dishonor it.*

9 Ex. A at p.10 (emphasis added).

10 73. The Account Agreement additionally promises:

11 When we determine that you do not have enough available funds in  
12 your account to cover an Item (including an ATM or Debit Card  
13 transaction), then we consider the Item an insufficient funds item. . . .  
14 *[W]ithout notice to you, we either authorize or pay the insufficient item  
15 and overdraw your account (an overdraft item) or we decline or return  
16 the insufficient item without payment (a returned item).* All types of  
17 Items, including Bank fees, may overdraw your account.

18 Ex. A at 24 (emphasis added).

19 74. Axos’s Account Agreement indicates that a singular fee can be assessed  
20 on checks, ACH debits, and electronic payments, and clearly states that only a singular  
21 charge or fee can be assessed, either an NSF Fee or OD Fee, per item or transaction  
22 that is returned due to insufficient funds.

23 75. The same check, ACH debit, debit card transaction or ATM withdrawal  
24 on an account cannot conceivably become a new one each time it is rejected for  
25 payment then reprocessed, especially when—as here—Plaintiff took no action to  
26 resubmit them.

27 76. The Fee Schedule reinforces this commonsense understanding:

28 Non-sufficient/uncollected funds- Paid or Returned Item  
(includes checks, ACH and bill payments), **per item** \$25.00

Ex. A at 35 (emphasis added).

77. Based on the above, an accountholder would expect to be charged either  
an NSF Fee or an OD Fee, but certainly not both, and absolutely not Multiple Fees.

78. There is zero indication anywhere that the same item is eligible to incur

1 Multiple Fees.

2 79. Even if Axos reprocesses an instruction for payment, it is still the same  
3 item. Axos's reprocessing is simply another attempt to effectuate an accountholder's  
4 original order or instruction.

5 80. The provisions referenced above never discuss a circumstance where  
6 Axos may assess Multiple Fees for a single check or ACH transaction that was returned  
7 for insufficient funds and later reprocessed one or more times and returned again.

8 81. In sum, Axos promises that one fee will be assessed per electronic  
9 payment or check, and these terms must mean all iterations of the same instruction for  
10 payment. As such, Axos breached the contract when it charged more than one fee per  
11 item.

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

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

23 84. Banks and credit unions like Axos that employ this abusive practice know  
24 how to plainly and clearly disclose it. Indeed, other banks and credit unions that do  
25 engage in this abusive practice disclose it expressly to their accountholders—  
26 something Axos never did.

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

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

6 (emphasis added).

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

10 YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO  
11 SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT  
12 **MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT**  
13 **OF A RETURNED ITEM AND RESUBMISSION.**

14 (emphasis added).

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

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

23 <https://tinyurl.com/4m6aaxky> (emphasis added) (last visited Sept. 17, 2021).

24 88. Air Academy Federal Credit Union contracts for its NSF fee as: "\$32.00  
25 **per presentment.**" <https://www.aafcu.com/fees.html> (emphasis added) (last visited  
26 Sept. 17, 2021).

27 89. Community Bank, N.A. unambiguously contracts on this issue:

28 **You may be charged more than one Overdraft or NSF Fee if a**  
**merchant submits a single transaction multiple times after it has**  
**been rejected or returned.**

<https://tinyurl.com/4juy277p> (emphasis added) (last visited Sept. 17, 2021).

90. Delta Community Credit Union contracts unambiguously as follows: "\$35  
**per presentment.**" <https://www.deltacommunitycu.com/home/fees.aspx> (emphasis  
added) (last visited Sept. 17, 2021).

91. Further, in its Account Contract, Delta unambiguously states as follows:

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

6 <https://tinyurl.com/etur74we> (emphasis added) (last visited Sept. 17, 2021).

7 92. USE Credit Union contracts as follows:

8 “Overdraft/Non-sufficient Funds (NSF): Applies to checks, Bill Pay,  
9 ACH, ATM/POS and other electronic debits that are paid or returned.  
10 **Fees are charged per presentment, meaning the same item is  
11 subject to multiple fees if presented for payment multiple times.**”

12 <https://tinyurl.com/2uf5habu> (emphasis added) (last visited Sept. 17, 2021)

13 93. First Financial Bank contracts unambiguously:

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

18 <https://tinyurl.com/48m4x8n5> (emphasis added) (last visited Sept. 17, 2021).

19 94. First Northern Credit Union unambiguously contracts its NSF in its Fee  
20 Schedule as follows: “\$29.00 **per each presentment and any subsequent  
21 representment(s).**” <https://tinyurl.com/6rxm94ft> (emphasis added) (last visited Sept.  
22 17, 2021).

23 95. Further, First Northern in its Account Contract, unambiguously  
24 contracted its NSF Fee as of 2020 as follows:

25 **You further agree that we may charge a NSF fee each time an item is  
26 presented for payment even if the same item is presented for  
27 payment multiple times. For example, if you wrote a check to a  
28 merchant who submitted the payment to us and we returned the item  
(resulting in a NSF fee), the merchant may re-present the check for  
payment again. If the second and any subsequent presentments are  
returned unpaid, we may charge a NSF fee for each time we return  
the item. You understand this means you could be charged  
multiple NSF fees for one check that you wrote as that check could be  
presented and returned more than once. Similarly, if you authorize a  
merchant (or other individual or entity) to electronically debit your  
account, such as an ACH debit, you understand there could be  
multiple submissions of the electronic debit request which could  
result in multiple NSF fees**

<https://tinyurl.com/328nzydc> (emphasis added) (last visited Sept. 17, 2021).

96. Glendale Federal Credit Union unambiguously contracts its NSF fee as,

1 “\$30 **per presentment.**” <https://tinyurl.com/466w96wm> (emphasis added) (last visited  
2 Sept. 17, 2021).

3 97. Liberty Financial contracts its NSF fee unambiguously as: “\$27.00 **per**  
4 **presentment.**” <https://liberty.financial/about/fee-schedule/> (emphasis added) (last  
5 visited Sept. 17, 2021).

6 98. Members First Credit Union contracts unambiguously:  
7 We reserve the right to charge an Non-Sufficient Funds Fee (NSF Fee)  
8 each time a transaction is presented if your account does not have  
9 sufficient funds to cover the transaction at the time of presentment and  
10 we decline the transaction for that reason. **This means that a  
11 transaction may incur more than one Non-Sufficient Funds Fee  
12 (NSF Fee) if it is presented more than once...we reserve the right  
13 to charge a Non-Sufficient Funds (NSF Fee) for both the original  
14 presentment and the representment[.]**

15 <https://tinyurl.com/66vxt6cs> (emphasis added) (last visited Sept. 17, 2021).

16 99. Meriwest Credit Union unambiguously contracts its fee as: “\$35.00/item  
17 **per presentment**”. <https://tinyurl.com/hs44c2hw> (emphasis added) (last visited Sept.  
18 17, 2021).

19 100. Partners 1st Federal Credit Union contracts unambiguously:  
20 Consequently, because **we may charge a fee for an NSF item each  
21 time it is presented, we may charge you more than one fee for any  
22 given item. Therefore, multiple fees may be charged to you as a  
23 result of a returned item and resubmission regardless of the  
24 number of times an item is submitted or resubmitted to us for  
25 payment, and regardless of whether we pay the item or return,  
26 reverse, or decline to pay the item.**

27 <https://tinyurl.com/77ekhebu> (emphasis added) (last visited Sept. 17, 2021)

28 101. RBC Bank unambiguously contracts:  
“We may also charge against the Account an NSF fee for each item  
returned or rejected, **including for multiple returns or rejections of  
the same item.**”

<https://tinyurl.com/y3k56uvm> (emphasis added) (last visited Sept. 17, 2021).

102. Regions Bank contracts unambiguously:  
If an item is presented for payment on your account at a time when there  
is an insufficient balance of available funds in your account to pay the  
item in full, you agree to pay us our charge for items drawn against  
insufficient or unavailable funds, whether or not we pay the item. **If**

1 any item is presented again after having previously been returned  
2 unpaid by us, you agree to pay this charge for each time the item is  
3 presented for payment and the balance of available funds in your  
4 account is insufficient to pay the item.

5 <https://tinyurl.com/82s96x6v> (emphasis added) (last visited Sept. 17, 2021).

6 103. Tyndall Credit Union Bank contracts its NSF fee as: “\$20.00 **per**  
7 **presentment** (maximum 5 per day).” <https://tinyurl.com/sd8kssk3> (emphasis added)  
8 (last visited Sept. 17, 2021).

9 104. Axos provided no such disclosure at the time of the operative transactions,  
10 and in so doing, deceived its accountholders about its true practices.

11 **CLASS ALLEGATIONS**

12 105. Plaintiff brings this action on behalf of himself, and all others similarly  
13 situated pursuant to Federal Rule of Civil Procedure 23. This action satisfies the  
14 numerosity, commonality, typicality, adequacy, predominance, and superiority  
15 requirements of Rule 23.

16 106. The proposed “Classes” are defined as:

17 All Axos checking account holders who, during the applicable statute  
18 of limitations, were charged OD Fees on transactions that were  
19 authorized into a positive available balance (the “APPSN Class”).

20 All Axos checking account holders who, during the applicable statute  
21 of limitations, were charged were charged two or more fees (“Multiple  
22 Fees”), including NSF Fees and OD Fees on the same item (the  
23 “Multiple Fee Class”).

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

26 108. Excluded from the Classes are Axos, its parents, subsidiaries, affiliates,  
27 officers and directors, any entity in which Axos has a controlling interest, all customers  
28 who make a timely election to be excluded, governmental entities, and all judges  
assigned to hear any aspect of this litigation, as well as their immediate family  
members.

109. The members of the Classes are so numerous that joinder is impractical.  
The Classes consist of thousands of customers, the identity of whom is within the

1 knowledge of and can be ascertained only by resort to Axos’s records.

2 110. The claims of the representative Plaintiff are typical of the claims of the  
3 Classes in that the representative Plaintiff, like all class members, were charged  
4 improper OD Fees on transactions that were authorized into a sufficient available  
5 balance, and Multiple Fees on the same item. The representative Plaintiff, like all class  
6 members, has been damaged by Axos’s misconduct in that they have been assessed  
7 unfair and unconscionable overdraft charges. Furthermore, the factual basis of Axos’s  
8 misconduct is common to all class members and represents a common thread of unfair  
9 and unconscionable conduct resulting in injury to all members of the Classes.

10 111. There are numerous questions of law and fact common to the Classes and  
11 those common questions predominate over any questions affecting only individual  
12 class members.

13 112. Among the questions of law and fact common to the Classes are whether  
14 Axos:

- 15 a. Imposed OD Fees on debit card transactions when those transactions were  
16 authorized into sufficient available balances;
- 17 b. Imposed Multiple Fees on a single ACH debit or check;
- 18 c. Breached its contract and the covenant of good faith and fair dealing with  
19 Plaintiff and other members of the Classes through its overdraft policies  
20 and practices; and
- 21 d. The proper method or methods by which to measure damages.

22 113. Plaintiff’s claims are typical of the claims of other class members, in that  
23 they arise out of the same wrongful overdraft policies and practices alleged herein.  
24 Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests  
25 of any other class member.

26 114. Plaintiff is committed to the vigorous prosecution of this action and have  
27 retained competent counsel experienced in the prosecution of class actions and, in  
28 particular, class actions on behalf of consumers and against financial institutions.

1 Accordingly, Plaintiff is an adequate representative and will fairly and adequately  
2 protect the interests of the Classes.

3 115. A class action is superior to other available methods for the fair and  
4 efficient adjudication of this controversy. Since the amount of each individual class  
5 member's claim is small relative to the complexity of the litigation, and due to the  
6 financial resources of Axos, no class member could afford to seek legal redress  
7 individually for the claims alleged herein. Absent a class action, the class members  
8 will continue to suffer losses and Axos's misconduct will proceed without remedy.

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

18 **FIRST CLAIM FOR RELIEF**  
19 **Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**  
20 **(On Behalf of the Classes)**

21 117. Plaintiff repeats paragraphs 1 through 88 above.

22 118. Plaintiff and members of the Class and Axos have contracted for bank  
23 account deposit, checking, ATM, and debit card services, agreeing that California law  
24 applies.

25 119. Axos misconstrued in the Account Agreement its true debit card  
26 processing and overdraft practices and breached the express terms of the Account  
27 Agreement.

28 120. Axos breached promises included in the Agreement.

121. No contract provision authorizes Axos to charge OD Fees on APPSN

1 Transactions, or Multiple Fees on the same item.

2 122. Therefore, Axos breached the terms of its Account Agreement by  
3 charging (a) OD Fees on transactions that were authorized into a sufficient available  
4 balance, but whose available balances were allegedly insufficient at the time the  
5 transactions were settled, and (b) Multiple Fees on the same item.

6 123. Under California law, every contract carries with it an implied covenant  
7 of good faith and fair dealing. Good faith and fair dealing, in connection with executing  
8 contracts and discharging performance and other duties according to their terms, means  
9 preserving the spirit – not merely the letter – of the bargain. Put differently, the parties  
10 to a contract are mutually obligated to comply with the substance of their contract in  
11 addition to its form. The covenant requires faithfulness to an agreed common purpose  
12 and consistency with the justified expectations of the other party to a contract. Evading  
13 the spirit of the bargain and abusing the power to specify terms constitute examples of  
14 bad faith in the performance of contracts.

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

21 125. Axos has breached the covenant of good faith and fair dealing in the  
22 contract through its overdraft policies and practices as alleged herein. Specifically,  
23 Axos harms consumers by exercising its contractual discretion in bad faith, even  
24 though that discretion is only vested in Axos, in a number of ways which no reasonable  
25 consumer would anticipate. Axos exercised its contractual discretion in bad faith to (a)  
26 cause APPSN Transactions to incur OD Fees by knowingly authorizing later  
27 transactions that it allows to consume available funds previously sequestered for  
28 APPSN Transactions; and (b) cause accountholders to incur Multiple Fees on the same

1 item.

2 126. Axos uses these contractual discretion points to extract OD Fees and NSF  
3 Fees on transactions that no reasonable consumer would believe could cause such fees.

4 127. Plaintiff and members of the Classes have performed all, or substantially  
5 all, of the obligations imposed on them under the contract.

6 128. Plaintiff and members of the Classes have sustained damages as a result  
7 of Axos’s breach of the contract and breach of the covenant of good faith and fair  
8 dealing.

9 **SECOND CAUSE OF ACTION**  
10 **VIOLATION OF THE UNFAIR COMPETITION LAW**  
11 **Cal. Bus. & Prof. Code § 17200, et seq.**  
12 **(On behalf of the Classes)**

13 129. Plaintiff incorporates the preceding allegations by reference as if fully set  
14 forth herein.

15 130. Axos’s conduct described herein violates the Unfair Competition Law (the  
16 “UCL”), codified at California Business and Professions Code section 17200, *et seq.*

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

21 132. By defining unfair competition to include “any unlawful, unfair or  
22 fraudulent business act or practice,” the UCL permits violations of other laws to be  
23 treated as unfair competition that is independently actionable and sweeps within its  
24 scope acts and practices not specifically proscribed by any other law.

25 133. The UCL expressly provides for injunctive relief, and also contains  
26 provisions denoting its public purpose. A claim for injunctive relief under the UCL is  
27 brought by a plaintiff acting in the capacity of a private attorney general. Although the  
28 private litigant controls the litigation of a UCL claim, the private litigant is entitled to  
recovery compensatory damages for his own benefit, but only disgorgement of profits

1 made by the defendant through unfair or deceptive practices in violation of the statutory  
2 scheme or restitution to victims of the unfair competition.

3 134. Axos's conduct violates the UCL by charging OD Fees on APPSN  
4 Transactions and Multiple Fees on the same check or ACH debit.

5 135. Axos committed fraudulent business acts and practices in violation of Cal.  
6 Bus. & Prof. Code § 17200, *et seq.*, in the following respect, among others:

- 7 • Axos's practice of falsely indicating in account documents that OD  
8 Fees will not be charged on APPSN Transactions.
- 9 • Axos's practice of falsely indicating in account documents that only a  
10 single NSF Fee or OD Fee will be charged on checks or ACH.

11 136. Specifically, Axos's conduct was not motivated by any business or  
12 economic need or rationale. The harm and adverse impact of Axos's imposition of OD  
13 Fees on APPSN Transactions and Multiple Fees on the same item was neither  
14 outweighed nor justified by any legitimate reasons, justifications, or motives.

15 137. Plaintiff and the Classes relied on Axos's misrepresentations and  
16 omissions in the publicly available account disclosures when opening and continuing  
17 to use their accounts, understanding OD Fees would not be charged on APPSN  
18 Transactions and Multiple Fees would not be charged on a single ACH payment or  
19 check. Had he known he would be charged such fees, he would not have used his  
20 account for such transactions.

21 138. The harm to Plaintiff and members of the Classes arising from Axos's  
22 unfair practices relating to the imposition of OD Fees on APPSN Transactions and  
23 Multiple Fees on the same item outweighs the utility, if any, of those practices.

24 139. Axos's unfair business practice relating to NSF Fees and OD Fees as  
25 alleged herein are immoral, unethical, oppressive, unscrupulous, unconscionable,  
26 and/or substantially injurious to Plaintiff and members of the Classes.

27 140. Axos's conduct was substantially injurious to consumers in that they have  
28 been forced to pay OD Fees on APPSN Transactions and Multiple Fees on the same

1 item, which the contract with Axos does not promise.

2 141. As a result of Axos’s violations of the UCL, Plaintiff and members of the  
3 Classes have paid, and/or will continue to pay NSF Fees and/or OD Fees and thereby  
4 have suffered and will continue to suffer actual harm.

5 142. In addition, Axos’s conduct continues to deceive the general public.  
6 Axos’s misrepresentations and omissions in its publicly available account documents  
7 and marketing materials are likely to deceive current and prospective accountholders  
8 making corresponding public injunctive relief necessary.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff and the Classes demand a jury trial on all claims so  
11 triable and judgment as follows:

- 12 (a) Declaring Axos’s APPSN Transaction and Multiple Fees policies and  
13 practices to be wrongful, unfair, and a breach of contract;
  - 14 (b) Restitution of all relevant OD Fees and NSF Fees paid to Axos by Plaintiff  
15 and the Classes, as a result of the wrongs alleged herein in an amount to  
16 be determined at trial;
  - 17 (c) Disgorgement of the ill-gotten gains derived by Axos from its misconduct;
  - 18 (d) Actual damages in an amount according to proof;
  - 19 (e) Statutory, punitive, and exemplary damages, as permitted by law;
  - 20 (f) Pre-judgment interest at the maximum rate permitted by applicable law;
  - 21 (g) Public injunctive relief to enjoin Axos’s practice of charging APPSN  
22 Transaction OD Fees and Multiple Fees on a single ACH payment or  
23 check;
  - 24 (h) Costs and disbursements assessed by Plaintiff in connection with this  
25 action, including reasonable attorneys’ fees pursuant to applicable law;  
26 and
  - 27 (i) Such other relief as this Court deems just and proper.
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**DEMAND FOR JURY TRIAL**

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

Dated: September 20, 2021

Respectfully submitted,

/s/ Taras Kick

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***Counsel for Plaintiff and Proposed Classes***

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