

## APPENDICES

**APPENDIX A**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

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**BARBARA FAWCETT,**  
*Plaintiff*

v.

**CITIZENS BANK, N.A.,**  
*Defendant*

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C.A. No. 17-11043-TSH

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**April 19, 2018**

District Judge Timothy S. Hillman: ELECTRONIC ORDER entered granting [12] Motion to Dismiss. I choose to follow overwhelming majority of jurisdictions which have ruled that sustained overdraft fees are not considered interest under the NBA. Accordingly, the Plaintiff's Complaint does not state a claim upon which relief can be granted and must be dismissed. Moreover, Defendant has waived its request that this matter be stayed in favor of arbitration. Accordingly, Defendant's motion to dismiss and/or stay and to compel arbitration is granted as to the request to dismiss the action and

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denied, as moot, as to the request to stay and compel arbitration. (Castes, Martin)

## APPENDIX B

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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**BARBARA FAWCETT,**  
*Plaintiff*

v.

**CITIZENS BANK, N.A.,**  
*Defendant*

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C.A. No. 17-11043-TSH

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### ORDER OF DISMISSAL

April 19, 2018

Hillman, D.J.

In accordance with the Court's Order dated 4/19/18, granting the defendant's motion to dismiss, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

4/19/18  
Date

/s/ Martin Castles  
Deputy Clerk

## APPENDIX C

### UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 18-1443

**BARBARA FAWCETT,**  
*Plaintiff, Appellant,*

v.

**CITIZENS BANK, N.A.,**  
*Defendant, Appellee*

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### APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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Before

Howard, Chief Judge  
Lynch and Lipez, Circuit Judges

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Edward F. Haber, with whom Patrick J. Vallely  
and Shapiro Haber & Urmy LLP were on brief, for  
appellant.

David J. Zimmer, with whom Brenda R. Sharton  
and Goodwin Procter LLP were on brief, for appellee.

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March 26, 2019

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**LYNCH, Circuit Judge.** This putative class action alleges that Citizens Bank's "Sustained Overdraft Fees" for overdrawn checking accounts are usurious interest charges in violation of Section 85 of the National Bank Act, 12 U.S.C. § 1 *et seq.* The district court concluded that Citizens Bank's fees were not "interest" under the Act and so dismissed the action for failure to state a claim. Order, Fawcett v. Citizens Bank, N.A., No. 4:17-cv-11043-TSH (D. Mass. Apr. 19, 2018), ECF No. 36.

On the facts of this case, we hold that Citizens Bank's "Sustained Overdraft Fees" are not "interest" under the National Bank Act. This result follows from regulatory text and history and from persuasive, directly applicable reasoning presented in the Office of the Comptroller of the Currency's Interpretive Letter 1082, issued in 2007. We affirm.

I.

A.

The National Bank Act (NBA) governs the business activities of national banks like Citizens Bank. The Office of the Comptroller of the Currency (OCC), the agency Congress has charged with implementing the NBA, oversees national banks' operations and interactions with customers. Watters v. Wachovia Bank, N.A., 550 U.S. 1, 6 (2007).

The NBA allows a national bank to charge "interest at the rate allowed by the laws of the State...where the bank is located." 12 U.S.C. § 85. The NBA does not define the term "interest" The Supreme Court has held that the term "interest" is

ambiguous and that OCC is due deference in interpreting it. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 739 (1996) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984)).

OCC has, in regulations promulgated after notice and comment, defined the term “interest” as used in Section 85 of the NBA:

The term 'interest' as used in 12 U.S.C. [§] 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended.

It includes, among other things, the following fees connected with credit extension or availability:

- numerical periodic rates,
- late fees,
- creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds,
- overlimit fees,
- annual fees,
- cash advance fees, and
- membership fees.

It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

12 C.F.R. § 7.4001(a) (bullet points and line breaks added).<sup>1</sup> When a charge is “interest,” its rate cannot exceed “the maximum rate permitted to any state-chartered or licensed lending institution by the law of [the state where the bank is located].” Id. § 7.4001(b). This maximum interest rate is called a “usury limit.” See, e.g., M. Nahas & Co., Inc. v. First Nat. Bank of Hot Springs, 930 F.2d 608, 610 (8th Cir. 1991) (using the term).

If a bank's charge is not “interest,” however, then the guidelines for “deposit account service charges” apply. 12 C.F.R. § 7.4002. Deposit account service charges are not subject to usury limits. See id. A bank may, at its discretion, impose a deposit account service charge and set its amount, so long as the bank acts within the bounds of “sound banking judgment and safe and sound banking principles.” Id. § 7.4002(b)(2).

Because the parties draw different conclusions from regulatory history, we recount that history here. In 2001, OCC revisited its definition of “interest.” OCC said that fees like “overdraft and returned check charges” imposed by a bank on its

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<sup>1</sup> These regulations were in effect throughout the alleged class period here.

checking account customers were “deposit account services” charges and not “interest.” 66 Fed. Reg. 8178, 8180 (Jan. 30, 2001). OCC then noted a gap in its regulations: If a bank’s overdraft fee exceeded its returned check fee, then the difference between those two charges -- its excess overdraft charge -- “could be viewed as interest within the meaning of [the NBA].” Id. OCC stated that its regulation “did not expressly resolve this issue” and invited comment. Id.

OCC published its final rule, set forth above, after the comment period closed. OCC noted that it had “received numerous comments” on whether “any portion of the fee imposed by a national bank when it pays an overdraft” should constitute “interest” under the NBA. 66 Fed. Reg. 34784, 34787 (July 2, 2001). Given the “complex and fact-specific concerns” that including “any portion of a charge imposed in connection with paying an overdraft” in the definition of “interest” would raise, OCC decided to “not amend[] [12 C.F.R.] § 7.4001(a) to address this issue.” Id.

OCC next addressed excess overdraft fees in Interpretive Letter 1082 on May 17, 2007. An unnamed bank described its overdraft fee structure to OCC and asked the agency whether under the NBA and OCC’s regulations it could, “(1) in its discretion, honor items for which there are insufficient funds in depositors’ accounts and recover the resulting overdraft amounts as part of the Bank’s routine maintenance of these accounts; and (2) establish, charge and recover overdraft fees from depositors’ accounts for doing so.” Office of the Comptroller of the Currency, Interpretive Letter No. 1082, 2007 WL 5393636, at \*1 (May 17, 2007). The

bank seeking guidance “charge[d] a Continuous Overdraft Charge of \$5 per business day from the fourth through eleventh calendar day that an account is overdrawn.” Id. at \*1 n.3 (emphasis added). OCC noted this and said that the bank’s practices posed no issues under the NBA or the OCC’s regulations interpreting the NBA. Id. at \*1. OCC explained that “[c]reating and recovering overdrafts have long been recognized as elements of the discretionary deposit account services that banks provide.” Id. at \*2.

## B.

Citizens Bank is a national bank that offers checking account services to its customers. When a Citizens Bank customer overdraws her account, Citizens Bank has two options: It can either (1) cover the overdraft or (2) decline to cover the overdraft and return the check.

Citizens Bank charges a fee in both instances. If Citizens Bank returns a check, it charges a \$35 “Returned Item Fee.” If Citizens Bank honors the check, it charges a \$35 “Overdraft Fee.” If the account remains overdrawn after Citizens Bank has honored the check and charged the initial overdraft fee, Citizens Bank then charges a “Sustained Overdraft Fee.” It charges that “Sustained Overdraft Fee” three times: \$30 four business days after the overdraft, another \$30 after seven business days, and a final \$30 after ten business days. The complaint does not allege that Citizens Bank charges any “Sustained Overdraft Fees” after the ten-business-day mark.

On the facts presented here, then, Citizens Bank may charge a customer up to \$90 more to honor her overdraft than it charges her to not cover it. This case considers whether that \$90 difference – Citizens Bank's excess overdraft charge – is “interest” under the NBA.

C.

Fawcett filed her complaint in Massachusetts federal district court on June 7, 2017. The complaint alleges that Citizens Bank's “Sustained Overdraft Fees” violate the NBA because they constitute “interest” at a rate above that allowed by Rhode Island, the state in which Citizens Bank is located.<sup>22</sup> See 12 U.S.C. § 85; 12 C.F.R. § 7.4001(b). The complaint does not challenge either Citizens Bank's “Returned Item Fee” or its “Overdraft Fee.”

Citizens Bank moved to dismiss.<sup>3</sup> The district court held a hearing on that motion and then dismissed Fawcett's complaint with a short text order. That order says that the court would “follow the overwhelming majority of jurisdictions which have ruled that sustained overdraft fees are not

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<sup>2</sup> The complaint alleges that during the class period the maximum interest rate allowed in Rhode Island was twenty-one percent. For purposes of the motion to dismiss, there is no dispute that Citizens Bank's “Sustained Overdraft Fees” exceeded that rate.

<sup>3</sup> Citizens Bank also moved to stay the case and compel arbitration. The district court denied that motion. Citizens Bank has not appealed that denial.

considered interest under the NBA,” apparently referring to cases cited in the briefing.

Fawcett timely appealed.

## II.

We review de novo the decision to grant a Rule 12(b)(6) motion to dismiss. Lemelson v. Bloomberg L.P., 903 F.3d 19, 23 (1st Cir. 2018). In doing so, “we accept as true all well-pleaded facts alleged in the complaint and draw all reasonable inferences therefrom in the pleader’s favor.” Id. (quoting Rodríguez-Reyes v. Molina-Rodríguez, 711 F.3d 49, 52-53 (1st Cir. 2013)).

Throughout, we are mindful that OCC, as the primary regulator of national banks chartered under the NBA, is entitled to “great weight” in interpreting the banking laws. Clarke v. Sec. Indus. Ass’n, 479 U.S. 388, 403-04 (1987) (quoting Inv. Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971)); accord Smiley, 517 U.S. at 739 (deferring to OCC under Chevron); NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995) (same).

### A.

As the law currently stands, Interpretive Letter 1082 resolves this case. The bank that requested OCC’s guidance there charged a flat excess overdraft charge to customers whose accounts remained overdrawn after the initial overdraft fee was imposed. 2007 WL 5393636, at \*1 n.3. OCC said that practice was consistent with the NBA and OCC’s regulations interpreting the NBA. Id. at \*1. OCC

thus concluded that the precise practice here is lawful.<sup>4</sup>

OCC's interpretation of its own regulations is controlling under Auer v. Robbins, 519 U.S. 452 (1997).<sup>5</sup> Under Auer, an interpretation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" Auer, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).<sup>6</sup>

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<sup>4</sup> The dissent argues that Interpretive Letter 1082 does not resolve this issue. But the bank seeking guidance there "describe[d] in some detail [its] process for honoring and clearing overdraft items and for establishing, charging, and recovering overdraft fees." 2007 WL 5393636, at \*1. That process included "charg[ing] a Continuous Overdraft Charge of \$5 per business day from the fourth through eleventh calendar day that an account is overdrawn." Id. at \*1 n.3 (emphasis added). Fawcett specifically admitted this at oral argument. And OCC noted this practice and confirmed that the bank's practices were lawful. This cannot be described as "silence" on the issue of whether flat excess overdraft charges like that bank's comport with the NBA.

<sup>5</sup> At least one circuit has applied Auer deference to OCC's interpretive letters. See Wells Fargo Bank of Tex. NA v. James, 321 F.3d 488, 494-95 (5th Cir. 2003) (deferring under Auer to a position OCC advanced in an interpretive letter). And the Supreme Court has granted Auer deference to interpretations advanced in even less formal documents, such as an internal advisory memorandum, e.g., Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007), and an amicus brief, e.g., Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 209 (2011).

<sup>6</sup> We recognize that the Supreme Court granted certiorari in Kisor v. Wilkie, 139 S. Ct. 657 (2018) (No. 18-15), which asks whether Auer should be overruled. At present, however, Auer remains binding precedent and we apply it as such.

Fawcett has made no argument that OCC plainly erred in interpreting its own regulation or that OCC's interpretation is inconsistent with the text of its regulation. Fawcett does, however, advance three arguments for why OCC's interpretation in Interpretive Letter 1082 otherwise does not merit deference. We reject each argument in turn.

First, Fawcett argues that Auer deference does not apply because Interpretive Letter 1082 analyzes OCC's regulation governing non-interest charges, 12 C.F.R. § 7.4002, not its "interest" regulation, 12 C.F.R. § 7.4001. This is a non-starter. The bank asked for OCC's guidance "under the National Bank Act and [OCC] regulations." 2007 WL 5393636, at \*1. And under OCC's regulations, a charge is either "interest" or it is a "non-interest charge[]," which includes "deposit account service charges." 12 C.F.R. § 7.4002(a); see id. § 7.4002(c) ("Charges and fees that are 'interest' within the meaning of [the NBA] are governed by § 7.4001 and not by this section."). In classifying the bank's excess overdraft charges as "deposit account service charges," OCC necessarily rejected the conclusion that those charges were "interest."

Second, Fawcett argues that OCC has advanced internally inconsistent interpretations of "interest." She points to OCC's 2001 statement that, in some factual scenarios, "[a] bank that pays a check drawn against insufficient funds may be viewed as having extended credit to the accountholder." 66 Fed. Reg. at 8180. This does not at all contradict OCC's later conclusion that, in cases like this one, a flat excess overdraft charge does not constitute "interest."

And third, Fawcett appears to argue we should not defer to OCC's definition of "interest" in 12 C.F.R. § 7.4001 because that definition simply paraphrases language from the NBA. Smiley, in which the Supreme Court deferred to OCC's definition of "interest" in 12 C.F.R. § 7.4001, forecloses this argument. See 517 U.S. at 739.

Because OCC's interpretation in Interpretive Letter 1082 is "consistent with the regulatory text" and not plainly erroneous, Chase Bank USA, N.A. v. McCoy, 562 U.S. 195, 208 (2011), and because there is no alternative reason to withhold deference, we give it deference.

## B.

Even absent Auer deference, OCC's interpretation is due "a measure of deference proportional to the 'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 159 (2012) (quoting United States v. Mead Corp., 533 U.S. 218, 228 (2001)). The most salient of those factors is the validity of OCC's reasoning. See Doe v. Leavitt, 552 F.3d 75, 82 (1st Cir. 2009).

OCC found that the overdraft fees described to it, including the flat dollar amount excess overdraft fees, were deposit account service charges. Those fees compensate the bank for services "directly connected with the maintenance of a deposit account." 2007 WL 5393636, at \*4. And those are services "that --

pursuant to [the bank's] deposit agreement with the accountholder -- the accountholder has agreed to pay for." Id. OCC's conclusion, on the facts here, is persuasive for at least four reasons: Flat excess overdraft fees (1) arise from the terms of a bank's deposit account agreement with its customers, (2) are connected to deposit account services, (3) lack the hallmarks of an extension of credit, and (4) do not operate like conventional interest charges.

First, flat excess overdraft fees arise from the terms of a bank's deposit account agreement with its customers. Even before Interpretive Letter 1082, the Eleventh Circuit considered this relevant to whether a charge should be classified as a deposit account service charge. See Video Trax, Inc. v. NationsBank, N.A., 33 F. Supp. 2d 1041, 1050 (S.D. Fla. 1998), aff'd, 205 F.3d 1358 (11th Cir. 2000).

Second, flat excess overdraft fees compensate a bank for its deposit account services. For instance, such excess overdraft fees may compensate a bank for the service of continuing to hold open an overdrawn checking account. See 12 C.F.R. § 7.4002(a) (stating that a bank "may charge its customers non-interest charges and fees"). And they may cover the costs incurred in providing this service, such as costs associated with additional monitoring to protect the bank against losses from a deposit accountholder who fails to remedy her overdrawn account. See 70 Fed. Reg. 9127, 9129 (Feb. 24, 2005) (noting that banks "should monitor [overdrawn] accounts on an ongoing basis"); cf. 12 C.F.R. § 7.4002(b)(2)(iv) (stating that a bank must consider, among other things, its "safety and soundness" when setting a non-interest charge). Flat

excess overdraft fees may also advance a bank's compliance with "safe and sound banking principles," *id.* § 7.4002(b)(2), by, for example, deterring customers from misusing those services, *id.* § 7.4002(b)(2)(ii).

Fawcett argues that a flat excess overdraft fee like Citizens Bank's "Sustained Overdraft Fee" is not associated with the provision of any deposit account service, but "is more of a charge in consideration for the time value of money," citing to *Farrell v. Bank of Am., N.A.*, 224 F. Supp. 3d 1016, 1020-21 (S.D. Cal. 2016). The preceding discussion amply counters this claim.

Third, flat excess overdraft fees lack the hallmarks of an extension of credit. Overdraft transactions do not involve a customer reaching out to the bank to borrow money. And there is no underwriting here -- Citizens Bank, under its deposit account agreement, honors the overdraft on the same terms for all its customers. These features separate flat excess overdraft fees like Citizens Bank's "Sustained Overdraft Fees" from interest charges like "late fees" that are "connected with credit extension" and "[p]ayment[s] compensating a creditor . . . for an extension of credit." 12 C.F.R. § 7.4001(a).

And fourth, flat excess overdraft fees do not operate like conventional "interest" charges. A conventional interest charge involves the application of an established rate to the principal balance. But the "Sustained Overdraft Fees" here are each \$30 regardless of the amount of the negative balance of the overdrawn account.

Fawcett argues that some “interest” charges could nonetheless have a flat amount as opposed to being a rate attached to an amount owed. She cites Smiley, in which the Supreme Court noted that there was “no indication” that the NBA’s definition of interest “was limited to charges expressed as a function of time or of amount owing.” 517 U.S. at 745. But the fact that some flat fees may be “interest” is no proof that it is invalid for OCC to classify the flat fees here as something other than “interest.” And in Smiley, the Court considered flat late fees applied to holders of credit card accounts, not deposit accounts. See id.

We find OCC’s reasoning persuasive and hold that Citizens Bank’s “Sustained Overdraft Fees” are “deposit account service charges,” not interest.

### C.

Fawcett makes an argument that, in her view, “the economic reality of banks paying overdrafts” is that the bank is in fact extending credit to its checking account customers. In support of this proposition, she points to language in the “Joint Guidance on Overdraft Protection Programs” that “[w]hen overdrafts are paid, credit is extended.” 70 Fed. Reg. at 9129. The Joint Guidance was issued in 2005 by four federal bank regulators: the OCC, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, and the National Credit Union Administration. Of those four agencies, only OCC is charged with the responsibility of interpreting and administering the NBA.

The statement in the Joint Guidance is inapplicable here for several reasons, of which we

give a few. First, the Joint Guidance was not meant to provide OCC's interpretation of the NBA, nor does it purport to do that. The Joint Guidance's purpose was to "assist" a variety of "insured depository institutions in the responsible disclosure and administration of overdraft protection services." 70 Fed. Reg. at 9127. Second, the Joint Guidance (from 2005) predates Interpretive Letter 1082 (from 2007), and so is not

OCC's last word on overdraft programs or on flat excess overdraft fees. And third, the statement that "[w]hen overdrafts are paid, credit is extended" appears in a section of the Joint Guidance entitled "Safety and Soundness Considerations." Id. at 9129. That section warns that overdraft protection programs "may expose an institution to more credit risk (e.g., higher delinquencies and losses)." Id. In context, then, the statement is meant only to acknowledge that if a bank honors an overdraft and the checking account customer does not replenish her account, the bank will have to charge off the negative balance, which may pose a "credit risk" to the institution. Id.

#### D.

Fawcett's argument, adopted by the dissent, that the district court erred in not allowing discovery fails. The dissent says that Fawcett should be allowed to probe "the rationales and factual basis for Citizens Bank's 'Sustained Overdraft Fees.'" But Congress entrusted OCC, not inexpert federal judges, with interpreting "the meaning of the banking laws." Smiley, 517 U.S. at 739. The dissent's

case-by-case approach would upend this order, at a cost to the clarity needed by the financial industry.

OCC's guidance forecloses this approach. This appeal concerns a pure question of law and does not turn on discovery.

\* \* \*

We hold only that flat excess overdraft fees like Citizens Bank's "Sustained Overdraft Fees" are not "interest" under the NBA.

Citizens Bank urges a broad ruling that "no fee connected to the overdraft is interest under § 7.4001." The bank argues that regulatory history establishes this proposition. We decline to take such a sweeping approach, given that the considerations surrounding overdraft fees are, in OCC's words, "complex and fact-specific," and because we need not adopt such a position to resolve this case. When "it is not necessary to decide more, it is necessary not to decide more." PDK Labs. Inc. v. U.S. D.E.A., 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

### III.

We affirm.

**-Dissenting Opinion Follows-**

**LIPEZ, Circuit Judge, dissenting.** Although I acknowledge that this is a close case, I cannot agree with my colleagues that Barbara Fawcett's complaint should be dismissed as a matter of law for failure to state a claim. Fawcett insists that, at a minimum, she is entitled to seek information about the rationales and factual basis for Citizens Bank's "Sustained Overdraft Fees." I agree. Accordingly, I respectfully dissent.

Fawcett wisely does not challenge the OCC's well-established view that, under 12 C.F.R. § 7.4001(a), the fee imposed when a checking account is first overdrawn is a service charge rather than interest at least where, as here, the overdraft fee does not exceed the returned check fee.<sup>7</sup> Rather, she challenges the bank's sustained fees, which are charged over the course of ten days if an account remains overdrawn. Those fees unquestionably relate to the accountholder's continuing "use" of the bank's money over time -- a service for which banks ordinarily charge interest. Fawcett thus argues that the OCC's treatment of initial overdraft fees does not support dismissal of her complaint challenging the sustained fees assessed against her.

Fawcett's reasoning draws support from both the OCC's and Citizens Bank's depiction of typical

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<sup>7</sup> Citizens Bank's initial "Overdraft Fee" and its "Returned Item Fee" is the same -- \$35. When the charge stemming from an overdraft does not differ depending on whether the bank advances funds to the accountholder or refuses to do so, the fee is plainly for an account service (handling the overdraft) and not for the de facto "credit" given to the customer whose debit is paid despite her inadequate funds.

overdraft practices. The OCC has described a bank's payment of checks drawn on insufficient funds as largely a bookkeeping accommodation for its customers: "Where a customer creates debits on his or her account for amounts in excess of the funds available in that account, a bank may elect to honor the overdraft and then recover the overdraft amount as part of its posting of items and clearing of the depositor's account." OCC Interpretive Letter No. 1082, 2007 WL 5393636, at \*2 (May 17, 2007). At oral argument before our court, Citizens Bank similarly explained that, in the ordinary case, banks providing overdraft coverage at their discretion are merely resequencing accountholder deposits and withdrawals that will soon balance out. The resequencing characterization becomes increasingly inapt, however, when an accountholder's deposits do not quickly cure the overdraft. That is, as the days pass without offsetting deposits, the overdraft coverage looks more and more like a short-term loan. Borrowers typically pay for loans in the form of interest; hence, Fawcett's theory that the sustained overdraft charges for delayed payment are in effect interest has traction.

My colleagues hold that Interpretive Letter 1082 conclusively forecloses characterizing Citizens Bank's Sustained Overdraft Fees as interest, pointing to the Letter's footnote 3 as proof that the OCC has deemed "the precise practice here...lawful." Maj. Op. at II.A. In footnote 3, the OCC reports that the bank whose inquiry prompted the Letter imposes initial overdraft fees of \$23 or \$34, depending on the frequency of overdrafts, and "also may charge a Continuous Overdraft Charge of \$5 per business day

from the fourth through eleventh calendar day that an account is overdrawn.” 2007 WL 5393636, at \*1 n.3 (emphasis added). Nowhere else in the Letter, however, does the OCC make specific reference to the continuous charges, and the Letter contains no analysis of whether those fees constitute interest.

To understand the significance of the footnote, it is important to recognize what the OCC was specifically addressing in the Letter. The Letter responded to questions posed by an unnamed bank that had been sued by plaintiffs who claimed the bank “may not recover overdraft amounts and fees owed on an account from public benefits payments deposited in that same account by a California depositor.” Id. at \*2. The bank asked whether it could “honor items for which there are insufficient funds in depositors’ accounts,” recover the overdraft amounts as part of its “routine maintenance of these accounts,” and deduct “overdraft fees from depositors’ accounts for doing so.” Id. at \*1. The bank also sought confirmation that its overdraft practices did not trigger OCC regulations involving the application of “state law to a national bank’s deposit-taking activities.” Id.

I cannot conclude that the OCC, in responding to these questions and making only a passing descriptive reference to the bank’s continuous overdraft charges, decided sub silentio the important issue of whether such fees constitute interest. To reach that conclusion, we must disregard the OCC’s own observations in 2001, when it revisited the definition of “interest” for purposes of 12 C.F.R. § 7.001(a).

At that time, the OCC recognized that “[a] bank that pays a check drawn against insufficient funds may be viewed as having extended credit to the accountholder.” 66 Fed. Reg. 8178- 02, 8180, 2001 WL 68132 (Jan. 30, 2001). In other words, even from the outset, a bank’s payment of a “not sufficient funds” (“NSF”) check reasonably could have been characterized as a loan to its accountholder, with the related fees properly classified as interest. The agency, however, adhered to its prior view that the initial overdraft transaction is not an extension of credit, and, accordingly, the fee imposed should not be treated categorically as interest under § 7001(a). Importantly, however, the OCC did not reject classifying some “portion of a charge imposed in connection with paying an overdraft” as interest. 66 Fed. Reg. 34784-01, 2001 WL 731640, at \*34787 (July 2, 2001). In fact, the OCC declined to decide whether the portion of such a fee that exceeds the amount charged when the bank refuses payment may constitute interest, noting that resolving this question involves “complex and fact-specific concerns.” Id.

Interpretive Letter 1082, which was issued six years later, simply does not resolve the issue. The OCC was not specifically asked to consider, and the Letter does not purport to address, whether any charges exceeding a returned check fee -- which would include the “sustained” fees at issue here -- constitute interest. To be sure, it is possible that the OCC’s cursory reference to the continuous charges means that it saw no obvious or material distinction between the initial and subsequent fees. Silence, however, is not guidance, and we would thus need to

infer a ruling on a debated issue from between the lines of the Letter. I do not see how we can defer to an interpretation that the OCC never clearly made on an issue that it previously described as complex and fact-specific.

Nor do I believe the other reasons articulated by the majority permit us to conclude that Fawcett has failed to plausibly plead that Citizens Bank's sustained overdraft fees may be interest charges. It is irrelevant that the "Sustained Overdraft Fees" are limited in number and duration -- specifically, three charges over ten days -- and therefore do not resemble classic interest charges. The Supreme Court has expressly rejected the notion that charges that "do not vary based on the payment owed or the time period of delay" cannot constitute interest. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 745 (1996) (internal quotation marks omitted). In addition, although the sustained fees may reflect payments for services related to monitoring and maintaining the overdrawn account, see Maj. Op. at II.B, the majority's speculation about such services does not justify discrediting the alternative possibility that the fees are instead designed to deter late payment and, as "late fees," constitute interest. See 12 C.F.R. § 7.4001(a) (listing "late fees" as within "[t]he term 'interest' as used in 12 U.S.C. § 85").

Likewise, while I agree that it is significant that Citizens Bank's discretionary decision to fund, or not, its customers' overdrafts lacks the ordinary hallmark of a lender-debtor relationship, see Maj. Op. at II.B, the bank's unilateral choice to honor or reject an NSF check does not foreclose a different relationship once a customer has failed to repay the

“loan” via the intended short-term resequencing of credits and debits. Indeed, an accountholder’s failure to promptly cure the overdraft inevitably puts the bank and its customer on different footing and allows for the possibility that the ongoing overdraft charges could constitute interest.

Although the classification of Citizens Bank’s Sustained Overdraft Fees is a question of law, the answer -- as the OCC acknowledged in 2001 -- could depend on the facts Fawcett seeks to obtain through discovery. Given that the OCC has declined to answer that classification question, it is properly our role to determine the nature of the fees here based on all relevant facts. Simply put, we should not be deciding as a matter of law, based solely on the complaint, the “complex and fact-specific” issues concerning Citizens Bank’s sustained fees. 2001 WL 731640, at \*34787.

I therefore respectfully dissent from my colleagues’ decision to affirm the dismissal of Fawcett’s complaint.

APPENDIX D

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 18-1443

**BARBARA FAWCETT,**  
*Plaintiff - Appellant,*

v.

**CITIZENS BANK, N.A.,**  
*Defendant - Appellee*

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF  
MASSACHUSETTS

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Before

Howard, Chief Judge  
Torruella, Lynch, Lipez, Thompson, Kayatta, and  
Barron,<sup>8</sup> Circuit Judges

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ORDER OF COURT

Entered; June 4, 2019

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<sup>8</sup> Judge Barron is recused and did not participate in the determination of this matter.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

**LIPEZ, Circuit Judge, Dissenting from the denial of panel rehearing.**

By the Court:

Maria R. Hamilton, Clerk

cc:

Edward F. Haber, Patrick J. Vallely, Brenda R. Sharton, David Zimmer, Bryan Gowdy, Hassan A. Zavareei, Jonathan M. Streisfeld

## APPENDIX E

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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**BARBARA FAWCETT,**  
*Plaintiff*

v.

**CITIZENS BANK, N.A.,**  
*Defendant*

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C.A. No. 17-11043-TSH

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### COMPLAINT

Plaintiff Barbara Fawcett (“Plaintiff” or “Ms. Fawcett”), by and through her counsel, on behalf of herself and the members of the putative Class (defined below), alleges the following against the defendant, Citizens Bank, N.A. (“Citizens Bank”) based on personal knowledge as to herself, and on information and belief and investigation of her counsel as to the remaining allegations.

#### Introduction

1. Plaintiff brings this class action seeking redress for defendant Citizens Bank’s past and continuing practice of charging its checking account

customers usurious interest in violation of the National Bank Act, 12 U.S.C. Sec. 1, et seq.

2. As explained in detail below, when a Citizens Bank checking account customer incurs a debit to their account (such as a check, ATM withdrawal, or debit card transaction) which exceeds the amount of money in their account, and Citizens Bank honors the debit (i.e., pays the check, permits the ATM withdrawal, or pays the debit card transaction), Citizens Bank immediately charges the customer a fee of \$35, which Citizens Bank calls an “Overdraft Fee.”

3. If a Citizens Bank checking account customer causes a check to be presented for payment and Citizens Bank does not honor the check and instead returns the check due to “insufficient funds” in the account, Citizens Bank also charges a \$35 charge against the customer’s account, which Citizens Bank refers to as a “Returned Item Fee.” If Citizens Bank returns the check due to insufficient funds, the \$35 Returned Item Fee is the only fee Citizens Bank charges as a result of a check having been presented for payment which exceeded the balance remaining in the account.

4. If, however, Citizens Bank honors an overdraft by advancing the deficiency to the customer, and if the customer does not repay that advance (by depositing sufficient funds into the account to bring the account balance positive or at least zero) within a very short period, Citizens Bank charges what it calls a “Sustained Overdraft Fee”” This charge is in addition to the initial “Overdraft Fee” Citizens Bank charges at the time the customer’s account was first

overdrawn. Citizens Bank continues to charge the so-called “Sustained Overdraft Fee” over regular intervals until the customer repays Citizen Bank’s monetary advances by returning his or her account to a positive balance.

5. The so-called “Sustained Overdraft Fee” is, in reality, interest that Citizens Bank charges to its customers for the use, forbearance, or detention of the money it has loaned to its customer by advancing the funds necessary to pay the overdraft. Unlike the initial “Returned Item Fee” and the “Overdraft Fee,” which are fees Citizens Bank charges for the service of responding when a customer causes a check or other debit to be presented when there are insufficient funds in the customer’s account, the only service or thing of value that Citizens Bank provides in exchange for the so-called “Sustained Overdraft Fee” is the continued use of the funds it previously loaned to the customer, which are still owed by the customer to Citizens Bank. Accordingly, the fee is, in fact, an interest charge.

6. The National Bank Act limits the rate at which a national bank such as Citizens Bank can charge interest. Citizens Bank has and continues to charge Plaintiff and the members of the putative class interest (camouflaged as “Sustained Overdraft Fees”) at annualized interest rates substantially greater than the maximum interest rate that the National Bank Act permits Citizens Bank to charge.

7. Citizens Bank’s unlawful charges of interest that exceed the maximum interest rate Citizens Bank may charge under the National Bank Act has

damaged plaintiff and Class Members (defined below).

8. Pursuant to the National Bank Act, Citizens Bank is liable to Plaintiff and the Class Members for twice the interest Citizens Bank has charged and continues to charge them in violation of the National Bank Act.

**Parties**

9. Plaintiff Barbara Fawcett is a citizen and resident of Hubbardston, Massachusetts. She has had a checking account with Citizens Bank for many years.

10. Defendant Citizens Bank, N.A. is a national bank with its headquarters and principal place of business located in Providence, Rhode Island. Among other activities, Citizens Bank is engaged in the business of providing retail banking services to consumers, including Plaintiff and Class Members. Citizens Bank operates banking centers, and thus conducts business, throughout the Commonwealth of Massachusetts.

**Jurisdiction**

11. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1337 because this action arises under the laws of the United States, namely the National Bank Act, 12 U.S.C. § 1, et seq.

12. Citizens Bank regularly and systematically provides retail banking services throughout the Commonwealth of Massachusetts, including in this

district, and provides retail banking services to its customers, including Plaintiff and other Class Members, in this district. As such, it is subject to the jurisdiction of this Court and the mandate of the National Bank Act.

**Venue**

13. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Citizens Bank is subject to personal jurisdiction in this Court and regularly conducts business within this district through its numerous branches. Additionally, a substantial part of the events giving rise to the claims asserted herein occurred and continues to occur in this district.

**Factual Allegations**

**I. Citizens Bank's Overdraft Practices**

14. Citizens Bank is a national bank located in Providence, Rhode Island.

15. Citizens Bank operates in eleven states (Connecticut, Delaware, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Vermont), and it is the thirteenth largest retail bank in the United States measured by total assets.

16. Citizens Bank offers checking account services to customers. Citizens Bank has over two million retail checking account customers.

17. An overdraft occurs when a customer does not have enough money in the customer's account to cover a check or other debit to the account.

18. In the event of an overdraft, Citizens Bank charges its customer either what it calls a "Returned Item Fee" if Citizens Bank returns a check or what it calls an "Overdraft Fee" if Citizens Bank honors the check or debit by advancing or loaning the funds to cover the account deficiency.

19. At present, Citizens Bank's charge for its "Returned Item Fee" and its "Overdraft Fee" is \$35.00 for each check Citizens Bank returns without payment and each debit for which Citizens Bank loans funds to the customer due to there being insufficient funds to pay the debit. Plaintiff makes no claim in this action regarding those Returned Item Fees and Overdraft Fees.

20. When Citizens honors a check or debit in excess of the amount of money available in a customer's account by loaning the customer the deficient funds and the customer does not repay those funds within a specified number of business days, Citizens Bank charges the customer what it describes as a "Sustained Overdraft Fee." The so-called "Substantial Overdraft Fee" is different than, separate and apart from, and in addition to the above described "Returned Item Fee" and "Overdraft Fee."

21. At present, Citizens Bank charges \$30.00 for its so-called "Sustained Overdraft Fee" when Citizens Bank's loan to cover the overdraft remains unpaid because the account remains overdrawn for

four consecutive business days. Citizens Bank then charges an additional \$30.00 for another so-called “Sustained Overdraft Fee” if the loan is not repaid for another three consecutive business days and, finally, Citizens Bank charges another \$30.00 for a so-called “Sustained Overdraft Fee” if the loan is not repaid for another three consecutive business days.

22. That is, Citizens Bank charges up to a total of \$90.00 for loaning its customer the funds to cover the overdraft deficiency if the loan is not repaid within ten consecutive business days.

23. The amount of the so-called “Sustained Overdraft Fees” depends entirely upon the number of consecutive business days during which the customer owes Citizens Bank the borrowed funds. That is, the longer the loan is outstanding or unpaid, the greater the total amount that Citizens Bank charges as interest disguised as its so-called “Sustained Overdraft Fees.”

24. Prior to March 8, 2016, the amount and frequency that Citizens Bank charged for its so-called “Sustained Overdraft Fees” were different than they are today.

25. Specifically, prior to March 8, 2016, in addition to the initial \$35 “Overdraft Fee” charged at the time of the overdraft, Citizens Bank would charge \$6.99 for a so-called “Sustained Overdraft Fee” if the funds that Citizens Bank had loaned its customers to pay the overdraft were not repaid for three consecutive business days. Prior to March 8, 2016, Citizens Bank would then charge an additional so-called “Sustained Overdraft Fee” in the amount of

\$6.99 per day for each additional business day that the loan remained outstanding and unpaid up to ten days, for a total of \$69.90 (i.e., one interest charge of \$6.99 for each of the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth business days the loan is outstanding).

26. As is true today, prior to March 8, 2016, the amount of the so-called “Sustained Overdraft Fees” depended entirely upon the number of consecutive business days during which the customer’s account retained a negative balance. That is, the longer an account remained overdrawn—the longer the loan remained unpaid—the greater the total amount of interest that Citizens Bank charged.

27. At all relevant times, the only service or thing of value that Citizens Bank provided in return for its so-called “Sustained Overdraft Fee” was the continued extension of credit to the customer. The charge is based solely on the indebtedness to the bank remaining unpaid by the customer for a period of time, and the total amount of such charges is proportional to the amount of time during which the account retains a negative balance. As such, Citizens Bank’s so-called “Substantial Overdraft Fees” were, and continue to be, interest that the National Bank Act regulates.

## **II. Ms. Fawcett’s Experience**

28. Plaintiff Barbara Fawcett presents a textbook example of why states and the federal government enact usury laws. The examples of her experience below demonstrate that Citizens Bank has

repeatedly charged Ms. Fawcett interest at rates often exceeding 1,000% annualized.

29. Ms. Fawcett has been a Citizens Bank customer for many years.

30. Ms. Fawcett lives on a fixed income.

31. Citizens Bank has charged against Ms. Fawcett's checking account so-called "Sustained Overdraft Fees" under both Citizens Bank's current rates for such charges and the rates as they existed prior to March 8, 2016, as described above.

32. Below are examples of Citizens Bank charging Ms. Fawcett usurious interest.

***October 2015 So-Called "Sustained Overdraft Fees"***

33. On October 1, 2015, Ms. Fawcett overdrew her account as a result of three debits, each of which Citizens Bank honored (i.e., Citizens Bank loaned Ms. Fawcett the funds it used to pay the debits to the payees on Ms. Fawcett's behalf). Citizens Bank charged Ms. Fawcett an initial "Overdraft Fee" of \$35.00 for each of the three debits, for a total of \$105.00. No claim is made in this action regarding those "Overdraft Fee" charges.

34. Ms. Fawcett was unable to repay promptly Citizens Bank's loan by returning her account to a positive balance. Citizens Bank charged Ms. Fawcett interest (labeled by Citizens Bank as so-called "Sustained Overdraft Fees") of \$6.99 on each of six consecutive business days—October 6, 2015; October

7, 2015; October 8, 2015; October 9, 2015; October 13, 2015; and October 14, 2015—for a total of \$41.94.

35. Citizens Bank provided no services or thing of value to Ms. Fawcett in exchange for the \$41.95 it charged Ms. Fawcett in October 2015, other than the continued extension of credit to Ms. Fawcett. Accordingly, although Citizens Bank characterized these charges as “Sustained Overdraft Fees,” the charges were, in reality, interest charges for an outstanding debt owed by Ms. Fawcett to Citizens Bank.

36. Based on the amount of Citizens Bank’s outstanding loan to Ms. Fawcett indicated by the negative opening daily balances in Ms. Fawcett’s account on the dates of each of the interest charges—October 6, 2015; October 7, 2015; October 8, 2015; October 9, 2015; October 13, 2015; and October 14, 2015—Citizens Bank charged Ms. Fawcett interest at annual rates of 1,016%, 710%, 903%, 728%, 623%, and 609%, respectively.

*January/February 2016 So-Called “Sustained Overdraft Fees”*

37. On January 26, 2016, Ms. Fawcett overdrew her account as a result of two debits, each of which Citizens Bank honored (i.e., Citizens Bank loaned Ms. Fawcett the funds it used to pay the debits to the payees on Ms. Fawcett’s behalf). Citizens Bank charged Ms. Fawcett an initial “Overdraft Fee” of \$35.00 for each of the two debits, for a total of \$70.00. No claim is made in this action regarding those “Overdraft Fee” charges.

38. Ms. Fawcett was unable to repay promptly Citizens Bank's loan by returning her account to a positive balance. Hence, Citizens Bank charged Ms. Fawcett interest (labeled by Citizens Bank as so-called "Sustained Overdraft Fees") of \$6.99, on each of nine consecutive business days—January 29, 2016; February 1, 2016; February 2, 2016; February 3, 2016; February 4, 2016; February 5, 2016; February 8, 2016; February 9, 2016; and February 10, 2016—for a total of \$62.91.

39. Citizens Bank provided no services or thing of value to Ms. Fawcett in exchange for the \$62.91 it charged Ms. Fawcett in late January and early February 2016, other than the continued extension of credit to Ms. Fawcett. Accordingly, although Citizens Bank characterized these charges as "Sustained Overdraft Fees," the charges were, in reality, interest charges for an outstanding debt owed by Ms. Fawcett to Citizens Bank.

40. Based on the amount of Citizens Bank's outstanding loan to Ms. Fawcett indicated by the negative opening daily balances in Ms. Fawcett's account on the dates of each of the interest charges—January 29, 2016; February 1, 2016; February 2, 2016; February 3, 2016; February 4, 2016; February 5, 2016; February 8, 2016; February 9, 2016; and February 10, 2016—Citizens Bank charged Ms. Fawcett interest at annual rates of 656%, 640%, 308%, 315%, 526%, 516%, 506%, 496%, and 2,656%, respectively.

*Late March/Early April 2016 So-Called  
"Sustained Overdraft Fees"*

41. On March 21, 2016, Ms. Fawcett overdrew her account as a result of two debits, each of which Citizens Bank honored (i.e., Citizens Bank loaned Ms. Fawcett the funds it used to pay the debits to the payees on Ms. Fawcett's behalf). Citizens Bank charged Ms. Fawcett an initial "Overdraft Fee" of \$35.00 for each of the two debits, for a total of \$70.00. No claim is made in this action regarding those "Overdraft Fee" charges.

42. Ms. Fawcett was unable to repay promptly Citizens Bank's loan by returning her account to a positive balance. Hence, Citizens Bank charged Ms. Fawcett interest (labeled by Citizens Bank as so-called "Sustained Overdraft Fee") of \$30.00 on March 25, 2016. Three business days later, on March 30, 2016, when Ms. Fawcett's account remained negative, Citizens Bank charged Ms. Fawcett a second so-called "Sustained Overdraft Fee" of \$30.00. Three business days later, on April 4, 2016, when Ms. Fawcett's account remained negative, Citizens Bank charged Ms. Fawcett a third so-called "Sustained Overdraft Fee" of \$30.00, for a total of \$90.00 in such so-called "Sustained Overdraft Fees" during late March and early April 2016.

43. Citizens Bank provided no services or thing of value to Ms. Fawcett in exchange for the \$90.00 it charged Ms. Fawcett in late March and early April 2016, other than the continued extension of credit to Ms. Fawcett. Accordingly, although Citizens Bank characterized these charges as "Sustained Overdraft Fees," the charges were, in reality, interest charges

for an outstanding debt owed by Ms. Fawcett to Citizens Bank.

44. Based on the amount of Citizens Bank's outstanding loan to Ms. Fawcett indicated by the negative daily balances in Ms. Fawcett's account on the dates of each of the interest charges—March 25, 2016; March 30, 2016; and April 4, 2016—Citizens Bank charged Ms. Fawcett interest at annual rates of 505%, 898%, and 814%, respectively.

*Late July/Early August 2016 So-Called  
“Sustained Overdraft Fees”*

45. On July 25, 2016, Ms. Fawcett overdrew her account as a result of one debit, which Citizens Bank honored (i.e., Citizens Bank loaned Ms. Fawcett the funds it used to pay the debit to the payee on Ms. Fawcett's behalf). Citizens Bank charged Ms. Fawcett an initial “Overdraft Fee” of \$35.00 for that debit. No claim is made in this action regarding that “Overdraft Fee” charge.

46. Ms. Fawcett was unable to repay promptly Citizens Bank's loan by returning her account to a positive balance. Hence, Citizens Bank charged Ms. Fawcett interest (labeled by Citizens Bank as a so-called “Sustained Overdraft Fee”) of \$30.00 on July 29, 2016. Three business days later, on August 3, 2016, Citizens Bank's loan to Ms. Fawcett remained unpaid. Hence, Citizens Bank charged Ms. Fawcett a second so-called “Sustained Overdraft Fee” of \$30.00. Three business days later, on August 8, 2016, when Citizens Bank's loan to Ms. Fawcett remained unpaid, Citizens Bank charged Ms. Fawcett a third so-called “Sustained Overdraft Fee” of \$30.00, for a

total of \$90.00 in such so-called “Sustained Overdraft Fees” in late July and early August 2016.

47. Citizens Bank provided no further services or thing of value to Ms. Fawcett in exchange for the \$90.00 it charged Ms. Fawcett in late July and early August 2016, other than the continued extension of credit to Ms. Fawcett. Accordingly, although Citizens Bank characterized these charges as “Sustained Overdraft Fees,” the charges were, in reality, interest charges for an outstanding debt owed by Ms. Fawcett to Citizens Bank.

48. Based on the amount of Citizens Bank’s outstanding loan to Ms. Fawcett indicated by the negative daily balances in Ms. Fawcett’s account on the dates of each of the interest charges—on July 29, 2016; August 3, 2016; and August 8, 2016—Citizens Bank charged Ms. Fawcett interest at annual rates of 4,264%, 2,459%, and 1,384%, respectively.

*Summary of the Usurious and Interest Charged to Ms. Fawcett.*

49. The above examples of the usurious interest that Citizens Bank charged Ms. Fawcett are just a small sample of the so-called “Sustained Overdraft Fees” that Citizens Bank charged against Ms. Fawcett’s account in violation of the National Bank Act.

50. During the eighteen-month period from August 2015 through January 2017, Citizens Bank charged a total of fifty-two so-called “Sustained Overdraft Fees” against Ms. Fawcett’s account, for a total of \$839.70.

51. During the same eighteen-month period, based on the daily negative balances on the dates of each so-called “Sustained Overdraft Fee,” the average annual interest rate that Citizens Bank charged Ms. Fawcett was 931%, with individual charges ranging from annual interest rates of 265% to 4,264%.

52. Citizens Bank’s modification of the timing of its so-called “Sustained Overdraft Fees” as of March 8, 2016, as described above, increased substantially the effective annual interest rate represented by such charges. For example, prior to March 8, 2016, the average annual rate of interest represented by so-called “Sustained Overdraft Fees” charged to Ms. Fawcett was 589%; after March 8, 2016, the average annual rate leapt to 1,421%.

53. Upon information and belief, because Citizens Bank limits the amount of credit it extends to checking account holders through its overdraft program (i.e., when an accountholder’s account becomes sufficiently negative, Citizens Bank will stop honoring debits), the annual interest rate reflected in so-called “Sustained Overdraft Fees” is always or almost always well into the hundreds of percentage points.

### **III. Citizens Bank’s So-Called “Sustained Overdraft Fees” Are Unlawful Interest Under the National Bank Act.**

54. Claims for usury against a national bank such as Citizens Bank are governed exclusively by the National Bank Act, 12 U.S.C. §§ 85, 86.

55. The National Bank Act provides for the following restriction on the interest a national bank may charge:

Any [national bank] may take, receive, reserve, and charge on any loan or...or other evidences of debt, interest [1] at the rate allowed by the laws of the State...where the bank is located, or [2] at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, ***whichever may be the greater, and no more.***

12 U.S.C. § 85 (emphasis added).

56. Under alternative [1] quoted above, a bank is “located” in the state that it designates in its organization certificate. *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 310–12 (1978).

57. Records of the Office of the Comptroller of the Currency indicate that Citizens Bank is located in Providence, Rhode Island. Accordingly, Rhode Island usury law dictates the maximum interest applicable under alternative [1] of the National Bank Act.

58. Rhode Island law itself imposes a “greater of” rule with respect to interest:

[No company] shall, directly or indirectly, charge, or take interest on a loan...at a rate that shall exceed the greater of [a] twenty-one percent (21%) per annum or...[b] nine

percentage points (9%) plus an index that is the domestic prime rate as published in the Money Rates section of The Wall Street Journal on the last business day of each month preceding the later of the date of the debtor's agreement or the date on which the interest rate is redetermined in accordance with the terms of the debtor's agreement.

R.I. Gen. Laws § 6-26-2(a, b).

59. The domestic prime rate published by The Wall Street Journal never exceeded 12% during the Class Period (defined below); therefore, the maximum interest rate under Rhode Island law for the entire Class Period is the twenty-one percent (21%) per annum rate described in alternative [a] above. Therefore, the maximum interest rate under alternative [1] the National Bank Act is likewise twenty-one percent (21%) per annum for the entire Class Period.

60. Alternative [2] of the National Bank Act, during the Class Period, was never greater than the twenty-one percent (21%) annum, the maximum interest rate permitted under alternative [1] as explained above. Specifically, the discount rate for the Federal Reserve Bank of Boston (which covers Rhode Island) ranged from 0.75% to 1.50% for primary credit and 1.25% to 2.00% for secondary credit. Therefore, the permissible interest rate under alternative [2] ranged from a minimum of 1.75% to a maximum of 3.00% during the Class Period. Therefore, pursuant to the "greater of" formulation of the National Bank Act, the maximum permissible interest rate chargeable by Citizens Bank during the

entire Class Period was always option [1] because option [1] was always greater than option [2]. As noted, the maximum annual interest pursuant to option [1], as dictated by Rhode Island law, was 21% throughout the Class Period.

61. As noted, 12 U.S.C. § 85 restricts “interest” charges “on any loan or...or other evidences of debt.” When Citizens Bank pays a debit on behalf of a customer even though the customer lacks sufficient funds in the customer’s account to pay for the debit, Citizens Bank provides a “loan” or “other evidence[] of debt” to a customer. Citizens Bank directs customers that “[o]nce you have overdrawn your account you must bring it to a positive balance as soon as possible,” reflecting Citizens Bank’s understanding that customers are obligated to repay any debt incurred to Citizens Bank as a result of it having honored an overdraft.

62. Interest, by definition, is compensation for the use or forbearance of money or as damages for its detention. Citizens Bank’s so-called “Sustained Overdraft Fee” is charged to a customer for the use or forbearance of money, and such charges, regardless of whatever label Citizens Bank attaches to them, are in fact interest.

63. By covering overdrafts, Citizens Bank extended credit to Plaintiff and other Class Members for use in their checking accounts. Such extensions of credit are loans made without a specific loan agreement. 12 U.S.C. § 84 defines the term “loans and extensions of credit” as including any and all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay

the funds. In addition, federal banking regulators have indicated in guidance to national banks that “[w]hen overdrafts are paid, credit is extended.” Joint Guidance on Overdraft Protection Programs, 70 Fed. Reg. 9127, 9129 (Feb. 24, 2005).

64. The National Bank Act permits Citizens Bank to charge Plaintiff and Class Members “no more” than 21% annualized interest on these loans and extensions of credit.

65. The so-called “Sustained Overdraft Fees” charged to Plaintiff constituted interest charges ranging from 265% to 4,264%, which means the lowest interest charges to Plaintiff were more than 12 times the interest rate permissible under the National Bank Act, while the highest interest charges were more than 270 times the permissible rate.

66. Because the so-called “Sustained Overdraft Fees” that Citizens charged Plaintiff and the Class Members exceeded the maximum interest rate a national bank may charge under the National Bank Act for ongoing indebtedness of Plaintiff and other Class Members to the Citizens Bank, such so-called “Sustained Overdraft Fees” were usurious and illegal under the National Bank Act.

#### **Class Action Allegations**

67. Plaintiff brings this action against Citizens Bank under Fed. R. Civ. Proc. 23(b)(2) and 23(b)(3) on her own behalf and on behalf of a class (the “Class,” members of which are the “Class Members”) defined as follows:

All checking account customers of Citizens Bank whom Citizens Bank charged one or more so-called "Sustained Overdraft Fee" at any time within the time period commencing two years prior to the filing of the initial complaint in this action (the "Class Period").

68. Plaintiff reserves the right to appropriately change the definition of the class.

69. Class Members are so numerous as to make it impracticable to bring all Class Members before the Court. The exact number of Class Members is unknown to Plaintiff but is believed to number in at least the thousands. The identity of all class members will be discoverable from Citizens Bank's computerized records.

70. Plaintiff's claim is typical of the claims of all Class Members she seeks to represent, in that all of them were similarly assessed so-called "Sustained Overdraft Fees" by Citizens Bank in the same manner, pursuant to the same policy, and using the same centralized computer system.

71. Citizens Bank, through its unlawful conduct as described herein, has damaged Plaintiff and the Class Members by charging Plaintiff and all Class Members interest charges substantially in excess of those permissible under the National Bank Act. Citizens Bank's common course of unlawful conduct has caused Plaintiff to suffer damages (i.e., unlawful and usurious interest charges) identical in the way in which the other Class Members suffered damages.

72. There are questions of law and fact common to the Class Members, and those common questions predominate over any questions affecting only individual Class Members.

73. The two questions of law and fact central to this case, which apply equally to Plaintiff and the Class Members, are the following:

a. The manner in which Citizens Bank applies so-called "Sustained Overdraft Fees"; and

b. Whether Citizens Bank's charges of so-called "Sustained Overdraft Fees" are interest under the National Bank Act.

74. Resolution of the two common questions described above will determine the outcome of Plaintiff's claim. That is, if Plaintiff's allegations regarding Citizens Bank's practices with respect to so-called "Sustained Overdraft Fees" are proven, and if such so-called "Sustained Overdraft Fees" are determined to be interest under the National Bank Act, Citizens Bank will be liable to Plaintiff and all Class Members for Citizens Bank's violation of the National Bank Act.

75. The calculation of damages for each member of the Class will be mechanical, based on Citizens Bank's own records reflecting the amount of interest it charged each Class Member for so-called "Sustained Overdraft Fees." Damages will be calculated by a simple classwide methodology, simply multiplying the unlawful interest charged by two, because pursuant to the National Bank Act, Citizens

Bank is liable to each class member for twice the usurious interest it charged them.

76. Plaintiff will assure the adequate representation of all the Class Members. She has no conflicts that could compromise her abilities to represent the Class. Plaintiff has no interests that are antagonistic to the interests of the Class, and Plaintiff will vigorously pursue the claims of the Class Members.

77. Plaintiff has retained experienced and competent lawyers who are well-versed in complex class action litigation and who will fairly and adequately represent the interests of the Class Members. Plaintiff's counsel satisfy all requirements of Fed. R. Civ. P. 23(g). Specifically, they have performed extensive work in identifying or investigating potential claims in the action; they have extensive experience in handling class actions, other complex litigation, and the types of claims asserted in this action; they have broad knowledge of the applicable law; and they have ample resources, which they can and will commit to representing the Class.

78. Citizens Bank has acted on grounds generally applicable to Plaintiff and the Class Members, as alleged herein, making appropriate an award of final injunctive relief and incidental damages with respect to all such persons.

79. Class actions provide fair and efficient methods of adjudicating the controversies described in this complaint. The substantive claims of Plaintiff and the Class Members are the same and require the

same evidentiary proof of the existence, terms, and administration of Citizens Bank's overdraft policies.

80. Class action treatment is superior to the alternatives for the fair and efficient adjudication of this controversy. Such treatment will permit large numbers of similarly situated persons simultaneously to prosecute their common claims, which in amount are modest individually, in a single forum, and without the duplication of effort and expense that numerous individual actions would entail. Prosecution of separate actions by individual Class Members would also create the risk of inconsistent or varying adjudications with respect to such persons that would establish incompatible standards of conduct for Citizens Bank.

81. Because the losses suffered by individual Class Members may be relatively small, the expense and burden of individual litigation makes it impracticable and impossible for Class Members individually to seek redress for the wrongs done to them. Any Class Members who are aware of their rights against Citizens Bank would likely be unable to secure counsel to litigate their claims on an individual basis because of the relatively small individual damages they have suffered and/or the value of individual injunctive relief. Hence, a class action is the only feasible means of recovery for Class Members. Without a class action, Citizens Bank will continue to charge usurious interest to Class Members, and Citizens Bank will continue to violate federal law, reaping and retaining the proceeds of its illegal practices.

82. The identities of Class Members and information required for notice and damages calculations can be obtained from Citizens Bank's records.

**Claim**

**Count I – Violation of National Bank Act**

83. Plaintiff realleges and incorporates by reference all of the allegations in the preceding paragraphs.

84. The so-called "Sustained Overdraft Fees" Citizens Bank charged Plaintiff and other Class Members were interest under the National Bank Act, and were therefore subject to the limitations on interest charges pursuant to 12 U.S.C. § 85.

85. Citizens Bank charged Plaintiff and the Class Members interest that far exceeded the annual rate of interest permissible under the National Bank Act, which, as explained above, for Citizens Bank, was 21% during the entire Class Period.

86. As a direct and proximate cause of Citizens Bank's violation of the National Bank Act, Plaintiff and other Class Members have been damaged.

87. Pursuant to 12 U.S.C. § 86, Citizens Bank is liable to Plaintiff and other Class Members for twice the amount of usurious interest Citizens Bank has charged them.

**Prayer for Relief**

WHEREFORE, Plaintiff, individually and on behalf of other Class Members, respectfully requests that the Court:

- A. Determine that the claims alleged in this Complaint may be maintained as a class action against Citizens Bank in the manner alleged herein, appoint Plaintiff as representative of the Class, appoint the undersigned counsel as counsel for the Class, and issue an order certifying the Class.
- B. Declare Citizens Bank's overdraft fee policies and practices to be unlawful under the National Bank Act;
- C. Award damages pursuant to the National Bank Act of twice all so-called "Sustained Overdraft Fees" Citizens Bank charged to Class Members during the Class Period;
- D. Award pre-judgment and post-judgment interest at the maximum rate permitted by law;
- E. Enjoining Citizens Bank from charging so-called "Sustained Overdraft Fees" in amounts that exceed the interest rates permissible under the National Bank Act;
- F. Award counsel their costs and disbursements incurred in connection with this action, plus reasonable attorneys' fees; and
- G. Grant any other relief the Court deems just and proper.

**Jury Demand**

Plaintiff demands a trial by jury on all claims so triable.

Dated: June 7, 2017

By the attorneys for Plaintiff and the Class,

/s/ Edward F. Haber  
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**APPENDIX F****Statutes and Regulations at Issue**

## 1. 12 U.S.C. § 85, provides, in pertinent part:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State...where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more....

## 1. 12 U.S.C. § 86, provides, in pertinent part:

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section [12 USCS § 85], when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same....

## 12 C.F.R. § 7.4001(a), provides:

(a) Definition. The term "interest" as used in 12 U.S.C. 85 includes any payment compensating a

creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, creditor-imposed not sufficient funds (NSF) fees charged when a borrower tenders payment on a debt with a check drawn on insufficient funds, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.