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16 UNITED STATES DISTRICT COURT
17 SOUTHERN DISTRICT OF CALIFORNIA

18 JOANNE FARRELL, RONALD
19 ANTHONY DINKINS, LARICE
20 ADDAMO, and TIA LITTLE, on behalf
21 of themselves and all others similarly
22 situated,

23 Plaintiffs

24 vs.

25 BANK OF AMERICA. N.A.,

26 Defendant

27 CLASS ACTION

28 CASE NO. 3:16-cv-00492-L-WVG

29 **FIRST AMENDED CLASS ACTION COMPLAINT**

30 Plaintiffs, JOANNE FARRELL, RONALD ANTHONY DINKINS, LARICE
31 ADDAMO, and TIA LITTLE, on behalf of themselves and all others similarly
32 situated, sue defendant BANK OF AMERICA, N.A., and allege:

33 **INTRODUCTION**

34 1) Plaintiffs bring this national class action seeking redress for an illegal
35 practice that Bank of America, N.A. (“Bank of America” or “BofA”) perpetrates on
36 its checking and money market account customers. Plaintiffs assert this action

1 operates banking centers, and thus conducts business, throughout the State of
2 California and the United States

3 **JURISDICTION**

4 8) This Court has original jurisdiction pursuant to 28 U.S.C. § 1331,
5 because it arises under the laws of the United States, namely the National Bank Act,
6 12 U.S.C. § 1, *et seq.*, and regulations promulgated by the Office of the Comptroller
7 of the Currency.

8 9) Bank of America regularly and systematically provides retail banking
9 services throughout the State of California, including in this district, and provides
10 retail banking services to its customers, including Plaintiffs and members of the
11 putative Class. As such, it is subject to the jurisdiction of this Court and the mandate
12 of the National Bank Act.

13 **VENUE**

14 10) Venue is likewise proper in this district pursuant to 28 U.S.C. § 1391
15 because Bank of America is subject to personal jurisdiction in this Court and
16 regularly conducts business within this district through its numerous branches.
17 Additionally, a substantial part of the events giving rise to the claims asserted herein
18 occurred and continue to occur in this district.

19 **OVERVIEW**

20 11) The gist of the Extended Overdrawn Balance Charge is as follows: If
21 Customer “A” were to overdraft his or her account by \$500.00, the bank first charges
22 an overdraft fee of \$35.00 per transaction. However, if Customer “A” fails to
23 replenish his or her account to bring the balance to a positive figure within five (5)
24 days, then the bank deducts yet another \$35.00 from the account of Customer “A” for
25 having extended this credit.

26 12) Unlike an initial overdraft fee, the Extended Overdrawn Balance Charge
27 is an *additional* charge to a customer for which the bank has provided nothing new.
28

1 The charge is based solely on the alleged indebtedness to the bank remaining unpaid
2 by the customer for a period of time.

3 13) By way of background, overdraft fees have been a substantial source of
4 revenue for banks, and today those numbers are proliferating. As technology has
5 rapidly grown and provided banking customers new ways of accessing the money in
6 their accounts, overdraft episodes and the attendant imposition of overdraft fees have
7 skyrocketed. Recent reports from the federal Consumer Financial Protection Bureau
8 (“CFPB”), for example, show that a broad investigation has been launched regarding
9 bank overdraft practices and procedures due to its concern that the growing cost of
10 overdraft practices could place banking customers at unnecessary risk. In 2012 alone,
11 banks took in approximately \$32 billion in overdraft-related fees.

12 14) As a recent CFPB report reflects, “sustained negative balance” fees are
13 becoming popular with banks and account for nearly 10% of total overdraft-related
14 fees collected by banks which impose such charges. According to its latest report
15 issued in July of 2014, once a bank charges its customer a sustained overdraft fee on
16 day five, the negative balance is likely cured by the customer within just a few days,
17 rather than weeks. As such, the bank’s extension of credit to its overdrawn customer
18 is typically very short-term. Moreover, most negative balances created by an
19 overdraft are not high figures. Nearly two-thirds of transactions that cause overdrafts
20 were for \$50 or less. As these statistics highlight, a bank’s exposure for carrying a
21 customer’s overdraft is ordinarily very small and limited. But rather than charging
22 legally permissible interest until its customer cures the overdraft balance, Bank of
23 America instead charges a purported Extended Overdrawn Balance Charge that in
24 reality is interest at an illegal rate.

25 **BANK OF AMERICA’S PRACTICE**

26 15) The specific issue in this case is BofA’s intentional practice of deducting
27 Extended Overdrawn Balance Charges from the accounts of its customers, including
28 Plaintiffs and others similarly situated. Under this practice, if the customer fails to

1 repay the full amount of the overdraft within five (5) days, the bank then charges a
2 sustained overdraft fee of \$35.00 – as reflected on Bank of America’s Personal Fee
3 Schedule. BofA renders no service to its customers in exchange for charging this
4 extra fee other than advancing money to a customer’s account in an amount to cover
5 the overdraft. BofA uses the fact that it has loaned funds to its customer as a pretext
6 to justify charging that customer a secondary service charge that exceeds lawful
7 limits.

8 16) In Bank of America’s written “Deposit Agreement and Disclosures”
9 with its customers including Plaintiffs, the overdraft provisions appears on page 12.
10 That provision states as follows:

11 **Extended Overdrawn Balance Charge**

12 The Extended Overdrawn Balance Charge is an overdraft fee. This
13 fee is in addition to Overdraft item and NSF: Returned Item fees that
14 may apply to your account for each overdraft or returned item. This
15 additional charge applies to your account when we determine that
16 your account has been overdrawn for 5 or more consecutive business
17 days. You can avoid this fee by promptly covering your overdraft –
deposit or transfer enough available funds to cover your overdraft,
plus any fees we assessed, within the first 5 consecutive business
days that your account is overdrawn.

18 Under this provision Bank of America allows itself to charge a fee against any
19 checking or money market account merely by virtue of the customer failing to pay the
20 bank a specific sum of money (the amount of the overdraft) for a period of five (5)
21 days. There is nothing in BofA’s written materials disclosing that this additional
22 “fee” is in reality a charge of interest on extended credit.

23 17) In Farrell’s case, her monthly bank statements for her “BofA Core
24 Checking” show that she went into “overdraft” status on October 13, 2015, and
25 remained in that status for thirteen days. On day seven, (October 20, 2015), BofA
26 charged her an Extended Overdrawn Balance Charge of \$35.00. During that limited
27 period, Farrell’s negative account balance fluctuated from -\$3.59 to -\$284.86.
28

1 18) The \$35.00 sustained overdraft fee that BofA charged Farrell was in
2 addition to six overdraft charges totaling \$210.00 that Bank of America also charged
3 her during this same time period for the two transactions that created her “overdraft”
4 status in the first place.

5 19) In Addamo’s case, her monthly bank statement for her “BofA Core
6 Checking” show that she went into “overdraft” status on June 6, 2016, and remained
7 in that status for eleven days. On day seven, (June 13, 2016), BofA charged her an
8 Extended Overdrawn Balance Charge of \$35.00. During that limited period,
9 Addamo’s negative account balance fluctuated from approximately \$-4.80 to
10 approximately -\$370.19.

11 20) The \$35.00 sustained overdraft fee that BofA charged Addamo was in
12 addition to four overdraft charges totaling \$140 that Bank of America also charged
13 her during this same time period for the four transactions that created her “overdraft”
14 status in the first place.

15 21) In Dinkins’ case, his monthly bank statement for his BofA Core
16 Checking” show that he went into “overdraft” status on January 19, 2016, and
17 remained in that status for twelve days. On day seven (January 26, 2016), BofA
18 charged him an Extended Overdrawn Balance Charge of \$35.00. During that period,
19 his negative account balance fluctuated from approximately -\$9.31 to approximately
20 -\$44.31.

21 22) The \$35.00 sustained overdraft fee that BofA charged Dinkins was in
22 addition to the initial overdraft charge of \$35.00 that Bank of America also charged
23 him during this same time period for the transaction that created his “overdraft” status
24 in the first place.

25 23) In Little’s case, her monthly bank statement for her “BofA Core
26 Checking” shows that she went into “overdraft” status on July 5, 2015, and remained
27 in that status for ten days. On day seven, (July 12, 2016), BofA charged her an
28 Extended Overdrawn Balance Charge of \$35.00. During that limited period, Little’s

1 negative account balance fluctuated from approximately -\$7.87 to approximately
2 -\$77.87.

3 24) The \$35.00 sustained overdraft fee that BofA charged Little was in
4 addition to the two overdraft fees of \$35.00 that Bank of America also charged her
5 during this same time period for the two transactions that created her “overdraft”
6 status in the first place.

7 **CLASS ACTION ALLEGATIONS**

8 25) Plaintiffs bring this action on their own behalf and all others similarly
9 situated pursuant to Fed. R. Civ. P. 23. The Class includes:

10 All holders of a BANK OF AMERICA checking and/or
11 money market account who, within the two-year period
12 preceding the filing of this lawsuit, incurred one or more
13 Extended Overdrawn Balance Charges.

14 26) Excluded from the class are Bank of America, its subsidiaries and
15 affiliates, its officers, directors and member of their immediate families and any
16 entity in which defendant has a controlling interest, the legal representatives, heirs,
17 successors or assigns of any such excluded party, the judicial officer(s) to whom this
18 action is assigned, and the members of their immediate families.

19 27) Plaintiffs reserve the right to modify or amend the definition of the
20 proposed Class and/or to add Subclasses if necessary before this Court determines
21 whether certification is appropriate.

22 28) This case is properly brought as a class action under Fed. R. Civ. P.
23 23(a) and (b)(3), and all requirements therein are met for the reasons set forth in the
24 following paragraphs.

25 29) Numerosity under Fed. R. Civ. P. 23(a)(1). The members of the
26 Class are so numerous that separate joinder of each member is impracticable. Upon
27 information and belief, and subject to class discovery, the Class consists of thousands
28 of members or more, the identity of whom are within the exclusive knowledge of and
can be ascertained only by resort to Bank of America’s records. BofA has the

1 administrative capability through its computer systems and other records to identify
2 all members of the Class, and such specific information is not otherwise available to
3 Plaintiffs.

4 30) Commonality under Fed. R. Civ. P. 23(a)(2). There are numerous
5 questions of law and fact common to the Class relating to Bank of America's
6 usurious business practice at issue herein and those common questions predominate
7 over any questions affecting only individual Class members. The common questions
8 include, but are not limited to:

9 a) Whether Bank of America charged interest to its customers under
10 the guise of a "sustained" overdraft fee in amounts that violate applicable usury
11 laws;

12 b) Whether Bank of America developed and engaged in an unlawful
13 practice that mischaracterized or concealed the true usurious nature of the
14 "sustained" overdraft fee;

15 c) Whether Bank of America charged its customer a "fee" that bears
16 no relationship to the actual costs and risks of covering insufficient funds
17 transactions; and

18 d) Whether Plaintiffs and other members of the Class have sustained
19 damages as a result of Bank of America's wrongful business practice described
20 herein, and the proper measure of damages.

21 31) Typicality under Fed. R. Civ. P. 23(a)(3). Plaintiffs' claims are typical
22 of the claims of the other Class members in that they arise out of the same wrongful
23 business practice by Bank of America, as described herein.

24 32) Adequacy of Representation under Fed. R. Civ. P. 23(a)(4). Plaintiffs
25 are more than an adequate representative of the Class in that they have a Bank of
26 America checking account and they have suffered damages, as a result of Bank of
27 America's usurious business practice. In addition:
28

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

5 b) There is no hostility of interest between Plaintiffs and the
6 unnamed Class members;

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

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

12 33) Predominance under Fed. R. Civ. P. 23(b)(3). The questions of law and
13 fact common to the Class as set forth in the "commonality" allegation above
14 predominate over any individual issues. As such, the "commonality" allegations
15 (paragraph 28 and subparts) are restated and incorporated herein by reference.

16 34) Superiority under Fed. R. Civ. P. 23(b)(3). A class action is superior to
17 other available methods and highly desirable for the fair and efficient adjudication of
18 this controversy. Since the amount of each individual Class member's claim is very
19 small relative to the complexity of the litigation and since the financial resources of
20 Bank of America are enormous, no Class member could afford to seek legal redress
21 individually for the claims alleged herein. Therefore, absent a class action, the Class
22 members will continue to suffer losses and Bank of America's misconduct will
23 proceed without remedy. In addition, even if Class members themselves could afford
24 such individual litigation, the court system could not. Given the complex legal and
25 factual issues involved, individualized litigation would significantly increase the
26 delay and expense to all parties and to the Court. Individualized litigation would also
27 create the potential for inconsistent or contradictory rulings. By contrast, a class
28 action presents far fewer management difficulties, allows claims to be heard which

1 might otherwise go unheard because of the relative expense of bringing individual
2 lawsuits, and provides the benefits of adjudication, economies of scale and
3 comprehensive supervision by a single court.

4 35) All conditions precedent to bringing this action have been satisfied
5 and/or waived.

6 **VIOLATION OF NATIONAL BANK ACT**

7 **(12 U.S.C. §§ 85, 86)**

8 36) Plaintiffs reallege and incorporate all allegations in paragraphs 1 through
9 34 as if set forth fully herein.

10 37) Interest, by definition, is compensation for the use or forbearance of
11 money or as damages for its detention. That is exactly the nature of BofA's Extended
12 Overdrawn Balance Charge. Any such charges imposed on a customer for use or
13 forbearance of money or as damages for its detention – no matter how labelled by
14 Bank of America – are in fact interest and in this case usurious, as alleged below.

15 38) Claims for usury against a national bank such as Bank of America are
16 governed exclusively by certain provisions in the National Bank Act—specifically, 12
17 U.S.C. §§ 85, 86. Under § 85, a national bank may charge interest on any loan or
18 debt at the *greater* of two options. Option (1) is “the rate allowed by the laws of the
19 State ... where the bank is located.” And option (2) is “1 per centum in excess of the
20 discount rate on ninety-day commercial paper in effect at the Federal reserve bank in
21 the Federal reserve district where the bank is located.”

22 39) Under option (1), a bank is “located” only in the state that is designated
23 in its organization certificate. BANK OF AMERICA is located in North Carolina.
24 Under North Carolina law, the “legal rate of interest shall be eight percent (8%) per
25 annum for such time as interest may accrue, and no more.” N.C.G.S.A. § 24-1.

26 40) Under option (2), the discount rate for the Federal Reserve Bank of
27 Richmond (which covers North Carolina) was .75% for primary credit and 1.25% for
28

1 secondary credit at all times material. As such, the maximum rate under option (2)
2 would be 2.25%.

3 41) Since option (1) is greater than option (2), 8% would be the maximum
4 interest rate that Bank of America could legally charge its customers in this context
5 under 12 U.S.C. § 85. By covering overdrafts, Bank of America has knowingly
6 extended credit to Plaintiffs and others similarly situated for use in their checking
7 and/or money market accounts. Such extensions of credit are loans made without a
8 specific loan agreement. In fact, 12 U.S.C. § 84 defines the term “loans and
9 extensions of credit” as including any and all direct or indirect advances of funds to a
10 person made on the basis of any obligation of that person to repay the funds. In
11 addition, federal banking regulators in guidance issued to national banks on the
12 subject of overdraft items have expressly stated, “When overdrafts are paid, credit is
13 extended.” Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127,
14 9129 (Feb. 24, 2005).

15 42) Although Bank of America is only permitted to charge Plaintiffs and
16 others similarly situated a *maximum* of 8% annualized interest on these loans and
17 extensions of credit, Bank of America has knowingly charged and collected, or
18 attempted to collect, “sustained” overdraft fees from Plaintiffs and others similarly
19 situated that far exceeded this permissible rate.

20 43) Using the maximum amount of Plaintiff Farrell’s overdraft during the
21 relevant period (\$284.86) and applying a 8% annual interest rate over a thirteen-day
22 period, the maximum amount that Bank of America was legally permitted to charge
23 Farrell was only 81¢. Instead, BofA charged Farrell \$35.00 for that thirteen-day
24 period – which is *over 43 times* the maximum legal amount.

25 44) A charge of \$35.00 for a five-day period on Farrell’s negative balance
26 (which fluctuated from \$3.59 to \$284.86) translates to an effective annualized interest
27 rate of between 897% and 71,170%.

28

1 45) Using the maximum amount of Plaintiff Addamo’s overdraft during the
2 relevant period (approximately \$370.19) and applying a 8% annual interest rate over
3 a five-day period, the maximum amount that Bank of America was legally permitted
4 to charge Addamo was only 41¢. Instead, BofA charged Addamo \$35.00 for that
5 five-day period – which is *over 85 times* the maximum legal amount.

6 46) A charge of \$35.00 for a 5-day period on Addamo’s negative balance
7 (which fluctuated from approximately \$4.80 to \$370.19) translates to an effective
8 annualized interest rate of between 690% and 53,229%.

9 47) Using the maximum amount of Plaintiff Dinkins’s overdraft during the
10 relevant period (approximately \$44.31) and applying a 8% annual interest rate over a
11 five-day period, the maximum amount that Bank of America was legally permitted to
12 charge Dinkins was only 5¢. Instead, BofA charged Dinkins \$35.00 for that five-day
13 period – which is *over 700 times* the maximum legal amount.

14 48) A charge of \$35.00 for five-day period on Dinkins’s negative balance
15 (which fluctuated from approximately \$9.31 to \$44.31) translates to an effective
16 annualized interest rate of between 5,776% and 27,444 %.

17 49) Using the maximum amount of Plaintiff Little’s overdraft during the
18 relevant period (approximately \$77.87) and applying a 8% annual interest rate over a
19 five-day period, the maximum amount that Bank of America was legally permitted to
20 charge Little was only 9¢. Instead, BofA charged Little \$35.00 for that five-day
21 period – which is *over 389 times* the maximum legal amount.

22 50) A charge of \$35.00 for a five-day period on Little’s negative balance
23 (which fluctuated from approximately \$7.87 to \$77.87) translates to an effective
24 annualized interest rate of between 3,281% and 32,465%.

25 51) The sustained overdraft fees charged to Plaintiffs and others similarly
26 situated for such advances of money are egregiously high, usurious and illegal.

27 52) By labeling its charge as a “charge,” Bank of America cannot mask the
28 true nature of the charge.

1 53) As a direct and proximate result of Bank of America's statutory
2 breaches, Plaintiffs and those similarly situated have sustained damages.

3 54) The usurious transactions at issue all occurred less than two years prior
4 to the date of this action.

5 55) Plaintiffs and those similarly situated are entitled to recover twice the
6 amount of the usurious interest they have paid under 12 U.S.C. § 86, which provides:
7 In case the greater rate of interest has been paid, the person by whom it has been paid,
8 or his legal representatives, may recover back, in an action in the nature of an action
9 of debt, *twice the amount of interest thus paid from the association taking or*
10 *receiving the same....* (Emphasis added)

11 56) Plaintiffs and those similarly situated hereby demand recovery of the
12 amounts owed to them as a result of the violations asserted herein.

13

14 WHEREFORE, Plaintiffs demand judgment against defendant Bank of
15 America for themselves and the Class members as follows:

- 16 (a) Certifying this matter as a class action pursuant to Fed. R. Civ.
17 P.23;
- 18 (b) Designating Plaintiffs as appropriate Class representatives;
- 19 (c) Awarding Plaintiffs and the Class damages (including twice the
20 amount of the usurious interest paid), prejudgment interest from the date of
21 loss, and their costs and disbursements incurred in connection with this action,
22 including reasonable attorney's fees, expert witness fees and other costs; and
- 23 (d) Granting such other relief as the Court deems just and proper.

24

25

DEMAND FOR JURY TRIAL

26 Plaintiffs and all others similarly situated hereby demand trial by jury on all
27 issues in this complaint that are so triable as a matter of right.

28

1 Dated: March ____, 2017

s/ Jeffrey Kaliel

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