

1 Richard D. McCune (State Bar No. 132124)  
rdm@mccunewright.com  
2 David C. Wright (State Bar No. 177468)  
dcw@mccunewright.com  
3 **MCCUNE WRIGHT AREVALO, LLP**  
3281 E. Guasti Road, Suite 100  
4 Ontario, California 91761  
Telephone: (909) 557-1250  
5 Facsimile: (909) 557 1275

6 Emily J. Kirk (IL Bar No. 6275282)\*  
ejk@mccunewright.com  
7 **McCUNE WRIGHT AREVALO, LLP**  
231 N. Main Street, Suite 20  
8 Edwardsville, IL 62025  
Telephone: (618) 307-6116  
9 Facsimile: (618) 307-6161

10 \*Pro Hac Vice application to be submitted

11 Attorneys for Plaintiff Jack Eisenberg and  
the Putative Class

12  
13 **UNITED STATES DISTRICT COURT**  
14 **SOUTHERN DISTRICT OF CALIFORNIA**  
15

16  
17 JACK EISENBERG, individually, and on  
18 behalf of all others similarly situated,

19 Plaintiff,

20 v.  
21

22 BBVA USA, and DOES 1 through 5,  
23 inclusive,

24 Defendants.  
25

Case No. **'20CV2368 L AHG**

**COMPLAINT FOR:**

1. Violation of the Electronic Fund Transfer Act (Regulation E, 12 C.F.R. §§ 1005, *et seq.*)
2. Violation of the California Unfair Competition Law (Bus. & Prof. Code § 17200, *et seq.*)

**CLASS ACTION**

**DEMAND FOR JURY TRIAL**

1 **CLASS ACTION COMPLAINT**

2 **I INTRODUCTION**

3 1. Jack Eisenberg (“Plaintiff”) brings this lawsuit against BBVA USA  
4 (“Defendant”) on behalf of the California public and BBVA’s California customers, on  
5 the basis that BBVA has violated and continues to violate Federal Reserve Regulation E,  
6 12 C.F.R. § 1005.1, *et seq.* (“Reg E” or “Regulation E”). Regulation E requires that  
7 before financial institutions may charge overdraft fees on one-time debit card and ATM  
8 transactions, they must provide a complete, accurate, clear, and easily understandable  
9 disclosure document of their overdraft services (opt-in disclosure agreement); they must  
10 provide that disclosure as a stand-alone document not intertwined with other disclosures;  
11 and they must obtain verifiable agreement (affirmative consent) of a customer’s  
12 agreement to opt-in to the financial institution’s overdraft program.

13 2. Specifically, in order to purportedly comply with the Regulation E  
14 requirements, BBVA provides its customers with the Regulation E opt-in disclosure  
15 agreement that describes the bank’s overdraft service as **“What You Need to Know**  
16 **About Overdrafts and Overdraft Fees”** (emphasis in original).<sup>1</sup> BBVA’s Regulation E  
17 opt-in disclosure agreement, however, provides customers with ambiguous and  
18 misleading language to describe the circumstances in which BBVA will charge the  
19 customer an overdraft fee. Specifically, the opt-in disclosure agreement does not disclose  
20 that BBVA uses an internal artificial account balance to determine if a debit card or ATM  
21 transaction will be considered overdrawn (*i.e.*, “available balance”), instead of the official  
22 and actual balance of the account. Not only does it not disclose the use of the available  
23 balance to assess overdraft fees, it describes an overdraft using language that conveys  
24 BBVA’s use of the actual balance instead of the artificial available balance to assess  
25 overdraft fees.

26  
27 <sup>1</sup> See document titled **“What You Need to Know About Overdrafts and**  
28 **Overdraft Fees”** attached hereto as Exhibit A (emphasis in original), which, based on  
information and belief, reflects the text of BBVA’s Regulation E opt-in disclosure  
agreement.



1 document that fully and accurately describes in an easily understandable way its overdraft  
2 services, before charging accountholders an overdraft fee on one-time debit card and  
3 ATM transactions. Because of the substantial harm to customers of significant overdraft  
4 fees on relatively small debit card and ATM transactions, Regulation E requires financial  
5 institutions to put all pertinent overdraft information in one clear and easily understood  
6 document. Financial institutions are not permitted to circumvent this requirement by  
7 referencing, or relying on, their account agreements, disclosures, or marketing materials.  
8 Regulation E expressly requires a financial institution to include all the relevant terms of  
9 its overdraft program within the four corners of the document, creating a separate  
10 agreement with accountholders regarding overdraft policies.

11 7. BBVA does not meet this requirement. It uses an opt-in disclosure  
12 agreement that misleadingly and/or ambiguously describes the circumstances in which  
13 BBVA charges an overdraft fee on a paid transaction. Specifically, BBVA defines an  
14 overdraft in its opt-in disclosure agreement as occurring when the customer does “not  
15 have enough money in [the customer’s] account, but the transaction is paid anyway.” But  
16 BBVA’s automated decision to assess overdraft fees is not based on whether there is  
17 enough money in the actual account balance to pay the transaction. Instead, BBVA  
18 calculates account balances for overdraft purposes using an artificially reduced  
19 calculation created by BBVA’s own internal bookkeeping called the “available balance,”  
20 which deducts any money it unilaterally decides should be held for future transactions.  
21 When these future holds are accounted for, the calculation often results in a negative  
22 “available balance” existing only on paper, even though there is actually money in the  
23 account to cover a transaction without a negative account balance at the time of payment  
24 and posting. While that practice is unfair on its face, the disclosure of the practice is at  
25 issue, not the practice itself.

26 8. Accordingly, BBVA’s opt-in disclosure agreement not only fails to  
27 accurately disclose to customers which balance is used to assess an overdraft fee (which  
28 failing to disclose in a clear and understandable way is all that is required for a Reg E

1 violation), it suggests that its overdraft policies apply an accountholder’s actual balance  
2 when determining whether to charge an overdraft fee, when it actually uses a different,  
3 artificially lower balance.

4 9. BBVA’s use of the artificially reduced account balance instead of the actual  
5 account balance to determine whether to assess overdraft fees is material. Based on  
6 analysis with other financial institutions, it is likely BBVA assessed overdraft fees on 10-  
7 20% more Regulation E overdraft transactions than would otherwise be the case if it used  
8 the actual balance to determine if an account was overdrawn.

9 10. Plaintiff has been harmed by BBVA’s Regulation E violation. He was  
10 opted-in to the disclosure agreement using the ambiguous, inaccurate and misleading  
11 description of BBVA’s overdraft practices, and has been assessed overdraft fees on Reg  
12 E transactions (including at least one transaction that would not have received an  
13 overdraft fee using the actual balance, but was assessed an overdraft fee using the  
14 available balance) that were not permitted because BBVA had earlier obtained Plaintiff’s  
15 “consent” using a noncompliant Reg E opt-in disclosure agreement. This action seeks  
16 statutory damages under Regulation E, restitution, and injunctive relief due to, *inter alia*,  
17 BBVA’s policy and practice of obtaining “affirmative consent” using a noncompliant  
18 opt-in disclosure agreement, unlawfully assessing and unilaterally collecting overdraft  
19 fees as set forth herein.

### 20 III PARTIES

21 11. Plaintiff Jack Eisenberg is a resident of San Diego County, and a BBVA  
22 accountholder at all relevant times.

23 12. Based on information and belief, Defendant BBVA is a bank with its  
24 headquarters and principal place of business in Birmingham, Alabama. BBVA also  
25 maintains several branches throughout Southern California and, specifically, the Southern  
26 District of California.

27 13. Without limitation, defendants DOES 1 through 5, include agents, partners,  
28 joint ventures, subsidiaries, and/or affiliates of Defendant and, upon information and

1 belief, also own and/or operate Defendant’s branch locations. As used herein, where  
2 appropriate, the term “Defendant” is also inclusive of Defendants DOES 1 through 5.

3 14. Plaintiff is unaware of the true names of Defendants DOES 1 through 5.  
4 Defendants DOES 1 through 5 are thus sued by fictitious names, and the pleadings will  
5 be amended as necessary to obtain relief against Defendants DOES 1 through 5 when the  
6 true names are ascertained, or as permitted by law or the Court.

7 15. There exists, and at all times herein mentioned existed, a unity of interest  
8 and ownership between the named defendants (including DOES) such that any corporate  
9 individuality and separateness between the named defendants has ceased, and that the  
10 named defendants are *alter egos* in that they effectively operate as a single enterprise, or  
11 are mere instrumentalities of one another.

12 16. At all material times herein, each defendant was the agent, servant, co-  
13 conspirator, and/or employer of each of the remaining defendants; acted within the  
14 purpose, scope, and course of said agency, service, conspiracy, and/or employment and  
15 with the express and/or implied knowledge, permission, and consent of the remaining  
16 defendants; and ratified and approved the acts of the other defendants. However, each of  
17 these allegations are deemed alternative theories whenever not doing so would result in a  
18 contradiction with the other allegations.

19 17. Whenever reference is made in this Complaint to any act, deed, or conduct  
20 of Defendant, the allegation means that Defendant engaged in the act, deed, or conduct  
21 by or through one or more of its officers, directors, agents, employees, or representatives  
22 who was actively engaged in the management, direction, control, or transaction of  
23 Defendant’s ordinary business and affairs.

24 18. As to the conduct alleged herein, each act was authorized, ratified, or  
25 directed by Defendant’s officers, directors, or managing agents.

26 **IV JURISDICTION AND VENUE**

27 19. This Court has subject matter jurisdiction over this case under 28 U.S.C. §  
28 1331, 15 U.S.C. § 1693m, and 28 U.S.C. § 1367(a).





1 unpaid returned item) to accounts when it claims to have determined that an account has  
2 been overdrawn.

3 24. The underlying principle for charging overdraft fees is that when a financial  
4 institution pays a transaction by advancing its own funds to cover the accountholder's  
5 insufficient funds, it may charge a *contracted and/or disclosed* fee, provided that  
6 charging the fee is not prohibited by some legal regulation. The fee Defendant charges  
7 here constitutes very expensive credit that harms the poorest customers and creates  
8 substantial profit. According to a 2014 Consumer Financial Protection Bureau ("CFPB")  
9 study:<sup>2</sup>

- 10 • Overdraft and NSF fees constitute the majority of the total checking account  
11 fees that customers incur.
- 12 • The transactions leading to overdrafts are often quite small. In the case of debit  
13 card transactions, the median amount of the transaction that leads to an  
14 overdraft fee is \$24.
- 15 • The average overdraft fee for bigger banks is \$34 and \$31 for smaller banks and  
16 credit unions.

17 Accordingly, as highlighted in the CFPB Press Release related to this study:

18 Put in lending terms, if a consumer borrowed \$24 for three days  
19 and paid the median overdraft of \$34, **such a loan would carry**  
20 **a 17,000 percent annual percentage rate (APR).**

21 (Emphasis added)<sup>3</sup>

22 25. Overdraft and NSF fees constitute a primary revenue generator for banks  
23 and credit unions. According to one banking industry market research company, Moebis  
24

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26 <sup>2</sup> [https://files.consumerfinance.gov/f/201407\\_cfpb\\_report\\_data-](https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf)  
27 [point\\_overdrafts.pdf](https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf) (last visited Nov. 10, 2020).

28 <sup>3</sup> CFPB, CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges  
(7/31/2014) [https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-small-](https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/)  
[debit-purchases-lead-to-expensive-overdraft-charges/](https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/) (last visited Nov. 10, 2020).



1 Services, banks and credit unions in 2018 alone generated an estimated \$34.5 billion on  
2 overdraft fees.<sup>4</sup>

3 26. Defendant's financial filings and practices reveal that it has followed these  
4 trends to the letter. Defendant charges an overdraft/NSF fee of \$32.00 per item, and if an  
5 account remains overdrawn by more than \$1.00 for seven days, Defendant assesses \$23  
6 more in extended overdraft fees up to a purported maximum of four. Even if Defendant  
7 had been properly charging overdraft fees, the \$32.00 overdraft fee bears no relation to  
8 the financial institution's minute risk of loss or cost for administering overdraft services.  
9 But the fee's practical effect is to charge those who pay it an interest rate with an APR in  
10 the thousands.

11 27. Accordingly, the overdraft fee is a punitive fee rather than a service fee,  
12 which makes it even more unfair because most account overdrafts are accidental and  
13 involve a small amount of money in relation to the fee. A 2012 study found that more  
14 than 90% of customers who were assessed overdraft fees overdrew their accounts by  
15 mistake.<sup>5</sup> In a 2014 study, more than 60% of the transactions that resulted in a large  
16 overdraft fee were for less than \$50.<sup>6</sup> More than 50% of those assessed overdraft fees do  
17 not recall opting into an overdraft program, (*id.* at p. 5), and more than two-thirds of  
18 customers would have preferred the financial institution decline their transaction rather  
19 than being charged a very large fee. (*Id.* at p. 10.)

20 28. Finally, the financial impact of these fees falls on the most vulnerable among  
21 the banking population with the least ability to absorb the overdraft fees. Younger,  
22

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23 <sup>4</sup> Moebs Services, *Overdraft Revenue Inches Up in 2018 (March 27, 2019)*,  
24 <http://www.moebs.com/Portals/0/pdf/Articles/Overdraft%20Revenue%20Inches%20Up%20in%202018%200032719-1.pdf?ver=2019-03-27-115625-283> (last visited Nov. 10,  
25 2020).

26 <sup>5</sup> Pew Charitable Trust Report, *Overdraft America: Confusion and Concerns about*  
27 *Bank Practices*, at p. 4 (May 2012), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes\\_assets/2012/sciboverdraft20americalpdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2012/sciboverdraft20americalpdf.pdf) (last  
28 visited Nov. 10, 2020).

<sup>6</sup> Pew Charitable Trust Report, *Overdrawn*, at p. 8 (June 2014),  
[https://www.pewtrusts.org/-/media/assets/2014/06/26/safe\\_checking\\_overdraft\\_survey\\_report.pdf](https://www.pewtrusts.org/-/media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf) (last visited Nov.  
10, 2020).

1 lower-income, and non-white accountholders are among those most likely to be assessed  
2 overdraft fees. *Id.* at p. 3. A 25-year-old is 133% more likely to pay an overdraft penalty  
3 fee than a 65-year-old. *Id.* More than 50% of the customers assessed overdraft fees  
4 earned under \$40,000 per year. *Id.* at p. 4. And non-whites are 83% more likely to pay  
5 an overdraft fee than whites. *Id.* at p. 3.

## 6 **B. Plaintiff**

7 29. Plaintiff Jack Eisenberg is a resident of the state of California and a  
8 customer of Defendant. Plaintiff has held an account with BBVA at all times relevant to  
9 the allegations and opted into BBVA's overdraft program for his debit card and ATM  
10 transactions. As will be established using BBVA's own records, Plaintiff has been  
11 assessed numerous improper fees on debit card and ATM transactions. By way of  
12 example, on March 5, 2020, Plaintiff was assessed a \$32 overdraft fee on a \$15.13 non-  
13 recurring debit card transaction even though Plaintiff had a positive account balance and  
14 had money in the account to pay the transaction. Based on information and belief,  
15 Defendant was not required to advance any of its own funds to cover the transaction, and  
16 Plaintiff was only assessed an overdraft fee because of BBVA's use of the available  
17 balance instead of the actual balance to determine if the account was overdrawn. The  
18 extent of improper charges assessed on Plaintiff and other California customers will be  
19 determined in the course of discovery using Defendant's records.

## 20 **C. Regulation E**

21 30. For many years, banks and credit unions have offered overdraft services to  
22 their accountholders. Historically, the fees generated by these services were relatively  
23 low, particularly when methods of payment were limited to cash, check, and credit card.  
24 But the rise of debit card transactions replacing cash for smaller transactions—especially  
25 for younger customers who carried lower balances—provided an opportunity for  
26 financial institutions to increase the number of transactions in a checking account that  
27 could potentially be considered overdraft transactions, and for which the financial  
28 institution could assess a hefty overdraft fee. The increase in these types of transactions

1 was timed perfectly for financial institutions, which faced falling revenue as a result of  
2 lower overall interest rates and the rise of competitive innovations such as no-fee  
3 checking accounts. Financial institutions thus recognized in overdraft fees a new and  
4 increasing revenue stream.

5 31. As a result, the overdraft process became one of the primary sources of  
6 revenue for financial depository institutions—banks and credit unions—both large and  
7 small. As such, financial institutions became eager to provide overdraft services to  
8 consumers because not only do overdrafts generate revenue, they do so with little risk.  
9 When an overdraft is covered, it is on average repaid in three days, meaning that the  
10 financial institution advances small sums of money for no more than a day or two.

11 32. Using common understanding bolstered by disclosures by BBVA, an  
12 overdraft occurs when two conditions are satisfied. First, the accountholder initiates a  
13 transaction that will result in the money in the account falling below zero if the financial  
14 institution makes payment on the transaction. Second, the financial institution pays the  
15 transaction by advancing its own funds to cover the shortfall. An overdraft, therefore, is  
16 an extension of credit. The financial institution advancing the funds, allows the  
17 accountholder to continue paying transactions even when the account has no money in it,  
18 or the account has insufficient funds to cover the amount of the withdrawal.<sup>7</sup> The  
19 financial institution uses its own money to pay the transaction, on the assumption that the  
20 accountholder will eventually cover the shortfall.

21 33. Before the Federal Reserve adopted Regulation E, many financial  
22 institutions unilaterally adopted internal “overdraft payment” plans. Consumers would  
23 initiate transactions that financial institutions would identify as “overdrafts,” then the  
24 financial institution would go ahead and cover the overdraft while charging the standard  
25 overdraft fee. Under such programs, consumers were charged a substantial fee—on  
26 average higher than the debit card transaction triggering the overdraft itself—without  
27

28 <sup>7</sup> For a thorough description of the mechanics of an “overdraft,” see  
<https://www.investopedia.com/terms/o/overdraft.asp> (last visited Nov. 10, 2020).

1 ever having made any choice as to whether they wanted such transactions approved or  
2 instead declined and providing the opportunity to select another form of payment rather  
3 than turning the \$4 cup of coffee at Starbucks into a \$40 cup of coffee.

4 34. The Federal Reserve, which has regulatory oversight over financial  
5 institutions, recognized that banks and credit unions had strong incentives to adopt these  
6 punitive overdraft programs. Banks and credit unions could rely on charging high fees  
7 for very little service and almost no risk on thousands of transactions per day, giving  
8 consumers no choice in the matter if they wanted to have a bank account at all. It is for  
9 these reasons that in 2009, the Federal Reserve Board amended Regulation E to require  
10 financial institutions to obtain affirmative consent (or so-called “opt in”) from  
11 accountholders for overdraft coverage on ATM and non-recurring “point of sale” debit  
12 card transactions. After Regulation E’s adoption, a financial institution could only  
13 lawfully charge an overdraft fee on one-time debit card purchases and ATM withdrawals  
14 if the consumer opted into the financial institution’s overdraft program. Otherwise, the  
15 bank or credit union could either cover the overdraft without charging a fee or, simply  
16 direct the transaction to be denied at the point of sale. Further, without the opt-in, there  
17 could be no NSF fee incurred because the denial of the transaction meant no transaction  
18 had taken place, and thus no transaction to return unpaid.

19 35. With the creation of the CFPB, it subsequently undertook the study  
20 referenced above regarding financial institutions’ overdraft programs and whether they  
21 were satisfying consumer needs. Unsurprisingly, the CFPB found that overdraft  
22 programs had a series of problems. The most pressing problem was that overdraft  
23 services were costly and damaging to accountholders. The percentage of accounts  
24 experiencing at least one overdraft (or NSF) transaction in 2011 was 27%, and the  
25 average amount of overdraft and NSF-related fees paid by accounts that paid fees was  
26 \$225. The CFPB further estimated that the banking industry may have collected  
27 anywhere from \$12.6 to \$32 billion in consumer NSF and overdraft fees in 2011,  
28 depending on what assumptions the analyst used in calculating the percentage of reported

1 fee income should be attributed to overdrafts. The CFPB also noted that there were  
2 numerous “variations in overdraft-related practices and policies,” all of which could  
3 “affect when a transaction might overdraw a consumer’s account and whether or not the  
4 consumer would be charged a fee.”<sup>8</sup>

5 36. Given the state of overdraft programs prior to Regulation E, it is easy to  
6 understand why the Federal Reserve was concerned about protecting consumers from  
7 financial institutions unilaterally imposing high fees. Banks and credit unions in this  
8 scenario had significant advantages over consumers when it came to imposing overdraft  
9 policies. By defaulting to charging fees for point-of-sale transactions, banks and credit  
10 unions created for themselves a virtual no-lose scenario—advance small amounts of  
11 funds (average \$24) for a small period of time (average 3 days), then charge a large fee  
12 (average \$34) that is unrelated to the amount of money advanced on behalf of the  
13 customer, resulting in a APR of thousands of percent interest (using averages - 17,000%  
14 APR), all while assuming very little risk because only a very small percentage of the  
15 overdraft customers failed to repay the overdraft.

16 37. Because of this, Regulation E does not merely require a financial institution  
17 to obtain an opt-in disclosure agreement before charging fees for transactions that result  
18 in overdrafts. It also provides that the opt-in disclosure agreement must satisfy certain  
19 requirements to be valid. The agreement must be a stand-alone document, not combined  
20 with other forms, disclosures, or contracts provided by the financial institution. It must  
21 also accurately disclose to the accountholder the institution’s overdraft charge policies.  
22 The accountholder’s choices must be presented in a “clear and readily understandable  
23 manner.” 12 C.F.R. § 1005.4(a)(1). The financial institution must ultimately establish  
24 that the accountholder has opted-in to overdraft coverage either through a written  
25 agreement, or through a confirmation letter to the customer confirming opt-in if the opt-in  
26

27 <sup>8</sup> The Federal Reserve has previously noted that “improvements in the disclosures  
28 provided to consumers could aid them in understanding the costs associated with  
overdrawing their accounts and promote better account management.” 69 Fed. Reg.  
31761 (June 7, 2004).

1 has taken place by telephone or computer after being provided a compliant opt-in  
2 disclosure agreement.

3 38. In the wake of Regulation E, some financial institutions simply decided to  
4 forego charging overdraft fees on non-recurring debit card and ATM transactions. These  
5 include large banks such as Bank of America, and smaller banks such as One West Bank,  
6 First Republic Bank, and Mechanics Bank. However, most financial institutions  
7 continued to maintain overdraft services on one-time debit card and ATM withdrawals.  
8 As such, these banks and credit unions must satisfy Regulation E's requirements in order  
9 to obtain compliant affirmative consent from their accountholders before charging  
10 overdraft fees on eligible transactions.

11 39. But charging these exorbitant penalty fees for the bank or credit union's  
12 small advance of funds to cover overdrafts was not where it stopped. Many financial  
13 institutions began manipulating the process as to when they would consider a transaction  
14 an overdraft to further increase the profit generated by their overdraft programs. They  
15 charged overdraft fees no longer just when the financial institution actually advanced  
16 money on behalf of the customer, but assessed overdraft fees on transactions when they  
17 paid the transaction with the customers' money. That is, the financial institution  
18 unilaterally decided the account was overdrawn not by the actual lack of funds in the  
19 account, but by whether the money in the account minus holds the financial institution  
20 unilaterally decided was for future events was enough to cover an ATM or one-time debit  
21 transaction when these transactions came in for payment at some future date.

22 40. Most banks and credit unions calculate two account balances related to their  
23 accounting of a customer checking account. "Actual balance," "ledger balance," or  
24 "current balance" are all terms used to describe the actual amount of the accountholder's  
25 money in the account at any particular time. In contrast, "available balance" is a term the  
26 financial industry recognizes as a balance reduced from the actual account balance by the  
27 amount the bank or credit union has either held from deposits or held from the account  
28

1 because of authorized debit transactions that have not yet come in (and may never come  
2 in) for payment.<sup>9</sup>

3 41. Although financial institutions calculate two balances, the  
4 actual/ledger/current balance of the money in the account is the official balance of the  
5 account. It is used when financial institutions report deposits to regulators, when they  
6 pay interest on an account, and when they report the amount of money in the account in  
7 monthly statements to the customer—the official record of the account.

8 42. While there is no regulation barring any financial institution from deciding  
9 whether it will assess overdraft or NSF fees based on the actual balance or the “available  
10 balance” for overdraft assessment purposes, per Regulation E, the terms of the overdraft  
11 program must be clearly and accurately disclosed. Whether the financial institution uses  
12 the actual money in the account or an internal artificial available balance to assess  
13 overdraft fees, is information the customer needs to understand the overdraft program.

14 43. Many financial institutions use the “available balance” for overdraft  
15 assessment purposes as it is consistent with these institutions’ self-interest because the  
16 available balance is always the same or lower, by definition, than the actual balance. The  
17 actual balance includes all money in the account. The available balance, on the other  
18 hand, always subtracts any holds placed on the funds in the account that may affect the  
19 money in the account in the future. It never adds funds to the account. To be clear, even  
20 when a financial institution has put a hold on funds in an account, the funds remain in the  
21 account. The financial institution’s “hold” is merely an internal characterization the bank  
22 or credit union uses to categorize some of the money. All of the accountholder’s money  
23 remains in the account, even the money Defendant has defined as “held.” The fact that  
24 the money has a “hold” on it does not mean it has been removed from the account.

25  
26  
27 <sup>9</sup> Some financial institutions use a third balance called the collected balance, which  
28 is also an internal calculated balance that is the actual account balance minus only deposit  
holds, and does not include debit holds.



1           44. The difference between which of the two balances a financial institution may  
2 use to calculate overdraft transactions is material to both the financial institution and  
3 accountholders. Prior investigation in similar lawsuits demonstrates that financial  
4 institutions using the available balance, instead of actual balance, increase the number of  
5 transactions that are assessed overdraft fees approximately 10-20%. What happens in  
6 those 10-20% of transactions is that sufficient funds are in the account to pay the  
7 transaction and therefore the bank or credit union has not advanced any funds to the  
8 customer. At all times, the financial institution uses the customer's own money to pay  
9 the transaction, which really means there has never been an overdraft at all—yet the  
10 financial institution charges an overdraft fee on the transaction anyway.

11           45. A hypothetical demonstrates what the financial institution is doing under  
12 these circumstances. Suppose that an individual has \$1,000. The individual intends to  
13 use \$800 of this amount to pay rent. The individual then intends to use the other \$200 to  
14 make his monthly car payment. But before the rent and car payment come due, the  
15 individual receives a \$40 water bill which informs that the bill must be paid immediately,  
16 or water service will be cut off. The individual now takes \$40 from the money he has  
17 earmarked for his car payment to pay the water bill. This individual has not spent more  
18 money that he has on hand—but he does need to find an additional \$40 before the car  
19 payment comes due. And if the individual does find the additional \$40 before paying the  
20 car payment, there will never be a problem. If he falls short, he may choose to proceed  
21 with the transaction anyway, for example, by writing a check for the car payment when  
22 he does not have funds to cover the bill. He would then create a potential “overdraft” of  
23 his funds for the car payment, but not the rent payment and the water bill.

24           46. The same pattern holds for financial institutions that calculate overdrafts  
25 using the actual (or ledger or current) balance of an account. Suppose the same  
26 individual put the \$1,000 in his checking account under similar circumstances on the 27th  
27 of the month. That day, he also authorizes his \$800 rent to be paid on the first of the next  
28 month, and his \$200 car payment to be paid on the third of the next month. The

1 individual then realizes that the \$40 payment on his water bill must be paid that day—the  
2 27th of the month—or he will incur a fee. He approves the water bill payment, and it  
3 posts immediately. Then, a few days later, he transfers an additional \$40 into the account  
4 which is enough to offset the water bill payment before the initial \$800 rent and \$200 car  
5 payments post and clear the account. All three payments are made with the individual’s  
6 own account funds. The financial institution never uses its own funds as an advance, and  
7 there is no “overdraft” of the account because the balance always remains positive.  
8 However, even if the customer does not transfer the \$40, it is only the car payment which  
9 posts last that is paid without sufficient money in the account to cover it. Thus, there is  
10 only one transaction (*i.e.*, the car payment) eligible for an overdraft fee.

11 47. A financial institution that uses the “available balance” method of  
12 calculating overdrafts would come to a different conclusion. Because the available  
13 balance subtracts from the account the amount of money that the financial institution is  
14 “holding” for other pending transactions, the financial institution considers the money set  
15 aside and unavailable, even though it is still in the account. This means that after the  
16 \$800 and \$200 transactions are scheduled, the “available balance” of the account is \$0  
17 even though \$1,000 still remains in the account. Under these circumstances, when the  
18 individual makes the additional \$40 payment and it posts first, the “available balance” is  
19 negative and the accountholder is charged an overdraft fee—even though the original  
20 \$1,000 is still in the account. And what is worse, even if the accountholder deposits \$40  
21 in the account before the original \$800 and \$200 payments post and clear, he is still  
22 subject to the overdraft fee for the \$40 transaction even though the financial institution  
23 never “covered” any portion of the payment with its own funds. Finally, what is worse  
24 still, if the customer does not make a deposit to cover the overdraft, the customer will be  
25 assessed an overdraft fee for all three transactions. Thus, using the available balance,  
26 although the financial institution only has to advance its own funds for one transaction  
27 (*i.e.*, the car payment), the financial institution will assess three overdraft fees tripling its  
28 profits from the same transactions.

1 48. Financial institutions have been put on notice by regulators, banking  
2 associations, their insurance companies and risk management departments, and from  
3 observing litigation and settlements that the practice of using the available balance  
4 instead of the actual amount of money in the account (*i.e.*, the actual, ledger, or current  
5 balance) to calculate overdrafts without clear disclosure of that practice likely violates  
6 Reg E and state consumer laws. For instance, the FDIC stated in 2019:

7 Institutions' processing systems utilize an "available balance"  
8 method or a "ledger balance" method to assess overdraft fees.  
9 The FDIC identified issues regarding certain overdraft  
10 programs that used an available balance method to determine  
11 when overdraft fees could be assessed. Specifically, FDIC  
12 examiners observed potentially unfair or deceptive practices  
13 when institutions using an available balance method assessed  
14 more overdraft fees than were appropriate based on the  
15 consumer's actual spending or when institutions did not  
16 adequately describe how the available balance method works in  
17 connection with overdrafts.<sup>10</sup>

18 The CFPB provided in its Winter 2015 Supervisory Highlights, that:

19 A ledger-balance method factors in only settled transactions in  
20 calculating an account's balance; an available-balance method  
21 calculates an account's balance based on electronic transactions  
22 that the institutions have authorized (and therefore are obligated  
23 to pay) but not yet settled, along with settled transactions. An  
24 available balance also reflects holds on deposits that have not  
25 yet cleared. Examiners observed that in some instances,  
26 transactions that would not have resulted in an overdraft (or an  
27 overdraft fee) under a ledger-balance method did result in an  
28 overdraft (and an overdraft fee) under an available-balance  
method. At one or more financial institutions, examiners noted  
that these changes to the balance calculation method used were  
not disclosed at all, or were not sufficiently disclosed, resulting  
in customers being misled as to the circumstances under which  
overdraft fees would be assessed. Because these misleading  
practices could be material to a reasonable consumer's decision  
making and actions, they were found to be deceptive.<sup>11</sup>

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27 <sup>10</sup><https://www.fdic.gov/regulations/examinations/consumercompsupervisoryhighlig>  
28 [hts.pdf](https://www.fdic.gov/regulations/examinations/consumercompsupervisoryhighlig) (last visited Nov. 10, 2020).

<sup>11</sup>[https://files.consumerfinance.gov/f/201503\\_cfpb\\_supervisory-highlights-winter-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf), p. 8 (last visited Nov. 10, 2020).

1           49. Under Regulation E, the financial institution may decide which balance it  
2 chooses to use for overdraft fees on one-time debit card and ATM transactions, but it is  
3 also very clear that it must disclose this practice accurately, clearly and in a way that is  
4 easily understood. As the Regulation E opt-in disclosure agreement must include this  
5 information in a stand-alone document, the use of available balance must be stated in the  
6 opt-in disclosure agreement to conform to Regulation E and permit the financial  
7 institution from charging that customer overdraft fees on one-time debit card and ATM  
8 transactions. Either inaccurately or failing to describe the use of available balance as part  
9 of its overdraft practice violates the plain language of Regulation E.

#### 10 **D. BBVA's Regulation E Practices**

11           50. BBVA opted customers into its overdraft practices using an opt-in disclosure  
12 agreement titled, **“What You Need to Know About Overdrafts and Overdraft Fees.”**  
13 (Ex. A.) A reasonable consumer reading a disclosure agreement requiring a signature or  
14 acknowledgement, and which relates to overdrafts and overdraft fees and represents in  
15 bold language that it contains information the customer needs to know about overdrafts  
16 and overdraft fees, would rely on the opt-in disclosure agreement without supplementing  
17 that knowledge with reference to other marketing materials and or account agreement  
18 language relating to overdrafts.

19           51. The opt-in disclosure agreement explained that an overdraft “occurs when  
20 you do not have enough money in your account to cover a transaction, but the transaction  
21 is paid anyway.” The agreement makes no reference to “available” balance or any  
22 description of how BBVA’s internal hold policies affect the balance. The opt-in  
23 disclosure agreement instead only explains that an overdraft occurs when there is not  
24 enough “money in [the] account” and BBVA covers the transaction with its own funds.

25           52. By defining overdrafts in this way, it is reasonable and expected for  
26 accountholders to understand that BBVA uses the actual balance and money in the  
27 account to calculate whether an overdraft has occurred. Many courts have already found  
28 that this exact same language is at least ambiguous as to whether it means the actual

1 balance or available balance is used in determining overdraft fees.<sup>12</sup> By using ambiguous  
 2 language to describe what constitutes an overdraft, BBVA has failed to provide a clear  
 3 and easily understandable description of its overdraft services in its opt-in disclosure  
 4 agreement as Regulation E demands.

5 53. Many financial institutions that use the available balance to calculate  
 6 overdrafts have specifically addressed the practice in their opt-in disclosure agreements.  
 7 San Diego County Credit Union, for example, defines an “overdraft” as when “the  
 8 available balance in your account is nonsufficient to cover a transaction at the time that  
 9 the transaction posts to your account, but we pay it anyway.” Synovus Bank defines an  
 10 overdraft similarly to BBVA, but adds the additional caveat that it “authorize[s] and  
 11 pay[s] transactions using the Available Balance in [the] account,” and then specifically  
 12 defines the Available Balance. TD Bank’s opt-in disclosure agreement states as follows:  
 13 “An overdraft occurs when your available balance is not sufficient to cover a transaction,  
 14 but we pay it anyway. Your available balance is reduced by any ‘pending’ debit card  
 15 transactions (purchases and ATM withdrawals) and includes any deposited funds that  
 16 have been made available pursuant to our Funds Availability Policy.” Similarly,  
 17 Communication Federal Credit Union’s opt-in disclosure agreement states, “[a]n  
 18  
 19

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20 <sup>12</sup> *Tims v. LGE Cmty. Credit Union*, 935 F.3d 1228, 1237-38; 1243-45 (11th Cir.  
 21 2019); *Bettencourt v. Jeanne D’Arc Credit Union*, 370 F. Supp. 3d 258, 261-66 (D. Mass.  
 22 2019); *Pinkston-Poling v. Advia Credit Union*, 227 F. Supp. 3d 848, 855-57 (W.D. Mich.  
 23 2016); *Walbridge v. Northeast Credit Union*, 299 F. Supp. 3d 338, 343-46; 348 (D.N.H.  
 24 2018) (holding that terms such as “enough money,” “insufficient funds,” “nonsufficient  
 25 funds,” “available funds,” “insufficient available funds,” and “account balance” were  
 26 ambiguous such that the Reg E claim was not dismissed); *Smith v. Bank of Hawaii*, No.  
 27 16-00513 JMS-RLP, 2017 WL 3597522, at \*6-8 (D. Haw. Apr. 13, 2017) (“sporadic”  
 28 use of terms such as “available” funds or balances insufficiently explained to consumer  
 when overdraft fee could be charged and ambiguous use of terms in opt-in agreement  
 constituted a proper allegation of a Reg E violation); *Walker v. People’s United Bank*,  
 305 F. Supp. 3d 365, 375-76 (D. Conn. 2018) (holding that allegations were sufficient to  
 state a cause of action for violation of Reg E where opt-in form failed to provide  
 customers with a valid description of overdraft program); *Ramirez v. Baxter Credit  
 Union*, No. 16-CV-03765-SI, 2017 WL 1064991, at \*4-8 (N.D. Cal. Mar. 21, 2017);  
*Gunter v. United Fed. Credit Union*, No. 315CV00483MMDWGC, 2016 WL 3457009,  
 at \*3-4 (D. Nev. June 22, 2016).

1 overdraft occurs when you do not have enough money in your account to cover a  
2 transaction, or the transaction exceeds your available balance, but we pay it anyway.  
3 ‘Available Balance’ is your account balance less any holds placed on your account.”

4 54. In addition, many financial institutions that use the actual balance to  
5 determine whether an account is in overdraft (meaning it looks strictly at the amount of  
6 funds in an account), as does, *e.g.*, MidFlorida Credit Union, use the same language as  
7 BBVA to reference the actual balance, not the available balance. *See*  
8 <https://www.midflorida.com/terms-and-conditions/overdraft-agreement/> (last visited Nov.  
9 10, 2020) (explaining that the language “[a]n overdraft occurs when you do not have  
10 enough money in your account to cover a transactions, but MIDFLORIDA pays it  
11 anyway” refers to the “[a]ctual balance.” Thus, if there is sufficient money in the account  
12 to cover a transaction—even if the money is subject to a hold for pending transactions—  
13 then the financial institution will not charge an overdraft fee.

14 55. Here, BBVA’s failure to accurately, clearly, and in an easily understandable  
15 way identify the balance BBVA uses to assess overdraft fees in the stand-alone opt-in  
16 disclosure agreement resulted in its failure to obtain the appropriate affirmative consent  
17 necessary to opt customers into its overdraft program. BBVA has and continues to  
18 charge customers overdraft fees for non-recurring debit card and ATM transactions in  
19 violation of Regulation E. Further, BBVA continues to “opt-in” new checking account  
20 customers into its overdraft program using its improper opt-in disclosure agreement.

## 21 VI FACTUAL ALLEGATIONS AGAINST DEFENDANT

22 56. At all relevant times, BBVA used the “available balance,” and not the actual  
23 account balance or the formerly used collective balance, to determine whether to assess  
24 overdraft fees on one-time debit card and ATM transactions.

25 57. At all relevant times, BBVA knew or should have known, that in order to  
26 legally charge its customers overdraft fees, it was required to first obtain affirmative  
27 consent from the customer using a Regulation E compliant stand-alone opt-in disclosure.  
28 Regulation E compliance requires, at a minimum, that a financial institution accurately



1 disclose all material parts of its overdraft program and policies in the opt-in disclosure  
2 agreement in clear and easily understood language before obtaining consent from a  
3 customer to “opt in” to those programs.

4 58. At all relevant times, BBVA used an identical opt-in disclosure agreement  
5 with Plaintiff and all putative class members that defined an overdraft as occurring “when  
6 you do not have enough money in your account to cover a transaction, but the transaction  
7 is paid anyway.”

8 59. This definition of overdraft would disclose and be interpreted by reasonable  
9 customers to mean as follows: (1) “not enough money in your account” means the Actual  
10 balance/Current Balance/Ledger Balance in the account; (2) to “cover a transaction”  
11 means that the overdraft decision is made at time of posting and payment; and (3) “the  
12 transaction is paid anyway” means that Defendant has advanced or loaned the customer  
13 money to pay the transaction. However, as BBVA determines overdraft fees based on the  
14 “available balance” that factors in credit and debit holds, approximately 10-20% of  
15 overdraft fees are assessed on transactions when there was money in the account to cover  
16 the transaction at the time it was posted and paid, and BBVA did not advance or loan the  
17 customer any money to pay the transaction.

18 60. The opt-in disclosure agreement did not accurately and in a clear and easily  
19 understandable way describe what constitutes an overdraft and under what circumstances  
20 the customer would be assessed an overdraft fee, and as such the opt-in disclosure  
21 agreement did not comply with Regulation E’s requirements.

22 61. Because BBVA uses an opt-in disclosure agreement that does not accurately  
23 describe its overdraft practices and thus is not compliant with Regulation E, BBVA is not  
24 permitted to charge customers overdraft fees on one-time debit card and ATM  
25 transactions.

26 62. At all relevant times, BBVA knew it was using the available balance to  
27 assess overdraft fees, and further knew or should have known that as a stand-alone  
28 document, its opt-in disclosure agreement was not providing an accurate, clear and easily



1 understandable definition of an overdraft when it identified an overdraft as “when you do  
2 not have enough money in your account to cover a transaction, but the transaction is paid  
3 anyway.”

4 63. At all relevant times, BBVA charged Plaintiff and the putative class  
5 overdraft fees on one-time debit card and ATM transactions even though it had not  
6 complied with Regulation E to first obtain customers’ affirmative consent using a  
7 Regulation E compliant opt-in disclosure agreement before it charged these fees.

8 64. Based on information and belief, BBVA continues to “opt-in” to its  
9 overdraft program customers using a non-compliant opt-in disclosure agreement, and  
10 then charges those customers overdraft fees on one-time debit card and ATM  
11 transactions.

12 65. Based on information and belief, BBVA continues to charge existing  
13 customers overdraft fees on one-time debit card and ATM transactions who had “opted-  
14 in” using that same non-compliant opt-in disclosure agreement.

## 15 VII CLASS ACTION ALLEGATIONS

16 66. The preceding allegations are incorporated by reference and re-alleged as if  
17 fully set forth herein.

18 67. Plaintiff brings this case, and each of the respective causes of action, as a  
19 class and representative action.

20 68. The “Class” is composed of one of the following:

21 The Regulation E Class:

22 All California customers of Defendant who have or have had  
23 accounts with Defendant who were assessed an overdraft fee on  
24 a one-time debit card or ATM transaction beginning one-year  
25 preceding the filing of this complaint and ending on the date the  
Class is certified. Following discovery, this definition will be  
amended as appropriate.

26 The UCL, Section 17200 Class:

27 All California customers of Defendant who have or have had  
28 accounts with Defendant who were assessed an overdraft fee on  
a one-time debit card or ATM transaction beginning four-years  
preceding the filing of this complaint and ending on the date the  
Class is certified. Following discovery, this definition will be

1 amended as appropriate.

2 69. Excluded from the Classes are: 1) any entity in which Defendant has a  
3 controlling interest; 2) officers or directors of Defendant; 3) this Court and any of its  
4 employees assigned to work on the case; and 4) all employees of the law firms  
5 representing Plaintiff and the Class Members.

6 70. This action has been brought and may be properly maintained on behalf of  
7 each member of the Class pursuant to Fed. R. Civ. P. 23(a), (b)(2), and (b)(3).

8 71. **Numerosity** – The members of the Class (“Class Members”) are so  
9 numerous that joinder of all Class Members would be impracticable. While the exact  
10 number of Class Members is presently unknown to Plaintiff, and can only be determined  
11 through appropriate discovery, Plaintiff believes based on the percentage of customers  
12 that are harmed by these practices with banks and credit unions with similar practices,  
13 that the Class is likely to include thousands of customers.

14 72. Upon information and belief, Defendant has databases, and/or other  
15 documentation, of its customers’ transactions and account enrollment. These databases  
16 and/or documents can be analyzed by an expert to ascertain which of Defendant’s  
17 customers has been harmed by its practices and thus qualify as a Class Member. Further,  
18 the Class definitions identify groups of unnamed plaintiffs by describing a set of common  
19 characteristics sufficient to allow a member of that group to identify himself or herself as  
20 having a right to recover. Other than by direct notice through mail or email, alternative  
21 proper and sufficient notice of this action may be provided to the Class Members through  
22 notice published in newspapers or other publications.

23 73. **Commonality** – This action involves common questions of law and fact.  
24 The questions of law and fact common to both Plaintiff and the Class Members include,  
25 but are not limited to, the following:

- 26 • Whether Defendant used the available balance for making a  
27 determination of whether to assess overdraft fees on one-time debit  
28 card and ATM transactions;

- 1 • Whether the opt-in disclosure agreement Defendant used to opt-in
- 2 Class Members violated the mandate of Regulation E that the opt-in
- 3 disclosure agreement must accurately, clearly, and in an easily
- 4 understandable way describe the overdraft services of Defendant;
- 5 • Whether Defendant breached Regulation E when it assessed overdraft
- 6 fees on one-time debit card and ATM transactions against Class
- 7 Members;
- 8 • Whether Defendant's conduct in violating Regulation E also violated
- 9 the Section 17200; and
- 10 • Whether Defendant continues to violate Regulation E and Section
- 11 17200 by opting in customers and the public using an opt-in
- 12 disclosure agreement that violates Regulation E and continuing to
- 13 assess customers overdraft fees on one-time debit card and ATM
- 14 transactions based on an opt-in disclosure agreement that violates
- 15 Regulation E.

16 74. **Typicality** – Plaintiff's claims are typical of all Class Members. The  
17 evidence and the legal theories regarding Defendant's alleged wrongful conduct  
18 committed against Plaintiff and all of the Class Members are substantially the same  
19 because the opt-in disclosure agreement used to opt-in Plaintiff is the same as the opt-in  
20 disclosure agreement used by Defendant to opt-in the Class Members and the general  
21 public. Further, Plaintiff and the Class Members have each been assessed overdraft fees  
22 on one-time debit card and ATM transactions. Accordingly, in pursuing his own self-  
23 interest in litigating his claims, Plaintiff will also serve the interests of the other Class  
24 Members and the general public.

25 75. **Adequacy** – Plaintiff will fairly and adequately protect the interests of the  
26 Class Members. Plaintiff has retained competent counsel experienced in class action  
27 litigation, and specifically financial institution overdraft class action cases to ensure such  
28 protection. There are no material conflicts between the claims of the representative

1 Plaintiff and the members of the Class that would make class certification inappropriate.  
2 Plaintiff and counsel intend to prosecute this action vigorously.

3       76. **Predominance and Superiority** – The matter is properly maintained as a  
4 class action because the common questions of law or fact identified herein and to be  
5 identified through discovery predominate over questions that may affect only individual  
6 Class Members. Further, the class action is superior to all other available methods for the  
7 fair and efficient adjudication of this matter. Because the injuries suffered by the  
8 individual Class Members are relatively small compared to the cost of the litigation, the  
9 expense and burden of individual litigation would make it virtually impossible for  
10 Plaintiff and Class Members to individually seek redress for Defendant’s wrongful  
11 conduct. Even if any individual person or group(s) of Class Members could afford  
12 individual litigation, it would be unduly burdensome to the courts in which the individual  
13 litigation would proceed. The class action device is preferable to individual litigation  
14 because it provides the benefits of unitary adjudication, economies of scale, and  
15 comprehensive adjudication by a single court. In contrast, the prosecution of separate  
16 actions by individual Class Members would create a risk of inconsistent or varying  
17 adjudications with respect to individual Class Members that would establish incompatible  
18 standards of conduct for the party (or parties) opposing the Class and would lead to  
19 repetitious trials of the numerous common questions of fact and law. Plaintiff knows of  
20 no difficulty that will be encountered in the management of this litigation that would  
21 preclude its maintenance as a class action. As a result, a class action is superior to other  
22 available methods for the fair and efficient adjudication of this controversy. Absent a  
23 class action, Plaintiff and the Class Members will continue to suffer losses, thereby  
24 allowing Defendant’s violations of law to proceed without remedy and allowing  
25 Defendant to retain the proceeds of its ill-gotten gains.

26       77. Plaintiff does not believe that any other Class Members’ interests in  
27 individually controlling a separate action are significant, in that Plaintiff has  
28 demonstrated above that his claims are typical of the other Class Members and that he

1 will adequately represent the Class. This particular forum is desirable for this litigation  
2 because Plaintiff's claims arise from activities that occurred largely therein. Plaintiff  
3 does not foresee significant difficulties in managing the class action in that the major  
4 issues in dispute are susceptible to class proof.

5 78. Plaintiff anticipates the issuance of notice, setting forth the subject and  
6 nature of the instant action, to the proposed Class Members. Upon information and  
7 belief, Defendant's own business records and/or electronic media can be utilized for the  
8 contemplated notices. To the extent that any further notices may be required, Plaintiff  
9 anticipates using additional media and/or mailings.

10 79. This matter is properly maintained as a class action pursuant to Fed. R. Civ.  
11 P. 23 in that without class certification and determination of declaratory, injunctive,  
12 statutory and other legal questions within the class format, prosecution of separate actions  
13 by individual members of the Class will create the risk of:

- 14 • inconsistent or varying adjudications with respect to individual  
15 members of the Class which would establish incompatible standards  
16 of conduct for the parties opposing the Class; or
- 17 • adjudication with respect to individual members of the Class would,  
18 as a practical matter, be dispositive of the interests of the other  
19 members not parties to the adjudication or substantially impair or  
20 impede their ability to protect their interests.

21 Common questions of law and fact exist as to the members of the Class and predominate  
22 over any questions affecting only individual members, and a class action is superior to  
23 other available methods of the fair and efficient adjudication of the controversy,  
24 including consideration of:

- 25 • the interests of the members of the Class in individually controlling  
26 the prosecution or defense of separate actions;
- 27 • the extent and nature of any litigation concerning the controversy  
28 already commenced by or against members of the Class;

- the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the difficulties likely to be encountered in the management of a class action.

80. Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole under Federal Rule of Civil Procedure 23(b)(2). Moreover, on information and belief, Plaintiff alleges that Defendant’s use of a non-compliant Regulation E opt-in disclosure agreement is substantially likely to continue in the future if an injunction is not entered.

**FIRST CAUSE OF ACTION**

**(Violation of Regulation E)**

81. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

82. By charging overdraft fees on ATM and non-recurring debit card transactions, Defendant violated Regulation E, 12 C.F.R. §§ 1005, *et seq.*, whose “primary objective” is “the protection of individual consumers,” 12 C.F.R. § 1005.1(b), and which “carries out the purposes of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693, *et seq.*, the ‘EFTA,’” 12 C.F.R. § 1005.1(b)).

83. Specifically, the charges violated what is known as the “Opt In Rule” of Regulation E. 12 C.F.R. § 1005.17. The Opt In Rule states: “a financial institution . . . shall not assess a fee or charge . . . pursuant to the institution’s overdraft service, *unless* the institution: (i) [p]rovides the consumer with a notice in writing [the opt-in notice] . . . describing the institution’s overdraft service” and (ii) “[p]rovides a reasonable opportunity for the consumer to *affirmatively consent*” to enter into the overdraft program. *Id.* (emphasis added). The notice “shall be clear and readily understandable.” 12 C.F.R. § 1005.4(a)(1). To comply with the affirmative consent requirement, a financial institution must provide a segregated description of its overdraft practices that is accurate, non-misleading and truthful and that conforms to 12 C.F.R. § 1005.17 prior to

1 the opt-in, and must provide a reasonable opportunity to opt-in after receiving the  
2 description. The affirmative consent must be provided in a way mandated by 12 C.F.R. §  
3 1005.17, and the financial institution must provide confirmation of the opt-in in a manner  
4 that conforms to 12 C.F.R. § 1005.17. Furthermore, choosing not to “opt-in” cannot  
5 adversely affect any other feature of the account.

6 84. The intent and purpose of this opt-in disclosure agreement is to “assist  
7 customers in understanding how overdraft services provided by their institutions operate .  
8 . . by explaining the institution’s overdraft service . . . in a clear and readily  
9 understandable way”—as stated in the Official Staff Commentary, 74 Fed. Reg. 59033,  
10 59035, 59037, 5940, 5948, which is “the CFPB’s official interpretation of its own  
11 regulation,” “warrants deference from the courts unless ‘demonstrably irrational,’” and  
12 should therefore be treated as “a definitive interpretation” of Regulation E. *Strubel v.*  
13 *Capital One Bank (USA)*, 179 F. Supp. 3d 320, 324 (S.D.N.Y. 2016) (quoting *Chase*  
14 *Bank USA v. McCoy*, 562 U.S. 195, 211 (2011)) (so holding for the CFPB’s Official Staff  
15 Commentary for the Truth In Lending Act’s Reg Z).

16 85. Defendant failed to comply with Regulation E, 12 C.F.R. § 1005.17, which  
17 requires affirmative consent before a financial institution may assess overdraft fees  
18 against customers’ accounts through an overdraft program for ATM withdrawals and  
19 non-recurring debit card transactions. Defendant has failed to comply with the 12 C.F.R.  
20 § 1005.17 opt-in requirements, including failing to provide its customers in a “clear and  
21 readily understandable way” a valid description of the overdraft program which meets the  
22 strictures of 12 C.F.R. § 1005.17. Defendant has selected an opt-in method that fails to  
23 satisfy 12 C.F.R. § 1005.17 because, *inter alia*, it states in the non-conforming disclosure  
24 agreement that an overdraft occurs when there is not enough money in the account to  
25 cover a transaction but Defendant pays it anyway. But, in fact, Defendant assesses  
26 overdraft fees even when there is enough money in the account to pay for the transaction  
27 and Defendant needs to advance no funds at all. This is accomplished by using the  
28 internal bookkeeping available balance to assess overdraft fees, rather than the actual and



1 official balance of the account. Defendant failed to use language to describe the  
2 overdraft service that identified that it was using the available balance to assess overdraft  
3 fees, which meant that in a significant percentage of the transactions that were the subject  
4 of the overdraft fee, there was money in the account to cover the transaction and  
5 Defendant did not have to advance any money – yet Defendant assessed an overdraft fee  
6 anyway.

7 86. As a result of violating Regulation E’s prohibition against assessing  
8 overdraft fees on ATM and non-recurring debit card transactions without obtaining valid  
9 affirmative consent to do so, Defendant was not legally permitted to assess any overdraft  
10 fees on one-time debit card or ATM transactions, and it has harmed Plaintiff and the  
11 Class Members by assessing overdraft fees on one-time debit card and ATM transactions.

12 87. As the result of Defendant’s violations of Regulation E, 12 C.F.R. § 1005, *et*  
13 *seq.*, Plaintiff and members of the Class are entitled to statutory damages, as well as  
14 attorneys’ fees and costs of suit, pursuant to 15 U.S.C. § 1693m.

15 **SECOND CAUSE OF ACTION**

16 **(Violation of California Unfair Competition Law, Business & Professions Code**  
17 **Section 17200, *et seq.*)**

18 88. The preceding allegations are incorporated by reference and re-alleged as if  
19 fully set forth herein.

20 89. Defendant’s conduct described herein violates California’s Unfair  
21 Competition Law (the “UCL”), codified at Business and Professions Code section 17200,  
22 *et seq.* The UCL prohibits, and provides civil remedies for, unfair competition. Its  
23 purpose is to protect both consumers and competitors by promoting fair competition in  
24 commercial markets for goods and services. In service of that purpose, the Legislature  
25 framed the UCL’s substantive provisions in broad, sweeping language. By defining  
26 unfair competition to include any “any unlawful, unfair or fraudulent business act or  
27 practice,” the UCL permits violations of other laws to serve as the basis of an  
28

1 independently actionable unfair competition claim, and sweeps within its scope acts and  
2 practices not specifically proscribed by any other law.

3 90. The UCL expressly provides for injunctive relief, and contains provisions  
4 denoting its public purpose. A claim for injunctive relief under the UCL is brought by a  
5 plaintiff acting in the capacity of a private attorney general. Although the private litigant  
6 controls the litigation of an unfair competition claim, he or she is not entitled to recover  
7 compensatory damages for his or her own benefit, but only disgorgement of profits made  
8 by the defendant through unfair competition in violation of the statutory scheme, or  
9 restitution to victims of the unfair competition.

10 91. As further alleged herein, Defendant's conduct violates the UCL's  
11 "unlawful" prong because that conduct violates public policy and/or the text of  
12 Regulation E. Defendant's conduct was not motivated by any legitimate business or  
13 economic need or rationale. The harm and adverse impact of Defendant's conduct on  
14 members of the general public was neither outweighed nor justified by any legitimate  
15 reasons, justifications, or motives. The harm to Plaintiff and Class Members arising from  
16 Defendant's unlawful practices relating to the imposition of the improper fees outweighs  
17 the utility, if any, of those practices.

18 92. Defendant's unlawful business practices as alleged herein are immoral,  
19 unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to  
20 Plaintiff and Class Members, and the general public. Defendant's conduct was  
21 substantially injurious to Plaintiff and the Class Members as they have been forced to pay  
22 millions of dollars in improper fees, collectively.

23 93. Moreover, as described herein, Defendant's conduct also violates the UCL's  
24 "unfairness" prong.

25 94. As a direct and proximate result of Defendant's violations of the UCL,  
26 Plaintiff and Class Members have been assessed improper and illegal overdraft fees and  
27 those funds removed from their account, and Defendant has received, or will receive,  
28

1 income, profits, and other benefits, which it would not have received if it had not engaged  
2 in the violations of Section 17200 described in this Complaint.

3 95. Further, absent injunctive relief forcing Defendant to disgorge itself of its ill-  
4 gotten gains and public injunctive relief prohibiting Defendant from misrepresenting and  
5 omitting material information concerning its overdraft fee policy at issue in this action in  
6 the future and requiring Defendant to immediately stop charging illegal overdraft fees  
7 unless and until it re-opts-in current customers using a Regulation E complaint opt-in  
8 disclosure agreement, Plaintiff and other existing accountholders, and the general public,  
9 will suffer from and be exposed to Defendant's conduct violative of the UCL.

10 96. Plaintiff requests that he be awarded all other relief as may be available by  
11 law, pursuant to California Business & Professions Code § 17203, including an order of  
12 this court compelling Defendants to cease all future unlawful and unfair business  
13 practices related to its overdraft practices.

#### 14 **VIII PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff and the Class pray for judgment as follows:

- 16 a. for an order certifying this action as a class action;
- 17 b. for an order requiring Defendants to disgorge, restore, and return all  
18 monies wrongfully obtained together with interest calculated at the maximum legal  
19 rate;
- 20 c. for statutory damages;
- 21 d. for civil penalties;
- 22 e. for an order enjoining the continued wrongful conduct alleged herein;
- 23 f. for costs;
- 24 g. for pre-judgment and post-judgment interest as provided by law;
- 25 h. for attorneys' fees under the Electronic Fund Transfer Act, the  
26 common fund doctrine, and all other applicable law; and
- 27 i. for such other relief as the Court deems just and proper.
- 28

1 Dated: December 4, 2020

Respectfully Submitted,

2 /s/ David C. Wright

3 Richard D. McCune (State Bar No. 132124)

[rdm@mccunewright.com](mailto:rdm@mccunewright.com)

4 David C. Wright (State Bar No. 177468)

[dcw@mccunewright.com](mailto:dcw@mccunewright.com)

5 **MCCUNE WRIGHT AREVALO, LLP**

3281 E. Guasti Road, Suite 100

6 Ontario, California 91761

Telephone: (909) 557-1250

7 Facsimile: (909) 557 1275

8 Emily J. Kirk (IL Bar No. 6275282)\*

[ejk@mccunewright.com](mailto:ejk@mccunewright.com)

9 **McCUNE WRIGHT AREVALO, LLP**

231 N. Main Street, Suite 20

10 Edwardsville, IL 62025

Telephone: (618) 307-6116

11 Facsimile: (618) 307-6161

12 Attorneys for Plaintiff Jack Eisenberg  
and the Putative Class

13 **DEMAND FOR JURY TRIAL**

14 Plaintiff and the Class Members demand a trial by jury on all issues so triable.

15 Dated: December 4, 2020

Respectfully Submitted,

17 /s/ David C. Wright

18 Richard D. McCune (State Bar No. 132124)

[rdm@mccunewright.com](mailto:rdm@mccunewright.com)

19 David C. Wright (State Bar No. 177468)

[dcw@mccunewright.com](mailto:dcw@mccunewright.com)

20 **MCCUNE WRIGHT AREVALO, LLP**

3281 E. Guasti Road, Suite 100

21 Ontario, California 91761

Telephone: (909) 557-1250

22 Facsimile: (909) 557 1275

23 Emily J. Kirk (IL Bar No. 6275282)\*

[ejk@mccunewright.com](mailto:ejk@mccunewright.com)

24 **McCUNE WRIGHT AREVALO, LLP**

231 N. Main Street, Suite 20

25 Edwardsville, IL 62025

Telephone: (618) 307-6116

26 Facsimile: (618) 307-6161

27 Attorneys for Plaintiff Jack Eisenberg  
and the Putative Class

28 \*Pro Hac Vice application to be submitted