

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.

PROCEDURAL HISTORY

10. On or about June 24, 2020, Plaintiff Judith Jimenez, on behalf of herself and others similarly situated, commenced this action against TD Bank (ECF No. 1).

11. Pursuant to the stipulation of the parties, which was adopted by the Court (ECF No. 26), Ms. Jimenez filed an Amended Complaint on January 22, 2021 (ECF No. 28). The

Amended Complaint, *inter alia*, added Kathy Fogel and Stephanie Vil as named Plaintiffs and added causes of action. *Id.*

12. In response, TD Bank moved to dismiss the Amended Complaint in its entirety (ECF No. 32).

13. After briefing on TD Bank's motion was complete, this Court issued a written Opinion (ECF No. 44), and entered an Order (ECF No. 45), granting in part and denying in part Defendant's motion.

14. The Court's Opinion also granted Plaintiffs leave to amend to cure the deficiencies outlined by the Court within 30 days. This Second Amended Complaint is filed in response to the Court's Opinion. In particular, Plaintiffs have added allegations in order to perfect four of their claims.

15. As to direct breach of contract, the Court held that Plaintiffs had not made allegations sufficient to show a violation of any specific provision of the contract. *See* ECF No. 45, pp. 11-19. Plaintiffs have added further allegations of breach and additional provisions of the contract that have been breached in Paragraphs 34 and 38-41 below.

16. As to good faith and fair dealing, the Court held that Plaintiffs had not tied TD Bank's conduct to any specific portion of the contract. *See* ECF No. 45, pp. 19-20. In this Second Amended Complaint, Plaintiffs have made an additional showing of TD Bank's abuses of its self-granted discretion under specific portions of the contract. *See infra* ¶¶ 28-33, 35-37. Such abuses of contractual discretion are sufficient to raise a viable good faith and fair dealing claim. Indeed, TD Bank has been forced to litigate numerous such claims previously, including under the laws of New Jersey, Florida, and Massachusetts.

17. As to conversion, the Court held that Plaintiff Kathy Fogel did not meet the applicable standard for specificity as to the funds at issue. *See* ECF No. 45, pp. 29-30. Ms. Fogel has rectified that oversight in Paragraphs 72-78 below.

18. Finally, as to the Electronic Funds Transfer Act, the Court held that Plaintiffs had offered no support for claims under 15 U.S.C. § 1693f and 15 U.S.C. § 1693g. *See* ECF No. 45, pp. 41-42. Plaintiffs have added substantial further allegations herein. For example, 15 U.S.C. § 1693f was plainly violated when Plaintiffs made their complaints to TD but no credits or refunds were timely provided. *See infra* ¶¶ 67-68, 88, 164. Under 15 U.S.C. § 1693g, which limits a consumer's liability for unauthorized transactions, Plaintiffs have added allegations that TD refused to limit the liability of Ms. Jimenez or Ms. Vil to \$50 as required by 15 U.S.C. §§ 1693g(a)(1). *See infra* ¶¶ 67-68, 88, 165. These and other allegations have been included below.

PARTIES

19. 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.

20. 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.

21. 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.

22. 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.

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

JURISDICTION AND VENUE

24. 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.

25. 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).

26. 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

27. 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"). A true and accurate copy of the Agreement has been attached hereto as Exhibit 1.

28. There are numerous provisions of the Agreement which are relevant to Plaintiffs' claims and allegations. First, the Agreement defines "Account" as follows:

"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.

Agreement, p. 4.

29. The Agreement continues: "'You' and 'your' mean each depositor who opens an Account, and any joint owner of each Account." *Id.* Thus, the Agreement defines "Account" to only include accounts opened by the customer.

30. The Agreement also limits the obligation to pay TD's fees and charges to accounts opened by customers and such funds may only be removed from customer-approved accounts:

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.

Id. Based on the plain terms of TD Bank's own form contract, the term "your Account" does not include accounts not opened by the customer themselves. Specifically, there is no permission granted to remove customer funds from other accounts, including those opened by TD Bank without authorization.

31. The Agreement does authorize one additional category of charges by stating: "You also agree to pay any additional reasonable charges we may impose for services you request which are not contemplated by the Agreement but are disclosed in our Personal Fee Schedule which may be amended from time to time." *Id.* As will be shown below, this provision provided discretion for TD Bank to assess fees and deduct funds but, for at least two reasons, this provision does not give TD Bank carte blanche to take customer funds. First, charges must be "reasonable," and Plaintiffs contend any deductions of customer funds from

unauthorized accounts are inherently unreasonable. Second, this provision only applies to “services you request” which, by definition, cannot expand TD Bank’s discretion to the deduction of funds from unauthorized accounts.

32. The Agreement provides various mechanisms for TD Bank to collect amounts it is owed, but none of them extends to a right to open an account in a customer’s name in order to deposit customer funds in order for TD Bank to then seize such funds. For example, the Agreement states: “The Bank may also collect any amounts due to the Bank because of returned checks, through the right of set-off, from any other of your Accounts at the Bank, or collect the funds directly from you.” *Id.* at 6. This provision does not allow the Bank’s conduct as described herein because, once again, it applies either to “your Accounts” – which must be opened by a customer – or the collection of funds “directly from” the customer. Similarly, in the section titled “If You Owe Us Money,” TD Bank reserves itself discretion to seize funds by saying “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.” *See id.* at 21-22 (emphasis added). Once again, however, it would not be a fair reading of this discretion to say the Bank is entitled to open unauthorized accounts without customers knowledge.

33. By way of further example, the Agreement provides for a “Right of Set-Off,” but the right is always limited to deducting funds from “your Account,” and is never extended to allow the Bank to open new accounts in a customer’s name. The Agreement states: “Unless we are prohibited by applicable law, the Bank can take any funds in any of your Account(s) to pay any debt you owe us or liability.” *Id.* at 22. For at least two reasons, this provision does not authorize TD Bank’s conduct described herein. First, this right does not override “applicable law,” which precludes the opening of unauthorized accounts. Second, set-off is limited to “your Account(s)” which means only accounts opened by the customer.

34. In addressing the opening of accounts, the Agreement strongly suggests that customer authorization is needed:

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. By stating that “Federal law requires,” TD Bank indicates that it will “obtain, verify and record” information from anyone “who opens and Account.” As shown below, the Bank actually opens accounts without even contacting customers. The Agreement goes on to state that the Bank “*will* ask” (emphasis added) for various information from a customer before opening an account. Although the use of the word “will” makes this mandatory, TD Bank does not honor this requirement before opening the unauthorized accounts at issue in this case.

35. The Agreement authorizes TD Bank to terminate or close accounts. For example, if there are conflicting demands on an account, the Bank may: “In our sole discretion . . . close the account and distribute the account balance, subject to any debts or obligations owed to the Bank, equally to each accountholder” *Id.* at 19. Notably, the Agreement does not allow the Bank to later open new accounts in the name of such customers.

36. By way of further 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), or we may exercise all available rights and remedies provided elsewhere in this Agreement or other agreements and all rights and remedies available at law or equity.

Id. at 24. Once again, the Agreement does not allow the later opening of an account without customer consent.

37. 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). This Agreement survives the closing of your Account.

Id. at 26. The Bank’s right to close accounts does not include any right to later open accounts without customer approval. *Also id.* at 27 (“This section does not change our ability to close Your Account(s) at any time within our discretion for any reason or no reason at all.”). The clear language allowing accounts to be closed by the Bank is never used in regard to opening accounts without customer authorization.

38. The Agreement’s “Truth in Savings Disclosure” applies to “ALL personal deposit Accounts including Checking” accounts. *Id.* at 29. In order to open an account, “you must deposit the amount shown in the accompanying Personal Account Maintenance information grid.” As shown below, TD Bank did not adhere to this requirement for the accounts at issue.

39. In the Agreement’s “Electronic Funds Transfers Disclosure” section, the Bank accepts general liability for customer “losses and damages” where the Bank does not complete transfers “in the correct amount according to our Agreement with you.” *Id.* at 50.

40. Also in the Agreement’s “Electronic Funds Transfers Disclosure” section, the Bank imposes limits on customer losses for “unauthorized transfers”:

Tell us AT ONCE if you believe your Card, your PIN, or both has been lost, stolen or used without your permission, or if you believe that an Electronic Funds Transfer has been made without your permission using information from your check. You could lose all the money in your Deposit Account, plus your available overdraft protection. Telephoning is the best way of keeping your possible losses down. If you notify us within two (2) Business Days after you learn of the loss or theft of your Card or PIN, you can lose no more than \$50 if someone uses your Card or PIN without your permission. If you do not notify us within two (2) Business Days after you learn of the loss or theft of your Card or PIN, and we can prove we could have prevented someone from using your Card and/or PIN without your permission if you had told us, you could lose as much as \$500 (\$50 if you are a resident of Massachusetts and this Agreement is governed by Massachusetts law). You will not be liable for unauthorized purchases made with your Debit Card when used as if it were a Visa® Credit Card. However, you can be held liable for fraudulent use of your Card and/or PIN when PIN-based

transactions are made with your ATM or Debit Card. Also, if your statement shows transfers that you did not make, notify us at once. If you do not notify us within sixty (60) Calendar Days after the statement was mailed or electronically delivered to you, you may not get back any money you lost after the sixty (60) Calendar Days if we can prove that we could have stopped someone from taking the money if you had told us in time. (If you are a resident of Massachusetts and this Agreement is governed by Massachusetts law, the maximum amount of money you could lose is \$50.) If a good reason (such as a long trip or hospital stay) kept you from notifying us, we will extend the time periods.

Id. at 52. As shown below, the Bank does not honor these promises for victims of its unauthorized accounts.

41. Also in the Agreement's "Electronic Funds Transfers Disclosure" section, the Bank makes promises about investigating and correcting unauthorized transactions:

When making a verbal inquiry, the Bank may ask that you send us your complaint in writing within ten (10) Business Days after the verbal inquiry. If we ask you to put your complaint or question in writing and we do not receive it within ten (10) Business Days, we may not provisionally credit your Account. We will complete our investigation within ten (10) Business Days after we hear from you (or within twenty (20) Business Days after we hear from you if your notice relates to a transfer that occurred within thirty (30) Calendar Days after your first deposit to the Account). If we need more time, however, we may take up to forty-five (45) Calendar Days to investigate your complaint or question. We may take up to ninety (90) Calendar Days to investigate your complaint or question if it relates to a transaction you initiated through point-of-sale, from outside the United States, or a transaction which occurred within thirty (30) Calendar Days after your first deposit to the Account. If we decide to do this, we will credit your Account for the amount you think is in error within ten (10) Business Days (or, twenty (20) Business Days if your complaint or question relates to a transfer which occurred within thirty (30) Calendar Days after your first deposit to the Account), so that you will have use of the money during the time it takes us to complete our investigation. We will correct any error promptly after we complete our investigation. We will send you a written explanation within three (3) Business Days after completing our investigation. You may ask for copies of the documents that we used in our investigation and we must make these available to you for inspection.

Id. at 53. The Bank does not honor these commitments for victims of its unauthorized account program as described below.

42. In order to carry out its unauthorized account program, TD Bank violates its own contract in several ways: it opens accounts without meeting contractual requirements; it fails to honor limits on customer losses; and it does not investigate or correct its practices.

43. Even more significantly, however, TD Bank violates the covenant of good faith and fair dealing by abusing its self-granted discretion in the Agreement to open unauthorized accounts and improperly take funds from its victims. Good faith and fair dealing is imposed as a matter of common law or statutory law in all states where TD Bank does business. Moreover, for banking transactions, the Uniform Commercial Code – which has been enacted by every state where TD Bank does business – also mandates good faith and fair dealing. TD Bank does not act in good faith each time it opens an unauthorized account and it does not deal fairly when it seizes funds from such accounts. As set out in Paragraphs 28-33 and 35-37 above, TD Bank has improperly abused its discretion under the Agreement.

44. 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

45. 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.

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

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

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

49. 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.

50. The check received by Ms. Jimenez indicated that it was issued for the “Closed Account Ending 9188.”

51. 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.

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

53. 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.

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

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

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

61. 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.

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

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

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

65. 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.

66. 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.

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

68. TD Bank has refused to respond to Ms. Jimenez's letter. TD did not honor its contractual promises set out in Paragraphs 39-41 above; namely, credits were not provided, Ms. Jimenez's liability was not limited, and the Bank's investigation and response were performed as required. These lapses also violated federal law.

69. 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

70. 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.

71. 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.

72. The account was opened in Ms. Fogel's name so that TD Bank could accept an ACH deposit from Ms. Fogel's Citibank Visa credit card account in the amount of \$300. These

funds were accepted by TD Bank from Ms. Fogel's Citibank account without any lawful authority.

73. 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. The unauthorized transfer was referred to as "HUNABK CK WEBXFR ETRANSFER" on Ms. Fogel's statement. On September 22, 2020, this unauthorized transaction was reversed.

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

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

76. 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.

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

78. 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.

79. 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

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

81. 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.

82. 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.

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

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

85. 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.

86. 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.

87. 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.

88. 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. TD did not honor its contractual promises set out in Paragraphs 39-41 above; namely, credits were not provided, Ms. Vil's liability was not limited, and the Bank's investigation and response were performed as required. These lapses also violated federal law.

89. 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.

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

91. 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

92. 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.”

93. 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.

94. 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.

95. 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.

96. 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.

97. 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.

98. 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.

99. 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.

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

101. 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.

102. 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)

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

104. Plaintiffs and TD Bank contracted for checking account services, as embodied in the Personal Deposit Account Agreement (“Agreement”).

105. As set out in Paragraphs 34 and 38-41 above, TD Bank breached the terms of the Agreement.

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

107. Plaintiffs and members of the putative Class have sustained monetary damages as a result of each of TD Bank program of opening accounts without authorization and seizing funds therefrom.

108. All of the relevant states mandate that an implied covenant of good faith and fair dealing govern every contract.¹ 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.

109. Most states, like Massachusetts, recognize that a claim for the breach of the implied covenant of good faith and fair dealing may exist even if an express term of the contract

¹ The Court previously dismissed Plaintiffs’ good faith and fair dealing claim in part on the basis that they did not dispute Defendant’s argument that, because the breach of contract claims failed, the claim for breach of the implied covenant must also fail. *See* ECF No. 44, p. 19. Respectfully, Plaintiffs disputed the Bank’s argument, *see* ECF No. 34, pp. 11-13 (citing to *Speakman* and *Abels*), but Plaintiffs have followed the Court’s instructions to amend their allegations to remedy any perceived deficiencies.

has not been breached. *E.g., Speakman v. Allmerica Fin. Life Ins.*, 367 F. Supp. 2d 122, 132 (D. Mass. 2005). In such circumstances, the essential inquiry is whether the challenged conduct “conformed to the parties’ reasonable understanding of performance obligations, as reflected in the overall spirit of the bargain” and not whether the letter of the contract was strictly adhered to. *Id.*

110. Others, such as Florida, recognize that when a specific contractual term gives one party discretion in performance under that term, “the parties’ intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion.” *Abels v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 1273, 1278 (S.D. Fla. 2009).

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

112. 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.

113. 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.

114. Under both Florida and Massachusetts law, TD Bank breached the covenant of good faith and fair dealing by using the discretion it affords itself under the Agreement in a manner inconsistent with a customer's expectations. The provisions of the Agreement which the Bank has abused with its unauthorized account program are set out in detail in Paragraphs 28-33 and 38-41 above.

115. In each instance, TD Bank has violated its obligations under the covenant of good faith and fair dealing by abusing its discretion to open an account without authorization, accept deposits into the account, and then seize funds from these accounts.

116. 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.

117. Plaintiffs and the members of the putative Class did not reasonably understand that by opening an account with TD Bank they were authorizing TD Bank to subsequently re-open or open a checking or savings account in their name without authorization for the purpose of seizing funds.

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

119. 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.

120. 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)

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

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

123. 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.

124. 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.

125. 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.

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

127. 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)

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

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

130. 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.

131. 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.

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

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

134. 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.

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

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

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

138. 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 IV²
VIOLATIONS OF THE FAIR CREDIT REPORTING ACT
(On Behalf of Plaintiffs and the National Class)

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

140. 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).

141. 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.

142. 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.

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

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

² Plaintiffs acknowledge that the Court dismissed this count, but they leave this count in the pleadings to preserve the issue for any potential appeal.

145. 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.

146. 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.

147. 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)

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

149. 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.

150. 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).

151. 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.

152. 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).

153. 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 error resolution provisions. 15 U.S.C. § 1693f. Indeed, Ms. Jimenez and Ms. Vil both notified TD Bank regarding the unauthorized transfers on their unauthorized accounts – *see* ¶¶ 67-68, 88, *supra* – but TD Bank refused to correct the error, provide a provisional credit during its investigation, or provide Ms. Jimenez or Ms. Vil with an explanation as to why their claims were denied as required by 15 U.S.C. §§ 1693f(b), 1693f(c), or 1693f(d).

154. 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 consumer liability limits. 15 U.S.C. § 1693g. Indeed, Ms. Jimenez and Ms. Vil both notified TD Bank regarding the unauthorized transfers on their unauthorized accounts – *see* ¶¶ 67-68, 88, *supra* – but TD Bank refused to limit the liability of Ms. Jimenez or Ms. Vil to \$50 as required by 15 U.S.C. §§ 1693g(a)(1).

155. 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)

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

157. 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).

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

159. 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 LAW³
(On Behalf of Plaintiff Fogle and the Massachusetts Subclass)

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

161. 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.

³ 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 Second 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.

162. 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.

163. 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.

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

165. 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 Second Amended Class Action Complaint that are so triable.

DATED this 11th day October, 2021.

Respectfully submitted,

BY: **GOLOMB SPIRT GRUNFELD, P.C.**

/s/ Kenneth J. Grunfeld

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