

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
CAMDEN DIVISION**

_____) )	
JUDITH JIMENEZ, KATHY FOGEL, and ) )	
STEPHANIE VIL, on behalf of themselves ) )	
and all others similarly situated, ) )	
) )	
Plaintiffs, ) )	
) )	Civil No. 1:20-cv-07699-NLH-KMW
v. ) )	
) )	
TD BANK, N.A., ) )	
) )	<u><b>JURY TRIAL DEMANDED</b></u>
Defendant. ) )	
_____) )	

**AMENDED CLASS ACTION COMPLAINT**

Plaintiffs Judith Jimenez, Kathy Fogel, and Stephanie Vil, pursuant to Federal Rule of Civil Procedure 15(a)(2), and on behalf of themselves and the classes of persons preliminarily defined below, bring this Amended Class Action Complaint against Defendant TD Bank, N.A. (“TD” or “TD Bank”) as follows:

**INTRODUCTION**

1. This is a civil action seeking monetary damages from Defendant arising from its improper business practice of opening consumer checking accounts without permission or lawful authority.

2. In late 2016, the banking industry was rocked by the Wells Fargo unauthorized account scandal.

3. Consumers and some in the banking industry were stunned to learn that Wells Fargo had opened millions of fraudulent savings and checking accounts on behalf of its clients without their consent.

4. News of the fraud became widely known in late 2016 after various regulatory bodies, including the Consumer Financial Protection Bureau, fined the company \$185 million as a result of the illegal activity.

5. Litigation over Wells Fargo's conduct resulted in a settlement with consumers who had accounts opened without their permission for \$142 million in March 2017. Since 2017, Wells Fargo has been forced to pay additional fines and settlements. For example, Wells Fargo settled with the Justice Department and Securities and Exchange Commission in 2020 for \$3 billion.

6. After the Wells Fargo scandal broke, several banks, including TD, conducted their own internal reviews to determine if similar issues existed.

7. Following an internal audit in November 2016, the press reported that a source familiar with the process indicated that the TD Bank did not find "anything systemic" as was the case with Wells Fargo.

8. While TD Bank attempted to ease any concern that it too was opening unauthorized accounts (and presumably generating improper income), the facts alleged herein paint a different picture.

9. Based on Plaintiffs' experiences, and information gained from other TD customers, it is clear that TD Bank has a routine practice of opening and re-opening accounts in the names of consumers without lawful authority.

### **PARTIES**

10. Plaintiff Judith Jimenez is a citizen of the State of Florida. Ms. Jimenez had a TD Simple Checking account with TD Bank and was the victim of an unauthorized account opened by TD.

11. Plaintiff Kathy Fogel is a citizen of the State of Massachusetts. Ms. Fogel had a TD Convenience Checking account with TD Bank and was the victim of an unauthorized account opened by TD.

12. Plaintiff Stephanie Vil is a citizen of the State of Florida. Ms. Vil had a checking account with TD Bank and was the victim of an unauthorized account opened by TD.

13. Defendant TD Bank is headquartered in Cherry Hill, New Jersey. TD has approximately 1,300 branches and 1,900 ATM machines in the United States. By assets, TD Bank is now ranked 7th among U.S. banks by deposits and provides banking services to 6,500,000 east coast customers from Maine to Florida.

14. TD Bank has 242 branches in New Jersey and provides banking services to over 12% of the state's bank customers.

#### **JURISDICTION AND VENUE**

15. This Court has jurisdiction over the subject matter presented by this Complaint because it is a class action arising under the Class Action Fairness Act of 2005 ("CAFA"), which explicitly provides for the original jurisdiction of the federal courts of any class action in which any member of the class is a citizen of a state different from any defendant, and in which the matter in controversy exceeds in the aggregate sum of \$5,000,000, exclusive of interest and costs.

16. Plaintiffs allege that the total claims of individual Class Members in this action are in excess of \$5,000,000 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. §§ 1332(d)(2) and (6). Plaintiffs are citizens of the State of Florida and State of Massachusetts, whereas Defendant is a citizen of New Jersey for purposes of diversity. Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A). Furthermore, Plaintiffs allege that more than two-thirds of all of the members of the proposed

classes are not from any one state and that the total number of members of the proposed Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

17. Venue is proper in the District of New Jersey pursuant to the facts described above which include having the TD Bank headquarters, hundreds of bank branches, and hundreds of thousands of customers in this District.

### **FACTUAL ALLEGATIONS**

18. Consumer checking accounts maintained by TD Bank, like the ones each Plaintiff had at one time, are governed by a Personal Deposit Account Agreement (“Agreement”).

19. The Agreement authorizes TD Bank to terminate or close any account at any time.

20. For example, the Agreement provides:

If you are in default, we may close any or all of your Accounts, with or without notice (unless notice is required under applicable law). . .

*See* Agreement, p. 24 (attached hereto as Exhibit 1).

21. The Agreement also states:

**Our Right to Refuse/Close Accounts:** The Bank reserves the right to refuse to open any Account and to terminate any Account at any time, and for any reason, or no reason without notice to you (unless notice is required under applicable law).

*See* Agreement, p. 26.

22. However, at no point does the Agreement authorize TD to *sua sponte* open or re-open an account.

23. Despite the fact that the Agreement does not authorize TD Bank to open an account or re-open a closed account, TD has a routine practice of opening accounts in order to generate fee-based income to which it is not lawfully entitled, conduct transactions that are not authorized, and/or seize disputed funds to which it has no legal right.

**A. Judith Jimenez**

24. Ms. Jimenez was a customer of TD Bank's predecessor starting in 2005, when she opened an account with Mercantile Bank, which was acquired by TD in September 2010.

25. Ms. Jimenez had a TD Simple Checking Account.

26. On April 15, 2020, TD Bank exercised the discretion afforded to it under the Agreement to close Ms. Jimenez's account without notice.

27. At the time her account was closed by the Bank, Ms. Jimenez had a positive balance of \$342.65.

28. That same day, TD Bank issued a check to Ms. Jimenez for the balance of her account and mailed it to the post office box where Ms. Jimenez receives her mail.

29. The check received by Ms. Jimenez indicated that it was issued for the "Closed Account Ending 9188."

30. When Ms. Jimenez received her April 2020 bank statement, it contained the following notation in the withdrawals section: "ACCOUNT CLOSED, CI-Demarketing D3E00096" and indicated that \$342.65 was withdrawn from the account on April 15.

31. TD Bank did not provide Ms. Jimenez with any other explanation or documentation regarding the closure of her account.

32. While the circumstances around the closure of her account are unknown, it should be noted that Ms. Jimenez's account was not overdrawn nor were her financial affairs in disarray.

33. Rather, as noted above, Ms. Jimenez had been banking with TD Bank and its predecessor since 2005. Her account was in good standing.

34. Indeed, in the months leading up to TD Bank closing the account, Ms. Jimenez had only incurred one overdraft fee and had an average collected balance in her account ranging from \$333.60 to \$495.69.

35. After closing Ms. Jimenez's account, TD kept her personal information, such as name, address, and social security number, in a database which was accessible to TD's systems and staff. On April 17, 2020, without Ms. Jimenez's knowledge or permission and without any legal authority, TD Bank opened an account in Ms. Jimenez's name.

36. TD Bank opened the unauthorized account in Ms. Jimenez's name for at least four improper reasons: (1) to reverse a provisional credit of \$12.31 that TD had previously issued to Ms. Jimenez; (2) to process a \$35.00 check that Ms. Jimenez had written prior to TD Bank closing the account; (3) to assess Ms. Jimenez a monthly maintenance fee of \$4.99 for her account; and (4) to assess bogus fees that amounted to nearly 100% profit for TD.

37. On April 20, 2020, TD Bank refused to pay the \$35.00 check and assessed Ms. Jimenez an Overdraft-Returned Fee of \$35.00 for that transaction and also assessed Ms. Jimenez an Overdraft-Paid Fee of \$35.00 for the provisional credit reversal.

38. Thus, by secretly opening or re-opening an account in Ms. Jimenez's name without her authorization, TD Bank was able to generate \$74.99 in fee-based income. It had essentially no expenses or risks to justify these fees. The fees were pure profit to TD. The fees and debits were seized by TD Bank's systems in an electronic and automated manner. Such electronic funds transfers were never authorized by Ms. Jimenez.

39. Subsequently, on April 22, 2020, Ms. Jimenez's tax refund was deposited into the new or re-opened account.

40. Because TD had assessed the aforementioned fees and reversed the provisional credit, TD Bank took \$87.30 of Ms. Jimenez's tax refund deposit to replenish her purportedly negative balance.

41. Over the next few days, TD Bank continued to process various transactions on Ms. Jimenez's improperly opened or re-opened account.

42. Ultimately, on April 28, 2020, TD Bank decided to close the new account that had been opened in Ms. Jimenez's name.

43. Subsequently, Ms. Jimenez received a bank statement from TD for the period from April 15, 2020 through April 28, 2020.

44. This bank statement contained the following notation in the withdrawals section: "ACCOUNT CLOSED, CI-Demarketing D2E00278" and indicated that \$84.88 was withdrawn from the account on April 28, which is the date TD closed the account.

45. Subsequently, Ms. Jimenez received a check for \$84.88 from TD along with another letter advising her that the Bank had closed an account in her name. In total, by opening the unauthorized account in Ms. Jimenez's name, TD Bank was able to improperly and unlawfully seize \$87.30. No debits or deductions from Ms. Jimenez's funds should have been facilitated by TD Bank. Defendant is responsible for all losses that resulted.

46. On April 22, 2020, Ms. Jimenez sent a letter to TD Bank asking for an explanation about her account being closed.

47. TD Bank has refused to respond to Ms. Jimenez's letter.

48. TD Bank's decision to open an account in Ms. Jimenez's name without her knowledge or authorization is not permitted under the Agreement or pursuant to law.

**B. Kathy Fogel**

49. Ms. Fogel had been a customer of TD Bank until her account was closed sometime in 2015. After closing Ms. Fogel's account, TD kept her personal information, such as name, address, and social security number, in a database which was accessible to TD's systems and staff.

50. Despite the fact that TD closed Ms. Fogel's account in 2015, on or about September 15, 2020, without Ms. Fogel's knowledge or permission, TD Bank opened an account in her name. Ms. Fogel's personal information, including social security number, was utilized without her permission or any legal basis.

51. The account was opened in Ms. Fogel's name so that TD Bank could accept an ACH deposit in the amount of \$300.

52. The next day, on September 16, 2020, an unauthorized transaction in the amount of \$298 was deducted from the unauthorized account that had been opened in Ms. Fogel's name. On September 22, 2020, this unauthorized transaction was reversed.

53. Subsequently, on October 23, 2020, the \$300 was removed from the unauthorized account opened in Ms. Fogel's name.

54. TD Bank financially benefitted from opening this unauthorized account by charging Ms. Fogel monthly fees.

55. By way of example, on November 25, 2020, Ms. Fogel's unauthorized account was charged a \$15.00 monthly maintenance fee, and a \$1.00 paper statement fee.

56. On December 24, 2020, Ms. Fogel's account was again charged a \$15.00 monthly maintenance fee, and a \$1.00 paper statement fee.

57. By covertly opening an account in Ms. Fogel's name without her authorization, TD Bank was able to generate \$32.00 in fees. It had essentially no expenses or risks to justify



these fees. The fees were pure profit to TD. The fees and debits were seized by TD Bank's systems in an electronic and automated manner. Such electronic funds transfers were never authorized by Ms. Fogel.

58. TD Bank's decision to open an account in Ms. Fogel's name without her knowledge or authorization is not permitted under the Agreement or pursuant to law.

**C. Stephanie Vil**

59. Ms. Vil was a customer of TD Bank until her account was closed on May 7, 2019.

60. At the time her account was closed, Ms. Vil had a negative balance resulting primarily from wrongful overdraft and insufficient funds fees, which are not the subject of this case, and junk fees such as monthly maintenance fees.

61. TD Bank used the discretion afforded to it under the Agreement to close Ms. Vil's account. After closing Ms. Vil's account, TD kept her personal information, such as name, address, and social security number, in a database which was accessible to TD's systems and staff.

62. In addition to closing her account, TD wrote off Ms. Vil's negative balance of \$348.49 and referred her account to collections.

63. Ms. Vil received demand letters from Radius Global Solutions, which TD Bank had authorized to collect this outstanding balance.

64. Despite the fact that TD had closed Ms. Vil's account and referred the account to collections, later in May of 2020, without Ms. Vil's permission, TD Bank opened an account in Ms. Vil's name and using her personal information.

65. TD Bank opened the unauthorized account in Ms. Vil's name to seize funds to which TD had no legal entitlement. TD was notified by Nordstrom that \$534.90 was being refunded to Ms. Vil based on her return of merchandise to Nordstrom. Rather than reject these

funds because Ms. Vil no longer had an account with TD, the Bank opened the unauthorized account using Ms. Vil's personal information, including social security number. TD then accepted the funds from Nordstrom and seized from Ms. Vil the \$348.49 that TD Bank claimed it was owed in relation to Ms. Vil's legitimate TD account.

66. Subsequently, on May 20, 2020, Ms. Vil received a check for \$186.41 from TD along with a letter advising her that the Bank had closed an account in her name. TD had seized all of the remaining monies from the Nordstrom refund. The fees and debits were seized by TD Bank's systems in an electronic and automated manner. Such electronic funds transfers were never authorized by Ms. Vil. No debits or deductions from Ms. Vil's funds should have been facilitated by TD Bank. Defendant is responsible for all losses that resulted.

67. Ms. Vil disputed TD's ability to *sua sponte* open an account for the purpose of seizing her funds. TD Bank failed to adequately respond to Ms. Vil's inquiries into how TD Bank handled the matter and failed to provide any legal or contractual authority for secretly opening an account using her personal information.

68. TD Bank's decision to open an account in Ms. Vil's name without her knowledge or authorization is not permitted under the Agreement or applicable law.

69. Plaintiffs' experiences with TD Bank are not isolated, but rather are illustrative of Defendant's improper business practices.

70. TD Bank's practice of opening unauthorized accounts has caused significant financial losses, reputational and credit reporting damage, and related stress and hardship to its customers. Specifically, TD Bank has:

(a) seized monies legally owing to customers by opening unauthorized accounts through the use of personal information collected and maintained by TD based on legitimate accounts;

(b) allowed unauthorized electronic fund transfers or withdrawals from customer accounts; and

(c) placed or caused to be placed erroneous and derogatory information in credit reports when unauthorized accounts were opened, closed, or utilized.

### **CLASS ACTION ALLEGATIONS**

71. Plaintiffs bring this action on behalf of themselves and on behalf of all others similarly situated pursuant to Federal Rule 23. The classes are preliminarily defined as:

#### **The National Class**

All persons who, within the applicable statute of limitations period, had a checking or savings account opened in their name by TD Bank without authorization.

#### **The Massachusetts Subclass**

All Massachusetts citizens who, within the applicable statute of limitations period, had a checking or savings account opened in their name by TD Bank without authorization.

Except as noted, the National Class and the Massachusetts Subclass will be collectively referred to hereinafter as the “Class.”

72. Excluded from the Class are Defendant, Defendant’s subsidiaries and affiliates, its officers, directors, and the members of their immediate families, and any entity in which Defendant has a controlling interest, the legal representatives, heirs, successors, or assigns of any such excluded party, the judicial officer(s) to whom this action is assigned, and the members of their immediate families.

73. Plaintiffs reserve the right to modify or amend the definition of the proposed Class and/or to add an additional classes or subclasses if necessary before the Court determines whether certification is appropriate.

74. The Class will face common questions such that there is a well-defined community of interest among the members of the Class. These questions predominate over questions that may affect only individual class members because TD Bank has acted on grounds

generally applicable to the Class. Such common legal or factual questions include, but are not limited to:

- a) Whether TD Bank improperly opened accounts without permission;
- b) Whether any of the conduct described above violates the TD Bank's contract with customers;
- c) Whether any of the conduct described above violates the covenant of good faith and fair dealing;
- d) Whether any of the conduct described above constitutes unjust enrichment;
- e) Whether any of the conduct described above constitutes conversion;
- f) Whether any of the conduct described above violates the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*;
- g) Whether any of the conduct described above violates the Electronic Funds Transfer Act, 15 U.S.C. § 1693, *et seq.*;
- h) Whether any of the conduct described above violates the Massachusetts Consumer Protection Law, Mass. Gen. Laws Ann. ch. 93A, § 2; and
- i) The appropriate measure of damages.

75. The potential class members are so numerous that joinder of them all is impracticable. Upon information and belief, and subject to class discovery, the Class consists of thousands of members or more, the identities of whom are within the exclusive knowledge of and can be ascertained only by resort to TD's records. TD Bank has the administrative capability through its computer systems and other records to identify all members of the Class, and such specific information is not otherwise available to Plaintiffs.

76. It is impracticable to bring the Class members' individual claims before the Court. Class treatment permits a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort, expense, or the possibility of inconsistent or contradictory judgments that numerous individual actions would engender. The benefits of the class

mechanism, including providing injured persons or entities with a method for obtaining redress on claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in the management of this class action.

77. Plaintiffs' claims are typical of the claims of the other members of the Class in that they arise out of the same wrongful business practices by TD Bank, as described herein.

78. Plaintiffs are more than adequate representatives of the Class in that Plaintiffs have had an unauthorized account opened in their name by TD Bank and have suffered damage as a result. In addition:

a) Plaintiffs are committed to the vigorous prosecution of this action on behalf of themselves and all others similarly situated and have retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers against financial institutions;

b) There is no conflict of interest between Plaintiffs and the unnamed members of the Class;

c) Plaintiffs anticipate no difficulty in the management of this litigation as a class action; and

d) Plaintiffs' legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

79. Plaintiffs know of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

80. TD Bank has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

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

**CAUSES OF ACTION**

**COUNT I**  
**BREACH OF CONTRACT AND BREACH OF THE**  
**COVENANT OF GOOD FAITH AND FAIR DEALING**  
**(On Behalf of Plaintiffs and the National Class)**

82. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Amended Class Action Complaint as if fully set forth herein.

83. Plaintiffs and TD Bank contracted for checking account services, as embodied in the Personal Deposit Account Agreement.

84. TD Bank breached the terms of the Agreement.

85. For example, the Agreement only provides for TD to remove customer funds from an “Account,” but the word “Account” is defined in the Agreement to exclude accounts not opened by the customer:

“**Account**” means your Checking Account, Money Market Account, personal CD Account and/or Savings Account with us, including Individual Retirement Accounts (IRAs), as applicable, unless limited by the heading under which it appears.

“**You**” and “**your**” mean each depositor who opens an Account, and any joint owner of each Account.

Agreement, p. 4.

86. TD is only authorized to assess fees on “Accounts” opened by customers or for services which the customer otherwise requests:

This Agreement includes your promise to pay the charges listed on the Personal Fee Schedule and Account Maintenance Information grid and your permission for us to deduct these charges, as earned, directly from your Account. You also agree to pay any additional reasonable charges we may impose for services you request which are not contemplated by this Agreement but are disclosed in our Personal Fee Schedule which may be amended from time to time.

*Id.*

87. Accounts are not permitted to be opened without express customer consent:

**Important Information for Opening a New Account**

To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify and record information that identifies each person who opens an Account. When you open an Account, we will ask for your name, legal address, date of birth, Social Security or Tax Identification Number, and other information that will allow us to identify you. We may also ask to see your driver's license or any other identifying documents.

*Id.* at 14.

88. Even TD Bank's self-serving contractual provisions preclude the opening of an account without customer authorization in order to seize funds TD claims it is owed:

**If You Owe Us Money**

If you withdraw funds from your Account that you do not have a right to withdraw, including the amount of a check or other item which we later charge back to your Account or any amounts that may be credited to your Account in error, you will have to pay us back. If you do not, the Bank may apply the funds in or deposits to your Account (or any other related account) against the debt or obligation owed to us, without providing notice to you, except that this provision does not apply to any consumer credit covered by the federal Truth in Lending law.

*Id.* at 21-22.

89. TD Bank's seizure of funds violated other terms of the Agreement, including:

You will owe us for any fees or transactions that are pending during the Account closure process or that post to your Account *before* we close the Account.

*Id.* at 27 (emphasis added). Under no circumstances is TD Bank allowed to open an account without customer authorization and thereby accrue new fees and charges. All debits, deductions, or losses of any kind resulting from such conduct should be reimbursed by Defendant.

90. Plaintiffs and members of the putative Class have performed all of their obligations pursuant to the Agreement.

91. Plaintiffs and members of the putative Class have sustained monetary damages as a result of each of Defendant's decision to open accounts without authorization.

92. All of the relevant states mandate that an implied covenant of good faith and fair dealing govern every contract. For banking transactions, this is also mandated by the Uniform Commercial Code that has been adopted in each state. The covenant of good faith and fair dealing constrains Defendant's discretion to abuse self-granted contractual powers.

93. This good faith requirement extends to the manner in which a party employs discretion conferred by a contract.

94. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of a lack of good faith in the performance of contracts.

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

96. TD Bank breached the covenant of good faith and fair dealing by using the discretion it affords itself under the Agreement to open accounts in Plaintiffs' names, accept deposits into these accounts without their permission, and then seize funds from the accounts. Nowhere in TD's 60-page Agreement does it provide explicit authority for such conduct. As such, TD must interpret one of its many self-serving contractual provisions to provide it the discretion to take these actions.



97. Any such discretion, however, must be exercised in good faith.

98. Defendant's actions were not taken in good faith, TD did not deal fairly, and it acted in a manner that was arbitrary and capricious.

99. Plaintiffs and members of the putative Class have performed all of the obligations imposed on them pursuant to the Agreement.

100. Plaintiffs and members of the putative Class have sustained monetary damages as a result of each of Defendant's breaches of the covenant of good faith and fair dealing.

101. Whether viewed as a direct breach of the Agreement, or as a violation of good faith and fair dealing, Plaintiffs and the Class should be made whole from the damages suffered as a result of TD Bank's decision to open unauthorized accounts.

**COUNT II**  
**UNJUST ENRICHMENT**  
**(In the Alternative to COUNT I)**  
**(On Behalf of Plaintiffs and the National Class)**

102. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Amended Class Action Complaint as if fully set forth herein.

103. This Count is brought solely in the alternative. Plaintiffs acknowledge that their breach of contract claim cannot be tried along with unjust enrichment.

104. The Agreement may not apply in instances where TD Bank has opened accounts without customer permission. For example, the Agreement itself limits its applicability as follows:

By *opening* and maintaining an Account with the Bank, you agree to the provisions of this Agreement, so you should read this Agreement thoroughly and keep it with other important records.

Agreement, p. 4 (emphasis added). If breach of contract principles do not apply, then unjust enrichment affords Plaintiffs and the Class a legal basis for recovery.

105. To the detriment of Plaintiffs and the Class, Defendant has been, and continues to be, unjustly enriched as a result of its wrongful conduct alleged herein.

106. Plaintiffs and the Class conferred a benefit on Defendant when they had their funds seized by Defendant as a result of TD's opening of unauthorized accounts. This practice was not disclosed by or allowed under the Agreement.

107. Defendant unfairly, deceptively, unjustly, and/or unlawfully accepted said benefits which, under the circumstances, it would be unjust to allow TD Bank to retain.

108. Plaintiffs and the Class, therefore, seek disgorgement of all wrongfully obtained fees received by Defendant as a result of its inequitable conduct as more fully stated herein.

**COUNT III**  
**CONVERSION**  
**(On Behalf of Plaintiffs and the National Class)**

109. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Amended Class Action Complaint as if fully set forth herein.

110. Defendant had and continues to have a duty to maintain and preserve customers' checking accounts and prevent their diminishment through its own wrongful acts.

111. Defendant has wrongfully collected funds and fees from Plaintiffs and the members of the Class after improperly opening accounts. TD has taken specific and readily identifiable funds from these accounts unlawfully.

112. Defendant has, without proper authorization, assumed and exercised the right of ownership over these funds, in hostility to the rights of Plaintiffs and the members of the Class, without legal justification.

113. Defendant continues to retain these funds unlawfully without the consent of Plaintiffs or the members of the Class.

114. Defendant intended to permanently deprive Plaintiffs and the members of the Class of these funds.

115. These funds were properly owned by Plaintiffs and the members of the Class, not Defendant, which now claims that it is entitled to its ownership, contrary to the rights of Plaintiffs and the members of the Class.

116. Plaintiffs and the members of the Class are entitled to the immediate possession or repossession of these funds.

117. Defendant has wrongfully converted these specific and readily identifiable funds.

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

119. By reason of the foregoing, Plaintiffs and the members of the Class are entitled to recover from the Defendant all damages and costs permitted by law, including all amounts that Defendant had wrongfully converted.

**COUNT IV**  
**VIOLATIONS OF THE FAIR CREDIT REPORTING ACT**  
**(On Behalf of Plaintiffs and the National Class)**

120. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Amended Class Action Complaint as if fully set forth herein.

121. Under the Fair Credit Reporting Act (“FCRA”), TD has a duty to provide accurate information regarding checking accounts to the credit reporting agencies and a duty to adequately investigate a dispute upon notice. *See* 15 U.S.C §§ 1681s-2(a), (b).

122. TD Bank methodically reports the status of all customer accounts to one or more credit reporting agencies. For example, TD has done business with reporting agencies ChexSystems and Early Warning Services. TD Bank has publicly conceded that it provides customer bank account information to ChexSystems. TD Bank also has claimed to utilize the

services of all three of the major general credit reporting bureaus, Equifax, Experian, and Transunion.

123. Reporting an account as open to the credit bureaus, such as ChexSystems, when, in reality, the account was opened without customer authorization violates the FCRA.

124. Reporting transactions from an unauthorized account to a credit reporting agency violates the FCRA. Such reporting is inherently inaccurate.

125. Reporting the closure of an unauthorized account to a credit bureau – including ChexSystems – violates the FCRA.

126. All such reporting was known by TD Bank to be inaccurate and illegal, since the transactions at issue were – by definition – not authorized by the consumer whose name was used to open the account.

127. Despite the clear and unambiguous requirements of the FCRA, Defendant regularly provides inaccurate information regarding checking accounts to one or more credit reporting agencies and fails to adequately investigate unauthorized and illegal accounts.

128. Pursuant to 15 U.S.C. §§ 1681n and 1681o, and other provisions of the FCRA, TD Bank is liable for negligently and willfully violating the FCRA. All possible relief under the FCRA is appropriate in light of the continuing egregious conduct of TD Bank.

**COUNT V**  
**VIOLATIONS OF THE ELECTRONIC FUNDS TRANSFER ACT**  
**(On Behalf of Plaintiffs and the National Class)**

129. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Amended Class Action Complaint as if fully set forth herein.

130. Congress created the Electronic Funds Transfers Act (“EFTA”), 15 U.S.C. § 1693, *et seq.*, in order to establish a framework to regulate electronic fund and remittance transfer systems, and to establish individual consumer rights related to electronic fund transfers.

131. Pursuant to EFTA, “No person may issue to a consumer any card, code, or other means of access to such consumer’s account for the purpose of initiating an electronic fund transfer other than (1) in response to a request or application therefor; or (2) as a renewal of, or in substitution for, an accepted card, code, or other means of access, whether issued by the initial issuer or a successor.” 15 U.S.C. § 1693i(a).

132. TD Bank has violated and continues to violate this prohibition every time it opens unauthorized accounts, issues debit and/or credit cards for such accounts, or facilitates any means of access to the unauthorized accounts allowing for electronic funds transfers. As shown above, TD Bank’s only purpose in opening unauthorized accounts is to facilitate electronic fund transfers to enrich itself without consumer notice or authorization.

133. TD Bank has violated EFTA each time it made an electronic fund transfer without full disclosure of all terms to the customer and customer approval of the account. 15 U.S.C. § 1693i(a).

134. TD Bank has violated EFTA each time it has learned about any electronic fund transfer from an unauthorized account and it has failed to honor EFTA’s binding error resolution provisions and consumer liability limits. 15 U.S.C. § 1693g.

135. Pursuant to 15 U.S.C. § 1693m, and other provisions of EFTA, TD Bank is liable for actual damages and statutory damages of not less than \$100 nor greater than \$1,000 based on the frequency, persistence, and outrageousness of its actions. Plaintiffs are also entitled to reimbursement for their legal fees and expenses.

**COUNT VI**  
**DECLARATORY RELIEF**  
**(On Behalf of Plaintiffs and the National Class)**

136. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Amended Class Action Complaint as if fully set forth herein.

137. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in “a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

138. As described above, this Court has jurisdiction over this matter, and therefore may declare the rights of Plaintiffs and the Class.

139. Plaintiffs and the Class therefore seek an order declaring TD Bank’s practice of opening accounts without authorization unlawful, and that TD Bank is liable to Plaintiffs and the Class for damages caused by that practice.

**COUNT VII**  
**VIOLATION OF THE MASSACHUSETTS CONSUMER PROTECTION LAW<sup>1</sup>**  
**(On Behalf of Plaintiff Fogle and the Massachusetts Subclass)**

140. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Amended Class Action Complaint as if fully set forth herein.

141. The Massachusetts Consumer Protection Law, Mass. Gen. Laws Ann. ch. 93A, § 2 (the “Act”), declares unlawful unfair or deceptive acts or practices in the conduct of any trade or commerce.

142. As alleged throughout this Amended Complaint, TD Bank engaged in unfair, deceptive, and/or unlawful acts or practices by opening accounts in the names of consumers without their knowledge and consent.

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<sup>1</sup> In accordance with Mass. Gen. Laws Ann. ch. 93A, § 9, a pre-suit demand for relief was sent to TD Bank on Ms. Fogel’s behalf via certified mail on December 15, 2020. A TD Bank investigator responded to this letter via telephone on or about January 12, 2021. As of the filing of this Amended Class Action Complaint, TD Bank has yet to deliver a written tender of settlement in response to Ms. Fogel’s demand even though 30 days has elapsed.

143. Plaintiff Fogle and the Massachusetts Subclass have lost money and incurred significant, unreasonable stress as a result of TD Bank's unfair, deceptive, and/or unlawful practices under the Act.

144. Plaintiff Fogle and the Massachusetts Subclass should be made whole for their losses and are further entitled to all relief permitted under the Act.

145. Pursuant to Mass. Gen. Laws Ann. ch. 93A § 9, Plaintiff Fogle and the Massachusetts Subclass are entitled to an award of reasonable legal fees and costs incurred in connection with this action.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of the Class, demand a jury trial on all claims so triable and judgment as follows:

1. Certifying the proposed National Class pursuant to Federal Rule of Civil Procedure 23, appointing Plaintiffs as representatives of the Class, and appointing counsel for Plaintiffs as counsel for the Class;

2. Declaring that Defendant's policies and practices as described herein constitute a breach of contract, breach of the covenant of good faith and fair dealing, conversion, unjust enrichment, and violation of federal law and regulation;

3. Certifying the proposed Massachusetts Subclass, appointing Ms. Fogel as representative of the Subclass, appointing counsel for Plaintiff and counsel for the Subclass, and awarding the Massachusetts Subclass damages and legal fees and costs pursuant to Massachusetts Consumer Protection Law;

4. Enjoining Defendant from the wrongful conduct as described herein;

5. Awarding restitution of all monies at issue seized by Defendant from Plaintiffs and the Class as a result of the wrongs alleged herein in an amount to be determined at trial;

6. Compelling disgorgement of the ill-gotten gains derived by Defendant from its misconduct;
7. Awarding actual and/or compensatory damages in an amount according to proof;
8. Awarding pre-judgment interest at the maximum rate permitted by applicable law;
9. Reimbursing all costs, expenses, and disbursements accrued by Plaintiffs in connection with this action, including reasonable attorneys' fees, costs, and expenses, pursuant to applicable law and any other basis; and
10. Awarding such other relief as this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs and all others similarly situated hereby demand trial by jury on all issues in this Amended Class Action Complaint that are so triable.



DATED this 22nd day January, 2021.

Respectfully submitted,

BY: **GOLOMB & HONIK, P.C.**

/s/ Kenneth J. Grunfeld

Kenneth J. Grunfeld, Esquire  
New Jersey Bar No. 026091999  
1835 Market Street  
Suite 2900  
Philadelphia, PA 19103  
(215) 985-9177  
kgrunfeld@golombhonik.com

E. Adam Webb\*

**WEBB, KLASE & LEMOND, LLC**  
1900 The Exchange, S.E.  
Suite 480  
Atlanta, GA 30339  
(770) 444-0773  
Adam@WebbLLC.com

*Attorneys for Plaintiff*

\* Admitted Pro Hac Vice