

WEITZ & LUXENBERG, P.C.
Kristen B. Miller, Esq. (Atty. Id. 014492009)
700 Broadway
New York, New York 10003
(212) 558-5864
Attorneys for the Plaintiffs

RAMONA WILKERSON and STACY
MALCOLM, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

INVESTORS BANK,

Defendant.

**SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY:LAW DIVISION**

Docket No.

Civil Action

COMPLAINT

JURY DEMAND

CLASS ACTION COMPLAINT

Plaintiffs, Ramona Wilkerson and Stacy Malcolm, individually and on behalf of the classes of persons preliminarily defined below (the “Classes”), make the following allegations based upon information and belief, except as to allegations specifically pertaining to Plaintiffs, which are based on personal knowledge.

NATURE OF THE ACTION

1. Plaintiffs bring this action individually and on behalf of Classes of all similarly situated consumers against Defendant Investors Bank (“Investors”), arising from its routine practices of a) assessing more than one insufficient funds fee (“NSF Fee”) on the same item; and b) assessing Overdraft Fees (“OD Fees”) on transactions that did not actually overdraw checking accounts.

2. Investors misleadingly and deceptively misrepresents its OD Fee practices, including in its own account contracts. Investors's practices violate New Jersey's consumer protection statute, as well as Investors's own form contracts.

3. Investors's improper scheme to extract funds from account holders has victimized Plaintiffs and hundreds of other similarly situated consumers. Unless enjoined, Investors will continue to engage in these schemes and will continue to cause substantial injury to its consumers.

4. This is a civil action seeking monetary damages, restitution, and declaratory and injunctive relief.

PARTIES

5. Plaintiff Ramona Wilkerson resident is a citizen and resident of Orange, New Jersey and has a checking account with Investors.

6. Plaintiff Stacy Malcolm is a citizen and resident of Southampton, New Jersey and has a checking account with Investors.

7. Defendant Investors Bank is a subsidiary of Investors Bancorp, does business as "Investors," has assets of approximately \$20 billion, and currently operates over 150 branch locations in New Jersey and New York, with its headquarters located in Short Hills, New Jersey.

JURISDICTION AND VENUE

8. This Court has personal jurisdiction of this matter as Defendant's corporate headquarters is in New Jersey. Further, many of the transactions that give rise to this matter took place in New Jersey and in Essex County. Further, at all times relevant to this matter, Plaintiffs were citizens of New Jersey Plaintiff Wilkerson resided in Essex County, New Jersey.

BACKGROUND FACTS

I. Investors Charges More than One NSF Fee on the Same Item

9. Investors's Deposit Agreement, Ex. A, Fee Schedule, Ex. B, and Overdraft Disclosure, Ex. C (collectively "Account Documents") allow it to charge a *single* \$30 NSF Fee or a *single* \$30 OD Fee when an item is returned for insufficient funds or paid despite insufficient funds.

10. Investors breaches its contract by charging more than one \$30 NSF Fee on the same item, since the contract states—and reasonable consumers understand—that the same item can only incur a single NSF or OD Fee.

11. Investors's abusive practices are not standard within the financial services industry. Indeed, major banks like JP Morgan Chase—the largest consumer bank in the country—charge one NSF Fee per item, even if that item is resubmitted for payment multiple times. And while some other banks engage in the same practices as Investors, they clearly disclose those charges in the deposit agreements with their customers.

12. Investors's Account Documents do not say that Investors repeatedly charges customers multiple NSF fees on a single item. To the contrary, they indicate it will only charge a single NSF Fee or OD Fee on an item.

A. Plaintiff Malcolm's Experience.

13. In support of her claims, Plaintiff Malcolm offers an example of a fee that should not have been assessed against her checking account. As alleged below, Investors: (a) reprocessed previously declined items; and (b) charged an additional fee upon reprocessing, for a total assessment of *\$90 in fees on an item*. The following pattern exhibited in the following example occurred numerous times on Plaintiff Malcolm's account.

14. For example, on September 18, 2018, Plaintiff attempted a payment to American Express via ACH.

15. Investors rejected payment of that item due to insufficient funds in Plaintiff's account and charged her a \$30 NSF Fee for doing so. Plaintiff does not dispute this initial fee, as it is allowed by Investors's Deposit Agreement.

16. Unbeknownst to Plaintiff, and without his request to Investors to reprocess the item, two days later on September 20, 2018, Investors processed the same item yet again, with the transaction being labeled a RETRY PYMT on her statements. Again, Investors returned the item unpaid and charged Plaintiff *another* \$30 NSF Fee for doing so.

17. Then, five days later, on September 25, 2018, Investors processed the same item yet again. Again, Investors returned the item unpaid and charged Plaintiff *another* \$30 NSF Fee for doing so.

18. In sum, Investors assessed Plaintiffs \$90 in fees in its effort to process a single payment.

19. Plaintiff understood the payment to be a single item as is laid out in Investors's contract, capable at most of receiving a single NSF Fee (if Investors returned it) or a single OD Fee (if Investors paid it).

20. The same pattern occurred with a payment re-submitted on December 19, 2017, December 21, 2017, and December 27, 2017, and on February 21, 2018, February 23, 2018, and February 26, 2018.

B. The Imposition of Multiple NSF Fees on a Single Item Violates Investors's Express Promises and Representations.

21. Investors's Account Documents state that the Bank will assess a single fee of \$36 for an item that is returned due to insufficient funds, and make no provision for the assessment of multiple fees on the same item.

22. The Deposit Agreement makes clear an item can incur only a single OD or NSF Fee:

If a check, item or transaction is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item for insufficient funds (NSF). We will not charge you a fee for paying an overdraft of an ATM or everyday debit card transaction if this is a consumer account and you have not opted-in to that service. The amounts of the overdraft and NSF fees are disclosed elsewhere, as are your rights to opt in to overdraft services for ATM and everyday debit card transactions, if applicable. We encourage you to make careful records and practice good account management. This will help you to avoid creating items without sufficient funds and potentially incurring the resulting fees.

Ex. A at 8 (emphasis added).

23. The Fee Schedule makes the same promise, that at most a *single* fee will be assessed when an item is returned or paid into overdraft:

Insufficient Funds Returned Item \$30.00

Fee Schedule, Ex. B.

24. The same check, automatic bill payment, or other electronic payment on an account is not a new “item” each time it is rejected for payment then reprocessed, especially when—as here—Plaintiff took no action to resubmit the item.

25. Even if Investors reprocesses an instruction for payment, it is still the same item. Investors’ reprocessing is simply another attempt to effectuate an accountholder’s original order or instruction.

26. As alleged herein, Plaintiff took only a single action to make a single transfer; he therefore may be charged only a single fee.

27. The disclosures described above never discuss a circumstance where Investors may assess multiple NSF Fees for an item that was returned for insufficient funds and later reprocessed one or more times and returned again.

28. In sum, Investors promises that one \$30 NSF Fee or one \$06 OD Fee will be assessed per item, and this must mean all iterations of the same instruction for payment. As such, Investors breached the contract when it charged more than one fee per item.

29. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same transaction will be treated as the same “item,” which Investors will either pay (resulting in an overdraft item) or return (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere does Investors disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor do Investors customers ever agree to such fees.

30. Customers reasonably understand, based on the language of the Account Documents, that Investors’s reprocessing of checks or ACH payments are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger additional NSF Fees. In other words, it is always the same item.

31. Banks like Investors that employ this abusive multiple fee practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that engage in this abusive practice disclose it expressly to their accountholders—something Investors never did.

32. For example, First Hawaiian Bank engages in the same abusive practices as Investors, but at least it currently discloses the practice in its online banking agreement, in all capital letters, as follows:

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

Terms and Conditions of FHB Online Services, First Hawaiian Bank 40, https://www.fhb.com/en/assets/File/Home_Banking/FHB_Online/Terms_and_Conditions_of_FHB_Online_Services_RXP1.pdf (last accessed September 36, 2019) (emphasis added).

33. Klein Bank similarly states in its online banking agreement:

[W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment (electronic or check) is submitted to us for payment from your Bill Payment Account when, at the time of posting, your Bill Payment Account is overdrawn, would be overdrawn if we paid the item (whether or not we in fact pay it) or does not have sufficient available funds; or (2) we return, reverse, or decline to pay an item for any other reason authorized by the terms and conditions governing your Bill Payment Account. **We will charge an NSF/Overdraft Fee as provided in this section regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the bill payment.**

Consumer and Small Business Online Access Agreement, Klein Bank ¶ H, <https://www.kleinbankonline.com/bridge/disclosures/ib/disclose.html> (last accessed September 36, 2019) (emphasis added).

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

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

Miscellaneous Fee Schedule, Central Pacific Bank 1 (Feb. 15, 2019), <https://www.centralpacifcibank.com/PDFs/Miscellaneous-Fee-Schedule.aspx>.

35. BP Credit Union likewise states: “We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.”

36. Regions Bank likewise states:

If an item is presented for payment on your account at a time when there is an insufficient balance of available funds in your account to pay the item in full, you agree to pay us our charge for items drawn against insufficient or unavailable funds, whether or not we pay the item. If any item is presented again after having previously been returned unpaid by us, you agree to pay this charge for each time the item is presented for payment and the balance of available funds in your account is insufficient to pay the item.

https://www.regions.com/virtualdocuments/Deposit_Agreement_6_1_2018.pdf.

37. First Financial Bank states, “Merchants or payees may present an item multiple times for payment if the initial or subsequent presentment is rejected due to insufficient funds or other reason (representation). Each presentment is considered an item and will be charged accordingly.” Special Handling/Electronic Banking Disclosures of Charges, First Financial Bank 2 (Aug. 2018), https://www.bankatfirst.com/content/dam/first-financial-bank/eBanking_Disclosure_of_Charges.pdf.

38. Andrews Federal Credit Union states,

You understand and agree that a merchant or other entity may make multiple attempts to resubmit a returned item for payment. Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to use for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item. When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft. https://www.andrewsfcu.org/AndrewsFCU/media/Documents/Terms-and-Conditions_REBRANDED_Dec2019-Update.pdf

39. Consumers Credit Union states:

Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

https://www.myconsumers.org/docs/default-source/default-document-library/ccu_membership_booklet_complete.pdf?sfvrsn=6

40. Wright Patt Credit Union states:

Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and represented regardless of the number of times an item is presented or represented to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

<https://www.wInvestors.coop/en-us/PDFDocuments/Important%20Account%20Information%20Disclosure%20-%20WInvestors.pdf>

41. Railroad & Industrial Federal Credit Union states,

Consequently, because we may charge an NSF fee for an NSF item each time it is presented, we may charge you more than one NSF fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

<https://www.rifcu.org/Documents/Disclosures/Account-Terms-Conditions.aspx>

42. Partners 1st Federal Credit Union states.

Consequently, because we may charge a fee for an NSF item each time it is presented, we may charge you more than one fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

https://www.partners1stcu.org/uploads/page/Consumer_Account_Agreement.pdf

43. Members First Credit Union states,

We reserve the right to charge an Non-Sufficient Funds Fee (NSF Fee) each time a transaction is presented if your account does not have sufficient funds to cover the transaction at the time of presentment and we decline the transaction for that reason. **This means that a transaction may incur more than one Non-Sufficient Funds Fee (NSF Fee) if it is presented more than once** . . . we reserve the right to charge a Non-Sufficient Funds (NSF Fee) for both the original presentment and the representation [.]

http://www.membersfirstfl.org/files/mfcufl/1/file/Membership_and_Account_Agreement.pdf

44. Community Bank, N.A. states,

We cannot dictate whether or not (or how many times) a merchant will submit a previously presented item. You may be charged more than one Overdraft or NSF Fee if a merchant submits a single transaction multiple times after it has been rejected or returned.

<https://cbna.com/u/header/2019-Overdraft-and-Unavailable-Funds-Practices-Disclosure.pdf>

45. RBC Bank states,

We may also charge against the Account an NSF fee for each item returned or rejected, including for multiple returns or rejections of the same item.

<https://www.rbcbank.com/siteassets/Uploads/pdfs/Service-Agreement-for-Personal-Accounts.pdf>

46. Diamond Lakes Credit Union states,

Your account may be subject to a fee for each item regardless of whether we pay or return the item. We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.

<https://www.diamondlakesfcu.org/termsconditions.html>

47. Parkside Credit Union states,

If the Credit Union returns the item, you will be assessed an NSF Fee. Note that the Credit Union has no control over how many times an intended payee may resubmit the same check or other item to us for payment. In the event the same check or other item is presented for payment on more than one occasion, your account will be subject to an additional charge on each occasion that the item is presented for payment. There is no limit to the total fees the Credit Union may charge you for overdrawing your account.

https://www.parksidecu.org/_/kcms-doc/1043/44277/Membership-and-Account-Agreement.pdf?_cf_chl_captcha_tk_=add6ebea42df3685074decd4b16c1f86a8369dc9-1580434763-0-AfXmB7FcyYTqzK9oMNBMSKM6k5fnKS5Xf-z7p3Tv-Pt951tDs7wM8yaaIV06w718t2nomyWR1Q8COWgpfGE07FJWZUeFkJN6lxbXDZG1SvidTWhYm9185AbCd5afw2imyGdtzKhX19bQ9TYkjOITVM4w8OFJOtE3wVIHrEITnQnSfoR5mZxM5O0bu4f_FHoHiJj0XsjNkVoGblk0-lti6-gMn-Wcu_o87SGQW6dOUF2i6rHGiM_CkdI-ULanKI2NS3KlkhYAuNatN9Jdwr7Plc6oJozMbZQeczuO7VlbRnuCFD0tjzkw1lsnof7uaRvLRAkFKYi3wh0tUU1c_Y6N4aH1qN8SPftOn8TYJHO7OoILvpMfamNTqv_djpbUI3GVA

48. Investors provides no such disclosure, and in so doing, deceives its accountholders.

II. Investors Charges OD Fees on Transactions that Do Not Actually Overdraw the Account

A. Overview of Claim

49. Plaintiff Wilkerson brings this claim challenging Investors’s practice of charging OD Fees on what are referred to in this complaint as “Authorize Positive, Purportedly Settle Negative Transactions,” or “APPSN Transactions.”

50. Here’s how it works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Investors immediately reduces the consumer’s checking account for the amount of the purchase, sets aside funds in the checking account to cover that transaction, and adjusts the consumer’s displayed “available balance” to reflect that subtracted

amount. As a result, customers' accounts will always have sufficient funds available to cover these transactions because Investors has already sequestered these funds for payment.

51. However, Investors still assesses crippling \$36 OD Fees on many of these transactions and misrepresents its practices in its account documents.

52. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, Investors later assesses OD Fees on those same transactions when they purportedly settle days later into a negative balance. These types of transactions are APPSN Transactions.

53. Investors maintains a running account balance, tracking funds consumers have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, Investors sequesters the funds needed to pay the transaction, subtracting the dollar amount of the transaction from the customer's available balance. Such funds are not available for any other use by the account holder and are specifically associated with a given debit card transaction.

54. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure that there are enough funds in the account to pay the transaction when it settles:

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

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

55. That means when any subsequent, intervening transactions are initiated on a checking account, they are compared against an account balance that has already been reduced to account for any earlier debit card transactions. Therefore, many subsequent transactions incur OD Fees due to the unavailability of the funds sequestered for those previously authorized debit card transactions.

56. Still, despite always reserving sufficient available funds to cover the transactions and keeping the held funds off-limits for other transactions, Investors improperly charges OD Fees on APPSN Transactions.

57. The Consumer Financial Protection Bureau (“CFPB”) has expressed concern with this very issue, flatly calling the practice “unfair” and/or “deceptive” when:

[A] financial institution authorized an electronic transaction, which reduced a customer’s available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer’s available balance and pushed the account into overdraft status; and when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged. Because such fees caused harm to consumers, one or more supervised entities were found to have acted unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which was not appropriately disclosed. They therefore could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive.

At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer’s available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net

impression created by the disclosures. Examiners therefore concluded that the disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer's decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing the fees under these circumstances was found to be unfair.

Consumer Financial Protection Bureau, "Supervisory Highlights" (Winter 2015).

58. There is no justification for these practices, other than to maximize Investors's OD Fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduce an account balance. But Investors is free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year. But Investors was not content with these millions in OD Fees. Instead, it sought millions more in OD Fees on APPSN Transactions.

59. Besides being deceptive, unfair, and unconscionable, these practices breach promises made in Investors's adhesion contracts, which fundamentally misconstrue and mislead consumers about the true nature of Investors's processes and practices. Investors also exploits its contractual discretion by implementing these practices to gouge its customers.

60. In plain, clear, and simple language, Investors's contract promises that Investors will only charge OD Fees on transactions that have insufficient funds to cover those transactions.

61. Investors is not authorized to charge OD Fees on transactions that have not overdrawn an account, but it has done so and continues to do so.

B. Mechanics of a Debit Card Transaction

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

63. At this step, if the transaction is approved, Investors immediately decrements the funds in a consumer’s account and sequesters funds in the amount of the transaction but does not yet transfer the funds to the merchant.

64. Sometime thereafter, the funds are actually transferred from the customer’s account to the merchant’s account.

65. Investors (like all banks and credit unions) decides whether to “pay” debit card transactions at authorization. After that, Investors is obligated to pay the transaction no matter what. For debit card transactions, that moment of decision can only occur at the point of sale, when the transaction is authorized or declined. It is at that point—and only that point—that Investors may choose to either pay the transaction or to decline it. When the time comes to actually transfer funds for the transaction to the merchant, it is too late for the bank to deny payment—the bank has no discretion and must pay the charge. This “must pay” rule applies industry wide. *See Electronic Fund Transfers*, 74 Fed. Reg. 59036-01, 59046 (Nov. 17, 2009).

66. There is no change—no impact whatsoever—to the available funds in an account when Investors transfers the funds that were previously held.

C. Investors’s Account Contract

67. The Deposit Agreement states that overdrafts are determined at the time the Bank “honors” transactions, i.e. at authorization:

Overdrafts - You understand that we may, at our discretion, honor withdrawal requests that overdraw your account. However, the fact that we may honor withdrawal requests that overdraw the account balance does not obligate us to do so later. So you can NOT rely on us to pay overdrafts on your account regardless of how frequently or under what circumstances we have paid overdrafts on your account in the past. We can change our practice of paying overdrafts on your account without notice to you. You can ask us if we have other account services that might be available to you where we commit to paying overdrafts under certain circumstances, such as an overdraft protection line-of-credit or a plan to sweep funds from another account you have with us. You agree that we may charge fees for overdrafts. For consumer accounts, we will not charge fees for overdrafts caused by ATM withdrawals or one-time debit card transactions if you have not opted-in to that service. We may use subsequent deposits, including direct deposits of social security or other government benefits, to cover such overdrafts and overdraft fees.

Ex. A at 4.

68. Investors promises to place an authorization hold on sufficient funds to pay the transaction at that time of authorization:

A temporary debit authorization hold affects your account balance - On debit card purchases, merchants may request a temporary hold on your account for a specified sum of money, which may be more than the actual amount of your purchase. When this happens, our processing system cannot determine that the amount of the hold exceeds the actual amount of your purchase. This temporary hold, and the amount charged to your account, will eventually be adjusted to the actual amount of your purchase, but it may be up to three days before the adjustment is made. **Until the adjustment is made, the amount of funds in your account available for *other* transactions will be reduced by the amount of the temporary hold.** If another transaction is presented for payment in an amount greater than the funds left after the deduction of the temporary hold amount, that transaction will be a nonsufficient funds (NSF) transaction if we do not pay it or an overdraft transaction if we do pay it. You will be charged an NSF or overdraft fee according to our NSF or overdraft fee policy. You will be charged the fee even if you would have had sufficient funds in your account if the amount of the hold had been equal to the amount of your purchase

Ex. A at 3.

69. The Overdraft Disclosure, Ex. D, also makes clear that overdrafts only occur when you do not have enough money in your account “to cover” a transaction, and that overdrafts are determined at the moment a debit card transaction is authorized:

An overdraft occurs when you do not have enough money in your personal checking account to cover a transaction, but Investors Bank pays it anyway.

...

We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below):

- ATM transactions
- Everyday debit card transaction

Ex. C.

70. For APPSN Transactions, which are immediately deducted from a positive account balance and held aside for payment of a transaction, there are always funds to cover that same transaction—yet Investors assesses OD Fees on it anyway.

71. The above promises indicate that transactions are only overdraft transactions when they are authorized into a negative account balance. Of course, that is not true for APPSN Transactions.

72. In fact, Investors actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to post those same transactions. Instead, it uses a secret posting process described below.

73. The above representations and contractual promises are untrue. In fact, Investors charges OD Fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. Nothing in the Contract authorizes Investors to impose OD Fees on APPSN Transactions.

74. The Contract also misconstrues Investors's true debit card processing and overdraft practices.

75. First, and most fundamentally, Investors charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions.

76. Investors assesses OD Fees on APPSN Transactions that do have sufficient funds available to cover them throughout their lifecycle.

77. Investors's practice of charging OD Fees even when sufficient available funds exist to cover a transaction violates its contractual promise not to do so.

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

79. Because these withdrawals take place upon initiation, the funds cannot be re-debited later. But that is what Investors does when it re-debits the account during a secret batch posting process.

80. In reality, Investors's actual practice is to assay the same debit card transaction twice to determine if the transaction overdraws an account—both at the time of authorization and later at the time of settlement.

81. At the time of settlement, however, an available balance *does not change at all* for transactions previously authorized into positive funds and for which sufficient funds were held. As such, Investors cannot then charge an OD Fee on these transactions because the available balance has not been rendered insufficient due to the pseudo-event of settlement.

82. Upon information and belief, something more is going on: at the moment a debit card transaction is about to settle, Investors does something new and unexpected during its middle of the night batch posting process. Specifically, Investors releases the hold placed on funds for the

transaction for a split second, putting money back into the account, then re-debits the same transaction a second time.

83. This secret step allows it to charge OD Fees on transactions that never should have gotten them—transactions that were authorized into sufficient funds, and for which Investors specifically set aside money to pay.

84. This discrepancy between Investors's actual practice and the Contract causes consumers like Plaintiffs to incur improper and unlawful OD Fees.

85. In sum, there is a huge gap between Investors's practices as described in the account documents and Investors's actual practices.

86. Other banks and credit unions that employ this abusive practice disclose it expressly to their account holders and require them to agree to it—something Investors here never did.

87. Indeed, recognizing the complexity of the settlement process for APPSN Transactions and the fact that a fee in such circumstances is counterintuitive to accountholders, financial institutions generally provide express warnings that APPSN Transactions can incur OD Fees as well as explanations and examples of how such fees occur.

88. For example, Bank of America's deposit agreement states:

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

Here is an example of how that may happen: On Monday we authorize a debit card transaction because you have enough available funds at the time. A hold is then placed on your funds until the merchant presents the transaction for payment. On Tuesday we process and post another transaction (such as a check you wrote)

that reduces your available funds below zero. If the merchant presents the original debit card transaction for payment on Wednesday, and your available funds are now below the amount needed to pay the transactions, the debit card transaction will overdraw your account and you may incur an overdraft fee.

Deposit Agreement and Disclosure, Bank of America 18 (Nov. 1, 2019), <https://www.bankofamerica.com/deposits/resources/deposit-agreements.go> (emphasis added).

89. As another example, Canvas Credit Union states:

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

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

Member Service Agreement, Part 2, Canvas Credit Union 30 (Nov. 5, 2019), https://cdn.canvas.org/files/content/pdf/MSA_Part_2-CanvasCU-Std_Size-11-05-19.pdf (emphases in original).

90. Capital One's deposit agreement similarly states:

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

You're enrolled in our optional overdraft service. Your account balance is \$100.00. On Monday, you go to the store and use your debit card to make a purchase for \$80.00. We authorize the transaction; however, the merchant doesn't send us the transaction

for payment and posting to your account on that day. On Tuesday, you withdraw \$30.00 from an ATM, reducing your account balance to \$70. **On Wednesday, the merchant requests payment for the \$80.00 transaction authorized on Monday, and you're charged a fee because the balance in your account is insufficient to pay the transaction at that time.**

Rules Governing Deposit Accounts, Capital One (Nov. 7, 2018), <https://www.capitalone.com/bank/rules-governing/disclosures/> (emphasis added).

91. Investors provides no such disclosure, and instead makes contractual promises that deceive its account holders.

D. Plaintiff Wilkerson's Debit Card Transactions

92. As examples, on December 1, 2017 and August 3, 2017, among other instances, Plaintiff Wilkerson was assessed OD Fees on debit card transactions, despite the fact that the transactions had been authorized, prior to that day, on a sufficient available balance and sufficient available funds had been placed on hold at that time.

III. Investors Abuses Contractual Discretion

93. Investors's practice of charging multiple NSF Fees on the same item and of OD Fees on APPSN Transactions is not simply a breach of the express terms of the Contract; Investors's NSF and OD Fee practices also exploit contractual discretion to the detriment of account holders.

94. The terms "item," "hold" and "overdraft" a transaction are not defined in the account documents. Investors uses its discretion to define "item," "hold" and "overdraft" in a manner contrary to any reasonable, common sense understanding of that term. In Investors's implied definition, a balance is insufficient to "honor" a transaction even if Investors sequesters sufficient available funds for that transaction at the time it is made.

95. Investors uses these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable consumer would believe could cause OD Fees.

CLASS ACTION ALLEGATIONS

96. *Description of the Classes:* Plaintiffs brings this action individually and on behalf of the following class of persons:

All Investors accountholders in New Jersey who, during the applicable statute of limitations, were charged more than one NSF Fee on an item (the “NSF Fee Class”).

All Investors accountholders in New Jersey who, during the applicable statute of limitations, were charged OD Fees on APPSN transactions (the “APPSN Class”).

97. Excluded from the Classes are Investors’s officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded from the Classes are any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

98. The time period for the Classes is the number of years immediately preceding the date on which this Complaint was filed as allowed by the applicable statute of limitations, going forward into the future until such time as Investors remedies the conduct complained of herein.

99. *Numerosity:* The members of the proposed Classes are so numerous that individual joinder of all members is impracticable. The exact number and identities of the members of the proposed Classes are unknown at this time and can be ascertained only through appropriate discovery. Plaintiffs estimates the number of members in each Classes to be in the thousands.

100. *Commonality and Predominance:* There are many questions of law and fact common to Plaintiffs and the Classes, and those questions substantially predominate over any questions that may affect individual Class members. Common questions of law and fact include:

- a. Whether Investors charged multiple NSF Fees on the same item and OD Fees on transactions that did not overdraw an account;
- b. Whether Investors breached its own contract by charging multiple NSF Fees on the same item and OD Fees on transactions that did not overdraw an account;
- c. Whether Investors breached the covenant of good faith and fair dealing;
- d. The proper method or methods by which to measure damages; and
- e. The declaratory and injunctive relief to which the Classes are entitled.

101. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Classes. Plaintiffs and all members of the Classes have been similarly affected by Investors's actions.

102. *Adequacy of Representation*: Plaintiffs will fairly and adequately represent and protect the interests of the Classes. Plaintiffs has retained counsel with substantial experience in prosecuting complex and consumer class action litigation. Plaintiffs and Plaintiffs' counsel are committed to vigorously prosecuting this action on behalf of the Classes and have the financial resources to do so.

103. *Superiority of Class Action*: Plaintiffs and the members of the Classes suffered, and will continue to suffer, harm as a result of Investors's unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy. Individual joinder of all members of the Classes is impractical. Even if individual Class members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversies engendered by Investors's common course of conduct. The class action device allows for unitary adjudication,

judicial economy, and the fair and equitable handling of all class members' claims in a single forum. The conduct of this action as a class action conserves the resources of the parties and of the judicial system and protects the rights of the Class members.

104. *Risk of Inconsistent or Varying Adjudication:* Class action treatment is proper, and this action should be maintained as a class action because the risks of separate actions by individual members of the Classes would create a risk of: (a) inconsistent or varying adjudications with respect to individual Class members which would establish incompatible standards of conduct for Investors as the party opposing the Classes; and/or (b) adjudications with respect to individual Class members would, as a practical matter, be dispositive of the interests of other Class members not party to the adjudication or would substantially impair or impede their ability to protect their interests.

105. *Action Generally Applicable to Classes as a Whole:* Investors, as the party opposing the Classes, has acted or refused to act on grounds generally applicable to the Classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Classes as a whole.

FIRST CLAIM FOR RELIEF

Breach of Contract, Including Breach of the Covenant of Good Faith and Fair Dealing (On Behalf of Plaintiffs and the Classes)

106. Plaintiffs incorporate by reference the preceding paragraphs.

107. Plaintiffs and Investors have contracted for banking services, as embodied in Investors's account documents.

108. All contracts entered by Plaintiffs and the Classes are identical or substantively identical because Investors's form Contracts were used uniformly.

109. Investors has breached the express terms of its own agreements as described herein.

110. Under New Jersey law, good faith is an element of every contract between banks and/or credit unions and their customers because banks and credit unions are inherently in a superior position to their checking account holders and, from this superior vantage point, they offer customers contracts of adhesion, often with terms not readily discernible to a layperson.

111. 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 bad faith in the performance of contracts.

112. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain and abuse of a power to specify terms.

113. Investors abused the discretion it granted to itself when it charged OD Fees on transactions that did not overdraw an account and when it charged multiple NSF Fees on the same item.

114. In these and other ways, Investors violated its duty of good faith and fair dealing.

115. Investors willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing fee revenue from Plaintiffs and other members of the Classes.

116. Plaintiffs and members of the Classes have performed all, or substantially all, of the obligations imposed on them under the Contract.

117. Plaintiffs and members of the Classes have sustained damages as a result of Investors's breaches of the parties' Contracts and breaches of contract through violations of the covenant of good faith and fair dealing.

SECOND CLAIM FOR RELIEF

**Violation of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 *et. seq.*
(On Behalf of Plaintiffs and the Classes)**

118. Plaintiffs repeats and re-alleges each and every allegation set forth above as if fully set forth verbatim and at length herein.

119. Defendant's representations regarding its OD and NSF fee practices are false, deceptive and misleading, as described above.

120. Contrary to its representations, Investors does in fact assess overdraft fees on debit card transactions authorized on a positive balance, and it does in fact assess multiple NSF Fees on the same item.

121. Defendants' violation of the New Jersey Consumer Fraud Act caused Plaintiffs and putative Class members to suffer ascertainable losses.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the Class, respectfully request that the Court:

- a. Certify this case as a class action, designating Plaintiffs as class representative and designating the undersigned as Class Counsel;
- b. Award Plaintiffs and the Classes actual, statutory, and punitive damages in an amount to be proven at trial;
- c. Award Plaintiffs and the Classes restitution in an amount to be proven at trial;

- d. Award Plaintiffs and the Classes pre-judgment interest in the amount permitted by law;
- e. Award Plaintiffs and the Classes attorneys' fees and costs as permitted by law;
- f. Declare Investors's practices outlined herein to be unlawful and a breach of contract;
- g. Enjoin Investors from engaging in the practices outlined herein;
- h. Grant Plaintiffs and the Classes a trial by jury;
- i. Grant leave to amend these pleadings to conform to evidence produced at trial; and
- j. Grant such other relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues raised herein.

Dated: March 23, 2021

By: /s/ Kristen B. Miller
Kristen B. Miller, Esq. (Atty. Id. 014492009)
WEITZ & LUXENBERG, P.C.
700 Broadway
New York, New York 10003
Tel: (212) 558-5864
kmiller@weitzlux.com

Jeffrey Kaliel, Esq.* (to be admitted *pro hac vice*)
jkaliel@kalielpllc.com
Sophia Gold, Esq.* (to be admitted *pro hac vice*)
sgold@kalielpllc.com
KALIEL GOLD PLLC
1100 14th Street NW 4th Floor
Washington, D.C. 20005
Tel: (202) 350-4783

David Berger, Esq.* (to be admitted *pro hac vice*)
dmb@classlawgroup.com
GIBBS LAW GROUP, LLP

505 14th Street, Suite 1110
Oakland, CA 94612
P: (510) 350-9713

Attorneys for Plaintiffs and the Putative Classes
** Pro Hac Vice applications forthcoming*

CERTIFICATION PURSUANT TO R. 4:5-1

I hereby certify that the matter in controversy in this action is not the subject of any pending action or arbitration and that no other action or arbitration is presently contemplated.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

WEITZ & LUXENBERG, P.C.
Attorneys for the Plaintiffs

Dated: March 23, 2021

By: /s/ Kristen B. Miller
Kristen B. Miller, Esq.