

1 **DAPEER ROSENBLIT**  
2 **LITVAK LLP**  
3 William Litvak  
4 (California State Bar No. 90533)  
5 wlitvak@drllaw.com  
6 11500 W. Olympic Blvd. Suite 550  
7 Los Angeles, California 90064  
8 Telephone: (310) 477-5575

9 **EDELSBERG LAW, PA**  
10 Scott Edelsberg\*  
11 (Florida Bar No. 0100537)  
12 (California Bar No. *Pending*)  
13 scott@edelsberglaw.com  
14 20900 NE 30th Ave #417  
15 Aventura, Florida 33180  
16 Telephone: (305) 975-3320

17 **SHAMIS & GENTILE, P.A.**  
18 Andrew J. Shamis\*  
19 (Florida Bar No. 101754)  
20 ashamis@shamisgentile.com  
21 14 NE 1st Avenue, Suite 705  
22 Miami, Florida 33132  
23 Telephone: (305) 479-2299  
24 \**Pro hac vice forthcoming*

25 *Attorneys for Plaintiff and the Proposed Class*

26 **UNITED STATES DISTRICT COURT**  
27 **SOUTHERN DISTRICT OF CALIFORNIA**

28 SARA HILL, on behalf of herself ) Case No : **'20CV1016 BEN WVG**  
and all others similarly situated, ) **CLASS ACTION COMPLAINT**  
Plaintiff, )  
vs. ) **[DEMAND FOR JURY TRIAL]**  
BBVA USA, an Alabama Corporation )  
Defendants. )

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**CLASS ACTION COMPLAINT**

Plaintiff Sarah Hill on behalf of herself and all persons similarly situated, allege the following based on personal knowledge as to allegations regarding the Plaintiff and on information and belief as to other allegations.

**INTRODUCTION**

1. Plaintiff brings this action on behalf of themselves, the general public, and classes of all similarly situated consumers against Defendant BBVA USA (“BBVA” or “Bank”), arising from their routine practices of (a) assessing OD Fees on transactions that did not actually overdraw the account; and (b) charging more than one non-sufficient funds fee (“NSF Fee”) on a single item.

2. BBVA misleadingly and deceptively misrepresents the above practices in its publicly available marketing materials, including its own account contracts. BBVA also omits material facts pertaining to each of the above practices in its publicly available marketing materials, including its account contracts.

3. BBVA’s customers have been injured by BBVA’s improper practices to the tune of millions of dollars bilked from their accounts in violation of their agreements with BBVA.

4. In addition, the deception, aimed at general public, continues to this day. BBVA’s account contracts (including the Consumer Account Deposit Agreement and the Fee Schedule) and marketing materials (including the

1 Overdraft Disclosure) and are publicly available online and in BBVA branches to  
2 all current and prospective accountholders. The general public relies on  
3 representations in these documents in making important financial decisions  
4 regarding with whom they would like to open a checking account. Consumers who  
5 have already opened accounts also rely on the misrepresentations and omissions in  
6 the publicly available account documents when making every day financial  
7 transactions.  
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11 5. The Pew Charitable Trusts has emphasized the importance of  
12 transparent checking account fee disclosures for both comparison shopping for  
13 checking accounts and for effective fee avoidance:  
14

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

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

25 6. Members of the public considering opening a checking account have  
26 the right to accurate information regarding the checking accounts they are  
27 considering. Research shows that fees are the most important factor influencing  
28 consumers’ selection of a new banking provider. *See* Ron Shevlin, “How

1 Consumers Choose a Bank: A Tale of Two Surveys.” Insight Vault, Cornerstone  
2 Advisors, 23 Aug. 2018, [www.cornrstone.com/insightvault/2018/08/23/how-](http://www.cornrstone.com/insightvault/2018/08/23/how-)  
3 [consumers-choose-a-bank-a-tale-of-two-surveys/](http://www.cornrstone.com/insightvault/2018/08/23/how-consumers-choose-a-bank-a-tale-of-two-surveys/) (summarizing two consumer  
4 surveys that revealed that the most important factor influencing consumers’  
5 selection of a new banking provider is the amount of fees charged); Claire Greene  
6 and Joanna Stavins, The 2016 and 2017 Surveys of Consumer Payment Choice:  
7 Summary Results. Federal Reserve Bank of Boston, 10 May 2018,  
8 [www.bostonfed.org/publications/research-data-report/2018/the-2016-and-2017-](http://www.bostonfed.org/publications/research-data-report/2018/the-2016-and-2017-)  
9 [surveys-of-consumer-payment-choice-summary-results.aspx](http://www.bostonfed.org/publications/research-data-report/2018/the-2016-and-2017-surveys-of-consumer-payment-choice-summary-results.aspx) (finding that 4 in 10  
10 consumers who did not have a bank account cited expense as the reason, including  
11 “fees and service charges are too high.”).

12  
13  
14  
15  
16 7. Reasonable consumers would not agree to open BBVA checking  
17 accounts if they were informed, for example, that they could incur overdraft fees  
18 on transactions that did not overdraw their account; could incur two or three  
19 insufficient funds fees on a single attempted electronic payment; or could incur  
20 three or four discrete ATM fees for a single out-of-network ATM use.

21  
22  
23 8. On behalf of themselves, the general public, and the Classes, Plaintiff  
24 seek damages, restitution, and public injunctive relief for Defendant’ breach of  
25 contract and violations of California’s consumer protection laws.  
26

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1 **PARTIES**

2 9. Sarah Hill is a resident of San Diego, California and holds a BBVA  
3 checking account.  
4

5 10. Defendant BBVA USA is engaged in the business of providing retail  
6 banking services to consumers, including Hill and members of the putative  
7 Classes, which includes the issuance of debit cards for use by its customers in  
8 conjunction with their checking accounts. BBVA USA operates banking centers,  
9 and thus conducts business, throughout the State of California and the United  
10 States.  
11  
12

13 **JURISDICTION AND VENUE**

14 11. BBVA USA regularly and systematically provides retail banking  
15 services throughout the State of California, including in this county, and provides  
16 retail banking services to its customers, including members of the putative Class.  
17 As such, it is subject to the personal jurisdiction of this Court.  
18

19 12. This Court has original jurisdiction of this action under the Class  
20 Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this  
21 Court has original jurisdiction because the aggregate claims of the putative class  
22 members exceed \$5 million, exclusive of interest and costs, and at least one of the  
23 members of the proposed classes is a citizen of a different state than BBVA.  
24  
25  
26

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1 13. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because  
2 BBVA is subject to personal jurisdiction here and regularly conducts business in  
3 this District, and because Plaintiff was assessed fees in this district  
4

5 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

6 **I. BBVA CHARGES OD FEES ON TRANSACTIONS THAT DO NOT**  
7 **ACTUALLY OVERDRAW THE ACCOUNT**

8 **A. Overview of Claim**

9 14. Plaintiff bring this cause of action challenging BBVA’s practice of  
10 charging overdraft fees on what are referred to in this complaint as “Authorize  
11 Positive, Purportedly Settle Negative Transactions,” or “APPSN Transactions.”  
12

13 15. Here is how it works. At the moment debit card transactions are  
14 authorized on an account with positive funds to cover the transaction, BBVA  
15 immediately reduces consumers’ checking accounts for the amount of the  
16 purchase, sets aside funds in a checking account to cover that transaction, and as a  
17 result, the consumer’s displayed “available balance” reflects that subtracted  
18 amount. As a result, customers’ accounts will always have sufficient available  
19 funds available to cover these transactions because BBVA has already sequestered  
20 these funds for payment.  
21

22 16. However, BBVA still assesses crippling \$32 OD Fee on many of  
23 these transactions and misrepresents its practices in its account documents.  
24

25 //

1 17. Despite putting aside sufficient available funds for debit card  
2 transactions at the time those transactions are authorized, BBVA later assesses OD  
3 Fees on those same transactions when they purportedly settle days later into a  
4 negative balance. These types of transactions are APPSN transactions.  
5

6 18. BBVA maintains a running account balance in real time, tracking  
7 funds consumers have for immediate use. This running account balance is adjusted,  
8 in real-time, to account for debit card transactions at the precise instance they are  
9 made. When a customer makes a purchase with a debit card, BBVA sequesters the  
10 funds needed to pay the transaction, subtracting the dollar amount of the  
11 transaction from the customer's available balance. Such funds are not available for  
12 any other use by the accountholder, and such funds are specifically associated with  
13 a given debit card transaction.  
14  
15  
16  
17

18 19. Indeed, the entire purpose of the immediate debit and hold of positive  
19 funds is to ensure that there are enough funds in the account to pay the transaction  
20 when it settles, as discussed in the Federal Register notice announcing revisions to  
21 certain provisions of the Truth in Lending Act regulations:  
22

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

1 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union  
2 Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29,  
3 2009).  
4

5 20. That means when any *subsequent*, intervening transactions are  
6 initiated on a checking account, they are compared against an account balance that  
7 has already been reduced to account for any earlier debit card transactions. This  
8 means that many subsequent transactions incur OD Fees due to the unavailability  
9 of the funds sequestered for those debit card transactions.  
10  
11

12 21. Still, despite keeping those held funds off-limits for other transactions,  
13 BBVA improperly charges OD Fees on those APPSN Transactions, although the  
14 APPSN transactions *always* have sufficient available funds to be “covered.”  
15

16 22. Indeed, the Consumer Financial Protection Bureau (“CFPB”) has  
17 expressed concern with this very issue, flatly calling the practice “deceptive”  
18 when:  
19

20  
21 A financial institution authorized an electronic transaction, which  
22 reduced a customer’s available balance but did not result in an  
23 overdraft at the time of authorization; settlement of a subsequent  
24 unrelated transaction that further lowered the customer’s available  
25 balance and pushed the account into overdraft status; and when the  
26 original electronic transaction was later presented for settlement,  
27 because of the intervening transaction and overdraft fee, the electronic  
28 transaction also posted as an overdraft and an additional overdraft fee  
was charged. Because such fees caused harm to consumers, one or  
more supervised entities were found to have acted unfairly when they  
charged fees in the manner described above. Consumers likely had no



1 reason to anticipate this practice, which was not appropriately  
2 disclosed. They therefore could not reasonably avoid incurring the  
3 overdraft fees charged. Consistent with the deception findings  
4 summarized above, examiners found that the failure to properly  
5 disclose the practice of charging overdraft fees in these circumstances  
6 was deceptive. At one or more institutions, examiners found deceptive  
7 practices relating to the disclosure of overdraft processing logic for  
8 electronic transactions. Examiners noted that these disclosures created  
9 a misimpression that the institutions would not charge an overdraft fee  
10 with respect to an electronic transaction if the authorization of the  
11 transaction did not push the customer's available balance into  
12 overdraft status. But the institutions assessed overdraft fees for  
13 electronic transactions in a manner inconsistent with the overall net  
14 impression created by the disclosures. Examiners therefore concluded  
15 that the disclosures were misleading or likely to mislead, and because  
16 such misimpressions could be material to a reasonable consumer's  
17 decision-making and actions, examiners found the practice to be  
18 deceptive. Furthermore, because consumers were substantially injured  
19 or likely to be so injured by overdraft fees assessed contrary to the  
20 overall net impression created by the disclosures (in a manner not  
21 outweighed by countervailing benefits to consumers or competition),  
22 and because consumers could not reasonably avoid the fees (given the  
23 misimpressions created by the disclosures), the practice of assessing  
24 fees under these circumstances was found to be unfair.

18  
19 Consumer Financial Protection Bureau, Winter 2015 "Supervisory  
20 Highlights."

21  
22 23. There is no justification for these practices, other than to maximize  
23 BBVA's overdraft fee revenue. APPSN Transactions only exist because  
24 intervening checking account transactions supposedly reduce an account balance.  
25  
26 But BBVA is free to protect its interests and either reject those intervening  
27 transactions or charge OD Fees on those intervening transactions—and it does the  
28

1 latter to the tune of millions of dollars each year. But BBVA was not content with  
2 these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these  
3 APPSN Transactions.  
4

5 24. Besides being deceptive, unfair, and unconscionable, these practices  
6 breach contract promises made in BBVA’s adhesion contracts—contracts which  
7 fundamentally misconstrue and mislead consumers about the true nature of  
8 BBVA’s processes and practices. These practices also exploit contractual  
9 discretion to gouge consumers.  
10  
11

12 25. In plain, clear, and simple language, the checking account contract  
13 documents covering overdraft fees promise that BBVA will only charge overdraft  
14 fees on transactions that have insufficient funds to “cover” that transaction.  
15

16 26. In short, BBVA is not authorized by contract to charge OD Fees on  
17 transactions that have not overdrawn an account, but it has done so and continues  
18 to do so.  
19

20  
21 **B. Mechanics of a Debit Card Transaction**

22 27. A debit card transaction occurs in two parts. First, authorization for  
23 the purchase amount is instantaneously obtained by the merchant from BBVA.  
24 When a merchant physically or virtually “swipes” a customer’s debit card, the  
25 credit card terminal connects, via an intermediary, to BBVA, which verifies that  
26 the customer’s account is valid and that sufficient available funds exist to “cover”  
27  
28

1 the transaction amount.

2 28. At this step, if the transaction is approved, BBVA immediately  
3 decrements the funds in a consumer's account and sequesters funds in the amount  
4 of the transaction, but does not yet transfer the funds to the merchant.  
5

6 29. Indeed, the entire purpose of the immediate debit and hold of positive  
7 funds is to ensure that there are enough funds in the account to pay the transaction  
8 when it settles, as discussed in the Federal Register notice announcing revisions to  
9 certain provisions of the Truth in Lending Act regulations:  
10  
11

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

18 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union  
19 Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29,  
20 2009).  
21

22 30. Sometime thereafter, the funds are actually transferred from the  
23 customer's account to the merchant's account. This is referred to in the banking  
24 industry as "posting" or "settling"—something which may occur several days after  
25 the transaction was initially initiated.  
26  
27

28 31. There is no change—no impact whatsoever—to the available funds in

1 an account when posting or payment of a transaction that settles in the same  
2 amount for which it authorized occurs. That is because available funds amounts do  
3 not change for debit card transactions that settle in the same amount for which they  
4 were authorized.  
5

6 **C. BBVA's Account Contract**  
7

8 32. Plaintiff has a BBVA checking account, which is governed by  
9 BBVA's standardized Consumer Account Agreement.  
10

11 33. The standardized Consumer Account Agreement is a publicly  
12 available document available online and in BBVA branches to all current and  
13 prospective accountholders. Consumers, and the general public, rely on account  
14 agreements like BBVA's in making important financial decisions regarding to  
15 whom they would like to entrust their money. In addition, BBVA accountholders  
16 rely on the Consumer Deposit Account Agreement in making every day financial  
17 transactions and predicting which transactions will incur fees and for how much.  
18

19 34. The Consumer Deposit Account Agreement and relevant contract  
20 documents covering overdraft fees provide that BBVA will only charge OD Fees  
21 on transactions with insufficient funds to cover a given transaction:  
22

23 Available Balance. The balance of funds in your account that is available for  
24 immediate withdrawal. Unlike the posted balance, the available balance  
25 reflects any holds placed on your account, including the restrictions  
26 described in the Funds Availability Disclosure included with this  
27 Agreement. Your available balance may be more or less than the amount of  
28 your posted balance, but does not include any credit available under any

1 BBVA USA Overdraft Protection Line of Credit you may have.

2 [...]

3  
4 If an item was initiated at a point-of-sale terminal or is a VISA transaction or  
5 ATM transaction, you agree that we may charge the amount of the item to  
6 your account or place a hold on your account in the amount requested by the  
7 merchant immediately upon authorization of such transaction, even though  
8 we have not then actually received the item for payment. We will make  
9 payment for a transaction only after the actual transaction is presented to us  
physically or electronically. Each such hold will reduce the available balance  
in your account by the amount of the hold.

10 [...]

11  
12 Insufficient Available Balance and Overdrafts. If your available  
13 balance is insufficient to pay the total amount of items presented  
14 against your account, we may, at our option, return any of the items  
15 unpaid or pay any or all of the items, even though payment will cause  
16 an overdraft of your account. We may return any item at any time if  
17 your available balance is insufficient to pay that item, even if we  
18 previously have permitted overdrafts. You are not entitled to rely on  
19 any prior act by us with respect to your account. Our election to pay  
20 overdrafts does not establish a course of dealing between you and us  
21 or modify the terms of this Agreement. You agree that, if your  
available balance is insufficient to pay any item presented against  
your account, you will pay promptly both our service charge for  
handling and processing that item and the amount of any overdraft  
without further notice or demand.

22 Exhibit A, Consumer Account Agreement.

23  
24 35. The “What You Need to Know about Overdrafts and Overdraft Fees”  
25 disclosure (“Overdraft Disclosure”) also contains important representations.  
26 Consumers, and the general public, rely on the Overdraft Disclosure in making  
27 important financial decisions regarding to whom they would like to entrust their  
28

1 money. In addition, BBVA accountholders rely on the Overdraft Disclosure in  
2 making every day financial transactions and predicting which transactions will  
3 incur fees and for how much. The Overdraft Disclosure states:  
4

5 An overdraft occurs when you do not have enough money in your  
6 account to cover a transaction, but the transaction is paid anyway.

7 [...]

8  
9 We may, at our discretion, authorize and pay overdrafts for the  
10 following types of transactions: (i) checks and other transactions made  
11 using your checking account number; and (ii) automatic bill payments.  
12 If you do not want BBVA to authorize and pay overdrafts arising from  
13 checks and other transactions made using your checking account  
14 number and from automatic bill payments, you must opt-out of our  
15 standard overdraft practices for these types of transactions.

16 36. The critical contract term “to cover” is never defined.

17 37. For APPSN Transactions, which are immediately deducted from a  
18 positive account balance and held aside for payment of that same transaction, there  
19 are always funds to “cover” those transactions—yet BBVA assesses OD Fees on  
20 them anyway.

21 38. Moreover, the Overdraft Disclosure reaffirms that debit card  
22 transactions are “authorized and paid” immediately in one fell swoop. BBVA  
23 clarifies that authorization and payment are linked and essentially a coterminous  
24 process—in other words, that authorization necessitates payment, and account  
25 balances are deducted once for any given transaction.  
26  
27  
28

1           39. In fact, BBVA actually “authorizes” transactions on positive funds,  
2 sets those funds aside on hold, then fails to use those same funds to “pay” those  
3 same transactions when they settle. Instead, it uses a secret posting process  
4 described below.

5  
6           40. All these representations and contractual promises are untrue. In fact,  
7 BBVA charges OD Fees even when sufficient funds exist to “cover” transactions  
8 that are “authorized and approved” into a positive balance. No express language in  
9 any document states that BBVA may impose overdraft fees on any APPSN  
10 Transactions.

11           41. The account documents misconstrue BBVA’s true debit card  
12 processing and overdraft practices.

13  
14           42. First, and most fundamentally, BBVA charges overdraft fees on debit  
15 card transactions for which there are sufficient funds available to “cover” the  
16 transactions. That is despite contractual representations that BBVA will only  
17 charge overdraft fees on transactions with insufficient available funds to “cover” a  
18 given transaction.

19  
20           43. BBVA assesses OD Fees on APPSN Transactions that *do* have  
21 sufficient funds available to “cover” them throughout their lifecycle.

22  
23           44. BBVA’s practice of charging OD Fees even when sufficient available  
24 funds exist to “cover” a transaction violates a contractual promise not to do so.  
25  
26  
27  
28

1 This discrepancy between BBVA's actual practice and the contract causes  
2 consumers like Plaintiff to incur more overdraft fees than they should.

3  
4 45. Next, sufficient funds for APPSN Transactions are actually debited  
5 from the account immediately, consistent with standard industry practice.

6  
7 46. Because these withdrawals take place upon initiation, they cannot be  
8 re-debited later. But that is what BBVA does when it re-debits the account during a  
9 secret batching posting process.

10  
11 47. In reality, BBVA's actual practice is to assay the same debit card  
12 transaction twice to determine if the transaction overdraws an account—both at the  
13 time a transaction is authorized and later at the time of settlement.

14  
15 48. At the time of settlement, however, an available balance *does not*  
16 *change at all* for these transactions previously authorized into good funds. As such,  
17 BBVA cannot then charge an overdraft fee on such transaction because the  
18 available balance has not been rendered insufficient due to the pseudo-event of  
19 settlement.  
20  
21

22 49. Upon information and belief, something more is going on: at the  
23 moment a debit card transaction is getting ready to settle, BBVA does something  
24 new and unexpected, during the middle of the night, during its nightly batch  
25 posting process. Specifically, BBVA releases the hold placed on funds for the  
26 transaction for a split second, putting money back into the account, then re-debits  
27  
28



1 the same transaction a second time.

2           50. This secret step allows it to charge overdraft fees on transactions that  
3 never should have gotten them—transactions that were authorized into sufficient  
4 funds, and for which BBVA specifically set aside money to pay them.  
5

6           51. This discrepancy between BBVA’s actual practices and the contract  
7 causes consumers to incur more overdraft fees than they should.  
8

9           52. In sum, there is a huge gap between BBVA’s practices as described in  
10 the account documents and BBVA’s practices in reality.  
11

12           **D. BBVA Abuses Contractual Discretion**

13           53. BBVA’s treatment of debit card transactions to charge overdraft fees  
14 is not simply a breach of the express terms of the numerous account documents. In  
15 addition, BBVA exploits contractual discretion to the detriment of accountholders  
16 when it uses these policies.  
17

18           54. The terms “hold” and “to cover” a transaction is undefined. BBVA  
19 uses its discretion to define “hold” and “to cover” in a manner contrary to any  
20 reasonable, common sense understanding of that term. In BBVA’s implied  
21 definition, a transaction is not “covered” even if BBVA sequesters sufficient  
22 available funds for that transaction.  
23  
24

25 //

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1           55. Moreover, BBVA uses its contractual discretion to cause APPSN  
2 Transactions to incur overdraft fees by knowingly authorizing later transactions  
3 that it allows to consume available funds previously sequestered for APPSN  
4 Transactions.  
5

6           56. BBVA uses all of these contractual discretion points unfairly to  
7 extract overdraft fees on transactions that no reasonable consumer would believe  
8 could cause overdraft fees.  
9

10  
11           **E. Plaintiff Hill’s Debit Card Transactions**

12           57. By way of example only, on December 6, 2019, Plaintiff was charged  
13 an overdraft fee in the amount of \$32 for a debit card transaction that settled that  
14 day, despite the fact that positive funds were deducted immediately for that  
15 transaction on which she was assessed an overdraft fee at the time of authorization.  
16

17           **II. BBVA CHARGES MULTIPLE NSF FEES ON THE SAME ITEM**

18           **A. Overview of Claim**

19  
20           58. Plaintiff brings this cause of action challenging BBVA’s imposition of  
21 more than one NSF Fee on the same item.  
22

23           59. As discussed more fully below, it is a breach of the Bank’s contract  
24 and of reasonable consumers’ expectations for the Bank to charge more than one  
25 NSF Fee, on the *same item*, since the contract explicitly states—and reasonable  
26 consumers understand—that the same item cannot more than one fee.  
27

28 //

1        **B. Plaintiff Hill’s Experience**

2            60. By way example only, on September 13, 2019, Ms. Hill attempted to  
3 make a transfer to Paypal in the amount of \$4.19. Because Ms. Hill had  
4 insufficient funds in her account, BBVA rejected that payment request and charged  
5 Ms. Hill a \$32 NSF Fee for doing so. Unbeknownst to Plaintiff, that very same  
6 item was processed again by BBVA days later, on September 24, with BBVA  
7 calling the transaction a “RETRY PAYMENT” on the bank statement. This time,  
8 BBVA again returned the item for insufficient funds and charged Plaintiff a \$32  
9 OD Fee for doing so. In sum, *BBVA charged Plaintiff \$64 in fees to process a*  
10 *single bill payment of \$4.19.*

11  
12            61. Ms. Hill took no affirmative action to reinitiate or resubmit the item.

13  
14            62. Plaintiff understood the Paypal transfer to be a single item, capable at  
15 most of receiving a single NSF *or* OD Fee. BBVA itself also understood the  
16 transaction to be a single item, and its systems categorized it as such. Indeed, on  
17 Ms. Hill’s bank statements, BBVA described subsequent attempts to debit the  
18 transaction as “RETRY PAYMENT.”

19            63. Instead—and unlike of BBVA’s major competitors such as JP Morgan  
20 Chase, which does not charge multiple NSF or OD Fees on the same item—BBVA  
21 charges more than one NSF Fee on the same item.

22  
23 //

1           64. BBVA has charged Plaintiff this deceptive fee numerous times on a  
2 variety of similar transactions.  
3

4           **C. Relevant Account Documents**

5           65. The account documents promise that only one NSF Fee or OD Fee  
6 will be charged per item.  
7

8           66. The Fee Schedule is a publicly available document available online  
9 and in BBVA branches to all current and prospective accountholders. Consumers,  
10 and the general public, rely on the Fee Schedule in making important financial  
11 decisions regarding to whom they would like to entrust their money and predicting  
12 which transactions will incur fees and for how much. In addition, BBVA  
13 accountholders rely on the Fee Schedule in making every day financial  
14 transactions.  
15  
16

17           67. According to the Fee Schedule:

18           Insufficient Funds (NSF) Charge - Returned Item \$32 Per returned item  
19 presented against insufficient funds  
20

21           [...]

22           Insufficient Funds Charge (NSF) - Returned Item \$32 per item  
23 Fee Schedule, Exhibit B.  
24

25           68. The Consumer Deposit Account Agreement also supports these  
26 promises, especially when it defines “Item” as:

27           Item. A check, substitute check, draft, withdrawal order, payment  
28 order, or other similar instrument, order or instruction, whether oral,

1 written or electronic, either for the deposit of funds to your account or  
2 for the payment of funds from your account. Items include debits and  
3 credits for point-of-sale, ATM, and Debit Card transactions.

4 “Consumer Account Agreement, Important legal information, disclosures, and  
5 terms you need to know,” *see* Exhibit A, p. 1 (“Consumer Deposit Account  
6 Agreement”).

8 69. The general public relies on marketing materials like the above in  
9 making important financial decisions regarding to whom they would like to entrust  
10 their money.

12 70. The terms of those agreements are starkly binary: for a given item,  
13 the Bank may assess only a single fee.

15 71. This abusive practice is not universal in the banking industry. Indeed,  
16 major banks like Chase—the largest consumer bank in the country—do not  
17 undertake the practice of charging more than one NSF or OD Fee on the same item  
18 when it is submitted for payment multiple times.

21 72. Banks like Defendant know how to plainly and clearly disclose this  
22 abusive practice. Indeed, other banks that do engage in this abusive practice  
23 disclose it expressly to their accountholders—something Defendant here never did.

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

27 //

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

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

9  
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 75. Klein Bank similarly states in its Online Banking Agreement:  
15 [W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment  
16 (electronic or check) is submitted to us for payment from your Bill Payment  
17 Account when, at the time of posting, your Bill Payment Account is overdrawn,  
18 would be overdrawn if we paid the item (whether or not we in fact pay it) or does  
19 not have sufficient available funds; or (2) we return, reverse, or decline to pay an  
20 item for any other reason authorized by the terms and conditions governing your  
21 Bill Payment Account. We will charge an NSF/Overdraft Fee as provided in this  
22 section regardless of the number of times an item is submitted or resubmitted to us  
23 for payment, and regardless of whether we pay the item or return, reverse, or  
24 decline to pay the bill payment.  
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1           76. BBVA intentionally provides no such disclosure, in an effort to  
2 deceive its accountholders.  
3

4           **D. BBVA Abuses Contractual Discretion**

5           77. To the extent the account documents do not explicitly bar the policies  
6 described above, BBVA exploits contractual discretion to the detriment of  
7 accountholders and breaches good faith and fair dealing when it uses these  
8 policies.  
9

10           78. The Bank uses its discretion to define the meaning of “item” in an  
11 unreasonable way that violates common sense and reasonable consumer  
12 expectations. BBVA uses its contractual discretion to set the meaning of that term  
13 to choose a meaning that directly causes more NSF Fees or OD Fees.  
14  
15

16           **CLASS ACTION ALLEGATIONS**

17           79. Plaintiff bring this action on behalf of themselves and on behalf of all  
18 others similarly situated. The Classes include:  
19

20           All holders of a BBVA checking and/or money market account in  
21 California who, within the applicable statute of limitations preceding  
22 the filing of this lawsuit, incurred more than one NSF Fee on the same  
23 item (the “Multiple Fee Class”).

24           All holders of a BBVA checking account in California who, within  
25 the applicable statute of limitations preceding the filing of this  
26 lawsuit, were charged OD Fees on transactions that were authorized  
27 into a positive available balance (the “APPSN Class”).

28           All consumers in California eligible to open a BBVA checking  
account (the “Injunctive Relief Class”).

1           80. Excluded from the Classes are Defendant, their subsidiaries and  
2 affiliates, their officers, directors and member of their immediate families and any  
3 entity in which defendants have a controlling interest, the legal representatives,  
4 heirs, successors or assigns of any such excluded party, the judicial officer(s) to  
5 whom this action is assigned, and the members of their immediate families.  
6  
7

8           81. Plaintiff reserve the right to modify or amend the definition of the  
9 proposed Classes and/or to add a Subclass(es) if necessary before this Court  
10 determines whether certification is appropriate.  
11

12           82. The questions here are ones of common or general interest such that  
13 there is a well-defined community of interest among the class members. These  
14 questions predominate over questions that may affect only individual class  
15 members because BBVA has acted on grounds generally applicable to the classes.  
16  
17 Such common legal or factual questions include, but are not limited to:  
18

- 19           a) Whether BBVA improperly charged multiple NSF Fees on the  
20 same item;
- 21           b) Whether BBVA improperly charged OD Fees on APPSN  
22 Transactions;
- 23           c) Whether such conduct enumerated above violates the contract;
- 24           d) Whether such conduct is deceptive or in bad faith;

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- 1 e) Whether Plaintiff and other members of the Classes have sustained
- 2 damages as a result of BBVA wrongful business practices
- 3 described herein, and the proper measure of damages; and
- 4 f) Whether BBVA's fee disclosures are deceptive and misleading to
- 5 both U.S. Bank customers and the general public.

6 83. The parties are numerous such that joinder is impracticable. Upon  
7 information and belief, and subject to class discovery, the Classes consist of  
8 thousands of members or more, the identity of whom are within the exclusive  
9 knowledge of and can be ascertained only by resort to BBVA's records. BBVA  
10 has the administrative capability through its computer systems and other records to  
11 identify all members of the Classes, and such specific information is not otherwise  
12 available to Plaintiff.  
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16 84. It is impracticable to bring Class members' individual claims before  
17 the Court. Class treatment permits a large number of similarly situated persons or  
18 entities to prosecute their common claims in a single forum simultaneously,  
19 efficiently and without the unnecessary duplication of evidence, effort, expense, or  
20 the possibility of inconsistent or contradictory judgments that numerous individual  
21 actions would engender. The benefits of the class mechanism, including providing  
22 injured persons or entities with a method for obtaining redress on claims that might  
23 not be practicable to pursue individually, substantially outweigh any difficulties  
24 that may arise in the management of this class action.  
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1           85. Plaintiff's claims are typical of the claims of the other Class members  
2 in that they arise out of the same wrongful business practices by BBVA, as  
3 described herein.  
4

5           86. Plaintiff is more than an adequate representative of the Classes in that  
6 she has a BBVA checking account and has suffered damages as a result of  
7 BBVA's improper business practices. In addition:  
8

- 9           a) Plaintiff is committed to the vigorous prosecution of this action on  
10 behalf of themselves and all others similarly situated and have  
11 retained competent counsel experienced in the prosecution of class  
12 actions and, in particular, class actions on behalf of consumers against  
13 financial institutions;  
14           b) There is no conflict of interest between Plaintiff and the unnamed  
15 Class members;  
16           c) They anticipate no difficulty in the management of this litigation as a  
17 class action; and  
18           d) Plaintiff's legal counsel has the financial and legal resources to meet  
19 the substantial costs and legal issues associated with this type of  
20 litigation.  
21

22           87. Plaintiff knows of no difficulty to be encountered in the maintenance  
23 of this action that would preclude its maintenance as a class action.  
24

25           88. BBVA has acted or refused to act on grounds generally applicable to  
26 the class, thereby making appropriate final injunctive relief or corresponding  
27 declaratory relief with respect to the class as a whole.  
28

1 89. All conditions precedent to bringing this action have been satisfied  
2 and/or waived.  
3

4 **DESCRIPTION OF PUBLIC INJUNCTIONS SOUGHT**

5 90. Plaintiff is seeking injunctions on behalf of herself, the Injunctive  
6 Relief Class (under Rule 23(b)(2)), and the public, prohibiting BBVA from making  
7 material omissions and misrepresentations to the public as to the nature and  
8 amount of the fees that it assesses on its customers.  
9

10  
11 91. Fees are one of the most important factors that consumers take into  
12 account when deciding whether to open a checking account, and which financial  
13 institution to bank with. The public has the right to a transparent marketplace in  
14 which banks are open and honest about the number, nature, and amount of fees  
15 they charge, and the circumstances under which those fees are assessed.  
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18 92. The injunctive relief sought by Plaintiff will protect the public from  
19 BBVA's deceitful marketing practices which lure customers in by understanding  
20 the amount and frequency it assesses OD and NSF Fees. It will prevent BBVA  
21 from distorting the marketplace by representing that it charges fewer fees than it  
22 actually does.  
23

24  
25 93. Plaintiff seeks to enjoin BBVA from misrepresenting and/or omitting  
26 material information as to its fee assessment practices in the documents that it  
27 makes available to the public.  
28

1 **CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION**  
3 **BREACH OF CONTRACT INCLUDING THE COVENANT**  
4 **OF GOOD FAITH AND FAIR DEALING**  
5 **(On behalf of the APPSN Class and Multiple Fee Class)**

6 94. Plaintiff Hill incorporates the preceding allegations by reference as if  
7 fully set forth herein.

9 95. Plaintiff Helen Hill and BBVA contracted for checking account and  
10 debit card services, as embodied in the Account documents.

12 96. BBVA breached the contract when it charged overdraft fees on  
13 APPSN transactions and when it assessed multiple NSF Fees on the same item.

15 97. Plaintiff and members of the putative Class have performed all of the  
16 obligations on them pursuant to the Consumer Account Agreement.

18 98. Plaintiff and members of the putative Class have sustained monetary  
19 damages as a result of Defendant' breach.

20 99. Under the laws of the State of California where BBVA does business,  
21 good faith is an element of every contract. Whether by common law or statute, all  
22 such contracts impose upon each party a duty of good faith and fair dealing. Good  
23 faith and fair dealing, in connection with executing contracts and discharging  
24 performance and other duties according to their terms, means preserving the spirit  
25 – not merely the letter – of the bargain. Put differently, the parties to a contract are  
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1 mutually obligated to comply with the substance of their contract in addition to its  
2 form. Evading the spirit of the bargain and abusing the power to specify terms  
3 constitute examples of bad faith in the performance of contracts.  
4

5 100. Subterfuge and evasion violate the obligation of good faith in  
6 performance even when an actor believes their conduct to be justified. Bad faith  
7 may be overt or may consist of inaction, and fair dealing may require more than  
8 honesty. Examples of bad faith are evasion of the spirit of the bargain, willful  
9 rendering of imperfect performance, abuse of a power to specify terms, and  
10 interference with or failure to cooperate in the other party's performance.  
11  
12

13 101. BBVA breached the covenant of good faith and fair dealing in its  
14 Consumer Account Agreement through its OD and NSF Fee policies and practices  
15 as alleged herein. Specifically, BBVA's Consumer Account Agreement  
16 misrepresents to accountholders the true nature of BBVA's assessment of its OD  
17 and NSF Fees.  
18  
19

20 102. Plaintiff Hill and members of the Class have performed all, or  
21 substantially all, of the obligations imposed on them under the Consumer Account  
22 Agreement.  
23

24 103. Plaintiff Hill and members of the Class have sustained damages as a  
25 result of BBVA's breach of the contract and the covenant of good faith and fair  
26 dealing.  
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**SECOND CAUSE OF ACTION**  
**VIOLATION OF THE UNFAIR COMPETITION LAW**  
**Cal. Bus. & Prof. Code § 17200, et seq.**

**(On behalf of the APPSN Class, the Multiple Fee Class and Injunctive Relief Class)**

104. Plaintiff Hill incorporates paragraphs 1-93 as if fully set forth herein.

105. California Business & Professions Code § 17200 prohibits acts of “unfair competition,” including any “unlawful, unfair or fraudulent business act or practice.” BBVA’s conduct related to the imposition of overdraft fees violated each of this statute’s three prongs.

106. BBVA committed an unlawful business act or practice in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, by violating the Consumers Legal Remedies Act, as set forth above.

107. BBVA committed unfair business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, by representing that it only authorizes one OD Fee or NSF Fee per item but does otherwise.

108. BBVA committed fraudulent business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, when it affirmatively and knowingly misrepresented that it only authorizes one OD Fee or NSF Fee per item but does otherwise. BBVA’s representations are likely to mislead the public with regard to when it imposes overdraft and NSF fees.

1           109. As a direct and proximate result of BBVA’s unfair and deceptive  
2 practices, Plaintiff and Class members suffered and will continue to suffer actual  
3 damages.  
4

5           110. As a result of its unfair and deceptive conduct, BBVA has been  
6 unjustly enriched and should be required to disgorge its unjust profits and make  
7 restitution to Plaintiff and Class members pursuant to Cal. Bus. & Prof. Code §§  
8 17203 and 17204.  
9

10           111. In addition, BBVA’s conduct continues to deceive the general public.  
11 BBVA’s misrepresentations and omissions in its publicly available account  
12 documents and marketing materials are likely to deceive current and prospective  
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112. Plaintiff also seeks an award of attorneys’ fees and costs under Cal.  
Code of Civ. Proc. § 1021.5.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demand judgment against Defendant for  
themselves and the Class members as follows:

- (a) Declaring BBVA’s NSF Fee and OD Fee policies and practices to be wrongful, unfair, and a breach of contract;
- (b) A public injunction that enjoins BBVA from continuing to misrepresent its OD and NSF Fee policies in its publicly available account documents and marketing materials;

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- (c) Restitution of all relevant NSF Fees and OD Fees paid to BBVA by Plaintiff and the Classes, as a result of the wrongs alleged herein in an amount to be determined at trial;
- (d) Disgorgement of the ill-gotten gains derived by BBVA from its misconduct;
- (e) Actual damages in an amount according to proof;
- (f) Statutory, punitive, and exemplary damages, as permitted by law;
- (g) Pre-judgment interest at the maximum rate permitted by applicable law;
- (h) An order on behalf of the general public enjoining BBVA from continuing to employ unfair methods of competition and commit unfair and deceptive acts and practices alleged in this complaint and any other acts and practices proven at trial;
- (i) Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- (j) 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: June 2, 2020

By: s/ William Litvak  
**DAPEER ROSENBLIT**  
**LITVAK, LLP**  
William Litvak  
(CA State Bar No.90533)  
wlitvak@drllaw.com  
11500 W. Olympic Blvd. Suite 550  
Los Angeles, California 90064  
Telephone: (310) 477-5575

**EDELSBERG LAW, PA**  
Scott Edelsberg \*  
(FL Bar No. 0100537)  
scott@edelsberglaw.com  
20900 NE 30<sup>th</sup> Ave #417  
Aventura, FL 33180  
Telephone: (305) 975-3320

**SHAMIS & GENTILE, P.A.**  
Andrew J. Shamis\*  
(FL Bar No. 101754)  
ashamis@shamisgentile.com  
14 NE 1<sup>st</sup> Avenue, Suite 705  
Miami, FL 33132  
Telephone: (305) 479-2299

*\*Pro hac vice forthcoming*  
*Attorneys for Plaintiff and the Proposed*  
*Class*