Schochet v Bank of Am., N.A.
2016 NY Slip Op 30038(U)
January 7, 2016
Supreme Court, New York County
Docket Number: 652058/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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BRIAN SCHOCHET and CLAIRE SCHOCHET,

Index No.: 652058/2013

Plaintiffs,

DECISION & ORDER

-against-

BANK OF AMERICA, N.A., a federally chartered bank,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Bank of America, N.A. (the Bank) moves, pursuant to CPLR 3212, for summary judgment against plaintiffs Brian Schochet and Claire Schochet. Plaintiffs oppose and cross-move for summary judgment and for leave to file an amended complaint. The motion and cross-motion are granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

The material facts are not in dispute.

Brian Schochet is an attorney. He represents himself and his wife, Claire, in this action.[1] In 1993, plaintiffs opened a checking account (the Account) at National Westminster Bank, which was later acquired by Fleet Bank. Bank of America, the defendant in this action, acquired Fleet Bank. This case concerns approximately $250,000 that was transferred from the Account between January 2010 and June 2012. It is undisputed that such transfers were not authorized by

[1] Since Brian Schochet is an attorney, the court does not afford him the "special solicitude" normally applicable to *pro se* litigants. Compare *Pezhman v City of New York*, 29 AD3d 164, 168 (1st Dept 2006) (*pro se* pleadings should be construed liberally), with *Tracy v Freshwater*, 623 F3d 90, 102 (2d Cir 2010) (an attorney proceeding *pro se* "receives no such solicitude"). The court notes that while Brian Schochet is not a commercial litigator, his representation of his wife necessarily implies he believes he is competent to handle this case. Therefore, the court treats his pleadings and briefs as an attorney's submissions. That said, the court declines to sanction him for his initial admittedly false descriptions [*see* Dkt. 55 at 20] about the subject statutory and regulatory framework discussed herein.

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plaintiffs or any other signatory on the Account. Each of these unauthorized transfers, which included Automatic Clearing House (ACH)[2] transfers and remotely-created checks,[3] appeared on plaintiffs' monthly bank statements. In total, there were 1,156 unauthorized transfers. Plaintiffs admit they received all of their monthly bank statements and admit they did not review them between February 2010 and May 2012. They, therefore, did not notice the unauthorized transfers for approximately two-and-a-half years. Plaintiffs further admit that a cursory review of the statements would have revealed the unauthorized transfers. It should be noted that plaintiffs have a separate wealth management account at the Bank, and some of the unauthorized charges appear in duplicate on the wealth management account statements. Plaintiffs also did not review those statements either.[4]

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[2] *See* Dkt. 70 at 9 (explanation of ACH network).

[3] *See* Dkt. 70 at 15 n.9 (explanation of remotely-created checks).

[4] Plaintiffs' lack of diligence is astonishing. As the Bank explains:

> The first unauthorized transaction for $77.42 was posted to [plaintiffs'] account on January 28, 2010. Had [plaintiffs] reported this transaction as soon as they received their statement in early February 2010 or within 60 days, [the Bank] would have immediately reversed the transaction and would have stopped the unauthorized access to the [Account]. However, [plaintiffs] reported nothing. One month later in March 2010, the total amount of the alleged unauthorized ACH Debits rose to $833.70. [Plaintiffs] still reported nothing. By the end of 2010, these alleged unauthorized transactions grew to $12,905.76 and still [plaintiffs] failed to report any of this supposedly unauthorized activity. By the end of 2011, the unauthorized transactions multiplied nearly eight fold and totaled $96,685.76. Combined with the 2010 amount, the alleged losses climbed to $109,591.52. Yet [plaintiffs] still failed to report this supposed unauthorized activity. When [plaintiff] finally reported unauthorized access to their account on June 10, 2012, the claimed unauthorized transactions were in excess of $220,000. Despite the fact that [the Bank] was not obligated to issue re-credits or the untimely reported transactions under Regulation E, it ultimately re-credited [plaintiffs] for over $185,000.

See Dkt. 70 at 2-3.

The bank statements evidence charges, such as monthly cable and telephone bill payments, that plaintiffs know they did not authorize and indicate a payor plaintiffs do not recognize. Since plaintiffs did not review their monthly bank statements, the unauthorized charges continued for approximately two-and-a-half years until plaintiffs finally became aware of them on June 10, 2012. Between June 11 and June 25, 2012, plaintiffs provided written notice to the Bank of the unauthorized charges, totaling, as noted, more than 1,100 separate transactions. The Bank has re-credited approximately $185,000 to the Account, but refuses to re-credit the rest of the stolen money because the Bank has not been able to recover such funds and because, it argues, plaintiffs' claims for the balance are time barred. Plaintiffs disagree, and maintain their claims are timely. Plaintiffs also seek statutory penalties for the Bank's failure to timely provisionally re-credit the Account in accordance with applicable federal law.

As discussed below, the Bank is not obligated to refund any further amounts to plaintiffs. However, the Bank is liable for a statutory fine for a regulatory violation.[5]

Plaintiffs commenced this action on June 10, 2013 by filing a complaint containing three causes of action: (1) violation of the federal Electronic Funds Transfer Act (EFTA); (2) breach of contract; and (3) negligence. The Bank filed an answer on October 30, 2013. Neither party sought judicial intervention until February 2, 2015, when the Bank filed the instant motion for summary judgment. On April 8, 2015, plaintiffs cross-moved for summary judgment and for leave to file a proposed first amended complaint (the PFAC) (*see* Dkt. 54). The PFAC contains the same causes of action, and merely increases the amount of damages sought from the Bank.

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[5] Despite this violation, it is abundantly clear that the Bank had gone above and beyond its legal obligations to plaintiffs. It is equally clear that plaintiffs' own gross negligence caused their loss. Nonetheless, plaintiffs seeks millions of dollars in statutory and punitive damages from the Bank. As the Bank correctly contends, not only are such damages claims legally infirm, under these circumstances, they are the height of chutzpah.

The PFAC states that plaintiffs seek $35,928.44 in compensatory damages, the only portion of the unauthorized transfers the Bank has not refunded, treble damages in excess of $100,000, statutory penalties in excess of $2 million, and unspecified punitive damages. The court reserved on the motion and cross-motion after oral argument. *See* Dkt. 75 (8/27/15 Tr.).

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

[* 5]

The Bank's liability for the subject unauthorized transfers is governed by EFTA, codified at 15 USC § 1693 *et seq.*, and Regulation E, 12 CFR § 205 *et seq.*[6] As applicable here, 15 USC § 1693f(a) provides:

> If a financial institution, **within sixty days** after having transmitted to a consumer documentation pursuant to section 1693d(a), (c), or (d) of this title or notification pursuant to section 1693d(b) of this title, receives oral or written notice in which the consumer--
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> (1) sets forth or otherwise enables the financial institution to identify the name and account number of the consumer;
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> (2) indicates the consumer's belief that the documentation, or, in the case of notification pursuant to section 1693d(b) of this title, the consumer's account, contains an error and the amount of such error; and
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> (3) sets forth the reasons for the consumer's belief (where applicable) that an error has occurred,
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> the financial institution shall investigate the alleged error, determine whether an error has occurred, and report or mail the results of such investigation and determination to the consumer within ten business days. The financial institution may require written confirmation to be provided to it within ten business days of an oral notification of error[7] if, when the oral notification is made, the consumer is advised of such requirement and the address to which such confirmation should be sent. A financial institution which requires written confirmation in accordance with the previous sentence need not provisionally recredit a consumer's account

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[6] As the Bank notes:

> The applicable rules for Regulation E as relevant here (codified at 12 C.F.R. § 205 et seq.) were amended in December 2011 and under the Dodd-Frank Wall Street Reform and Consumer Protection Act rulemaking authority under the EFTA was transferred from the Board of Governors of the Federal Reserve to the Consumer Financial Protection Bureau (CFPB). In December 2011, the CFPB restated the Board's implementing Regulation E at 12 C.F.R, § 1005. See https://fdic.gov/regulations/compliance/manual/pdfWI-2.1,pdf. For purposes of the arguments before this Court, the cited regulations under 12 C.F.R. § 205 are substantially identical to 12 C.F.R. § 1005.

See Dkt. 70 at 6 n.2.

[7] § 1693(f) defines "error" to include "an unauthorized electronic fund transfer."

> in accordance with subsection (c) of this section, nor shall the financial institution be liable under subsection (e) of this section if the written confirmation is not received within the ten-day period referred to in the previous sentence.

(emphasis added).

Similarly, Regulation E provides that "[a] consumer must report an unauthorized electronic fund transfer that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement to avoid liability for subsequent transfers." *See* 12 CFR § 205.6(b)(3). Likewise, the Bank's deposit agreement governing the Account also requires the customer to notify the Bank within 60 days and states that failure to do so precludes a customer from seeking to hold the Bank liable for unauthorized transactions. *See* Dkt. 7;[8] *see also Bloch v Bank of Am. Corp.*, 2011 WL 4530642, at *5-6 (SDNY 2011) (enforcing Bank of America's 60-day claim reporting limit), *report & recommendation adopted* 2011 WL 4542719 (SDNY 2011), *aff'd* 479 FedAppx 399 (2d Cir 2012); *see also Gluck v JPMorgan Chase Bank*, 12 AD3d 305 (1st Dept 2004) (enforcing Chase's 60-day requirement applicable to forged checks). Moreover, while the applicable statute of limitations for plaintiffs' claim is one year, it is well settled that deposit agreements may shorten the reporting period to 60 days. *See Clemente Bros. Contracting Corp. v Hafner-Milazzo*, 23 NY3d 277, 281, 288 (2014) (holding "a bank and its

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[8] Plaintiffs' claim that the disclosures are inadequate is both conclusory and actually wrong. Plaintiffs admit to signing a contract when opening the Account in 1993, and as discussed at oral argument, the current operative version of the Bank's deposit agreement (*see* Dkt. 7) meets the federal requirements. Indeed, plaintiffs' account statements provide:

> When you opened your account, you received a deposit agreement and fee schedule and agreed that your account would be governed by the terms of these documents, as we may amend them from time to time. These documents are part of the contract for your deposit account and govern all transactions relating to your account, [i]ncluding all deposits and withdrawals. Copies of both the deposit agreement and fee schedule, which contain the current version of the terms and conditions of your account relationship, may be obtained at our banking centers.

See, e.g., Dkt. 8 at 4.

customer may agree to shorten from one year to 14 days the statutory time period ... within which a customer must notify its bank of an improperly paid item" and noting that "Courts around the country have permitted parties to shorten the one year to various periods, from as short as 14 days to more than 60 days"); *see also Garage Mgmt. Corp. v Chase Manhattan Bank*, 22 AD3d 432, 433 (1st Dept 2005) ("Recovery on any check paid and returned prior to the January 2001 statement was **contractually barred by the terms and conditions governing the account**) (emphasis added).

The Bank, therefore, is not liable if a customer fails to notify the Bank of an unauthorized transfer within 60 days of the customer's receipt of his monthly statement. This not only is dictated by the deposit agreement, but is the rule under the applicable federal statutes and regulations, which state that if the customer fails to provide timely notice, the Bank:

> need not [reimburse] the consumer for losses the financial institution establishes would not have occurred but for the failure of the consumer to report within sixty days of transmittal of the statement (or in extenuating circumstances such as extended travel or hospitalization, within a reasonable time under the circumstances) any unauthorized electronic fund transfer or account error which appears on the periodic statement provided to the consumer under section 1693d of this title.

15 USC § 1693g(a); *see also* 12 CFR § 205.6(b)(3) ("If the consumer fails to [provide timely notice], the consumer's liability shall not exceed the amount of the unauthorized transfers that occur after the close of the 60 days and before notice to the institution, and that the institution establishes would not have occurred had the consumer notified the institution within the 60-day period.").[9]

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[9] EFTA and Regulation E indisputably apply to the subject ACH transfers. However, the parties dispute whether Article 4 of the New York UCC applies to the remotely-created checks. .The court need not resolve this dispute because the result is no different under the UCC. *See* NY UCC § 4-406 (imposing substantially similar requirements as applicable federal law and regulations and setting absolute 1 year time bar for subject claims "[w]ithout regard to care or

A California federal district court recently succinctly summarized these rules:

> EFTA contains an error resolution process which obligates consumers to report transfer errors to financial institutions within 60 days after having been transmitted the written documentation containing the error. For the purposes of this provision, an "error" includes either an unauthorized, incorrect or omitted transfer of funds. The financial institution must investigate any timely-reported error and notify the consumer of the results within 10 business days. If the financial institution determines that an error did occur, it shall promptly, but in no event more than one business day after such determination, correct the error ... including the crediting of interest where applicable. However, a financial institution is not liable for losses the financial institution establishes would not have occurred but for the failure of the consumer to report within sixty days of transmittal of the statement (or in extenuating circumstances such as extended travel or hospitalization, within a reasonable time under the circumstances) any unauthorized electronic fund transfer or account error which appears on the periodic statement.

Camacho v JPMorgan Chase Bank, 2015 WL 5262022, at *3 (ND Cal Sept. 9, 2015) (citations and quotation marks omitted).

Camacho is instructive. There, as here, the customer failed to provide timely notice to the bank under both EFTA and the contract governing the bank account, and, therefore, the court held that the bank was not liable. *See id.* at *4,[10] citing *Overby v Chase Manhattan Bank*, 351 FSupp2d 219, 225 (SDNY 2005) ("[U]nder [EFTA] ... plaintiff had a duty to notify [the bank] of any errors or unauthorized transactions within 60 days after receiving documentation of the

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lack of care of either the customer or the bank"). *See Royal Arcanum I*, *infra*, 35 Misc3d 1205(A), at *9, citing *Monreal v Fleet Bank*, 95 NY2d 204, 206 (2000).

[10] In *Camacho*, rather than an unauthorized transfer being made, the bank failed to transfer funds that were supposed to be used to make a premium payment on an insurance policy. *See id.* at *3. The transfer did not occur, and, unlike in this case, plaintiff did not receive the monthly statement that would have revealed the bank's error. *See id.* However, under the governing account agreement, the plaintiff was required to provide notice to the bank if she did not receive her monthly statement. *See id.* Plaintiff did not timely do so, and her claims were precluded for failure to abide by the applicable notice deadline. *See id.* at *3-4. *Camacho*, thus, is further instructive because it demonstrates that all losses that might be attributable to a bank may be barred for failure to provide timely notice, even where the plaintiff's loss may be fairly characterized as "unfortunate". *See id.* at *4.

electronic transfer. **Because of plaintiff's failure to notify [the bank] within the required time period, he is now barred from asserting any of his banking claims.**") (emphasis added); *see also Royal Arcanum Hosp. Ass'n of Kings County, Inc. v Herrnkind*, 35 Misc3d 1205(A), at *12 (Sup Ct, Kings County 2012) (Demarest, J.) (*Royal Arcanum I)* ("Applying the EFTA and Regulation E to the case at bar, [the customer] had a duty to notify [the bank] of any errors ... within 60 days after receiving documentation of the electronic transfer. It is undisputed that although the bank statements reflecting the allegedly unauthorized transactions were sent to [the customer] no later than August 31, 2007, [the customer] failed to notify [the bank] of any unauthorized transactions until July of 2008, well beyond 60 days after receiving these statements. Thus, [the bank] is not legally liable to reimburse [the customer] for the allegedly unauthorized transfers."), *aff'd* 113 AD3d 672 (2d Dept 2014) (*Royal Arcanum II)*.

In this case, there is no question that the Bank is not obligated to further re-credit the Account. The Bank graciously re-credited the Account with money plaintiffs are not entitled to under the deposit agreement and applicable federal law. The Bank apparently did so because it sought to avoid litigation. The amount plaintiffs now seek ($35,928.44) corresponds to funds not recovered by the Bank and for which plaintiffs failed to provide timely notice.

Plaintiffs make no attempt to justify their own gross negligence. Rather, plaintiffs seek to shift responsibility onto the Bank by asserting, conclusorily, that the Bank had constructive notice that the subject transfers were unauthorized. Plaintiffs rely on 12 CFR § 205.6(b)(5)(iii), which provides that "[n]otice may be considered constructively given when [the bank] becomes aware of circumstances leading to the reasonable belief that an unauthorized transfer to or from the consumer's account has been or may be made." Plaintiffs' constructive notice theory rests on

nothing more than the premise that a simple review of the subject transaction records, which appear on the monthly statements provided to plaintiffs, would have evidenced their impropriety. Though plaintiffs are certainly correct in this regard, plaintiffs grossly misunderstand the implications of this fact.

The current regulatory framework derives from the common law, which has long placed the burden of discovering fraud on the customer, who is in the best position to detect fraud by reviewing his monthly account statements. *Woods v MONY Legacy Life Ins. Co.*, 84 NY2d 280, 284 (1994); *see Minskoff v Am. Exp. Travel Related Servs. Co.*, 98 F3d 703, 709 (2d Cir 1996) (same and noting this principle applies to checks and credit cards); *see also Royal Arcanum I*, 35 Misc3d 1205(A), at *8 ("A bank cannot be held responsible for losses caused by a customer's failure to timely examine statements."). Plaintiffs cite no case setting forth the circumstances when a bank might be liable under a constructive notice theory, nor do they cite a case finding a bank to have constructive notice based on nothing more than the unauthorized nature of the transfers being apparent from the account statements. It makes sense that no case supports plaintiffs' position. After all, if the fraud was so obvious from the face of the account statements, that fact militates in favor of customer liability, not bank liability. The customer, not the Bank, has the obligation to reviews the statements. Were it otherwise, a constructive notice exception would swallow the rule that a customer must review his monthly statements.

To be sure, if plaintiffs alleged something more than a conclusory allegation of notice by the Bank, such as the Bank becoming aware of a fraudulent charge or using negligent fraud detection systems, perhaps the result might be different. But plaintiffs allege no such thing. While plaintiffs suggest that the Bank's fraud detection must, under some *res ipsa loquitur*

principle, be negligent since the subject unauthorized transfers surely would have been detected by a responsible bank – that is a conclusory allegation. Plaintiffs do not plead any facts suggesting this to be true, nor do plaintiffs even plead what sufficient safeguards banks normally have or that the subject fraud would have been detected by such safeguards. The authority cited above makes clear that when the customer would have become aware of the unauthorized transactions by reviewing his monthly statements, failure to do so and the consequent failure to provide timely notice to the Bank bars a claim against the Bank. That is precisely what occurred here. Summary judgment is granted to the Bank on plaintiffs' reimbursement claim due to plaintiffs' failure to provide notice within the applicable 60-day window.

Summary judgment also is granted to the Bank on plaintiffs' breach of contract and negligence claims. It is well established that "[a] bank and its depositor have the contractual relationship of debtor and creditor." *Royal Arcanum II*, 113 AD3d at 673, quoting *Hartford Acc. & Indem. Co. v Am. Express Co.*, 74 NY2d 153, 164 (1989), accord *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Chemical Bank*, 57 NY2d 439, 444 (1982). Plaintiffs' breach of contract claim fails because plaintiffs did not abide by the governing contract, the deposit agreement, by failing to provide the required notice. *See Garage Mgmt. Corp.*, 22 AD3d at 433; *see also Singh v Data Palette Info. Servs., LLC*, 103 AD3d 534 (1st Dept 2013) (plaintiff's breach of contract claim infirm when plaintiff breached the contract), citing *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Plaintiffs' negligence claim fails since they do not allege a duty arising from an extra-contractual relation with the Bank. *See Wildenstein v 5H & Co.*, 97 AD3d 488, 491 (1st Dept 2012), citing *Clark–Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d

[* 12]

382, 389 (1987). On the contrary, the parties' relationship is exclusively contractual. *See Royal Arcanum II*, 113 AD3d at 673.

That said, plaintiffs correctly contend that the Bank provisionally re-credited some of the funds slightly after the statutorily required time to do so expired. The Bank admits it violated 15 USC § 1693f(c) by failing to provisionally re-credit the Account for a handful of the more than 1,110 transactions at issue. *See* Dkt. 70 at 14 ("A small number of transactions that were reported within the 60 day period did not receive a provisional credit although [the Account] was ultimately re-credited within 45 days"). While the Bank, to its credit, concedes this violation, it is clear that such violation was not a product of bad faith. Indeed, the Bank finally credited plaintiffs' Account in an amount well in excess of that required by law.

Nonetheless, the Bank is liable for statutory damages. Plaintiffs seek over $2 million in statutory penalties. The Bank objects, claiming the maximum penalty that may be imposed is $1,000. The applicable statute, 15 USC § 1693m, provides:

> Except as otherwise provided by this section and section 1693h of this title, any person who fails to comply with any provision of this subchapter with respect to any consumer, except for an error resolved in accordance with section 1693f of this title, is liable to such consumer in an amount equal to the sum of—
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> (1) any actual damage sustained by such consumer as a result of such failure;
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> (2)(A) in the case of **an individual action**, an amount not less than $100 nor greater than $1,000; or
>
> (B) in the case of **a class action**, such amount as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant.].

(emphasis added).

[* 13]

Plaintiffs wrongly focus on the number of technical violations, arguing the nominal number of transactions implicated by a regulatory violation is the proper metric. The Bank disagrees, contending that plaintiffs ignore the fact that the word "action" in § 1693m does not mean number of transactions or violations. The Bank is correct. "Action" means exactly what it says – "lawsuit". *See Hughes v Kore of Indiana Enter., Inc.*, 731 F3d 672, 675 (7th Cir 2013) (Posner, J.) ("the $100 to $1000 range for statutory damages is **per suit rather than per transaction**.") (emphasis added).[11]

Under § 1693m(a), since this is not a class action, the statutory penalty cannot exceed $1,000. To determine thc proper amount of the penalty in an individual action, § 1693m(b)(1) requires the court to consider "the nature of such noncompliance, and the extent to which the noncompliance was intentional." As found above, the Bank did not act in bad faith.[12] There, however, was a small delay in payment of an overwhelming number of unauthorized transactions which took place over a two-and-one-half year period. Plaintiffs provided notice to the Bank during a two week period. While the Bank, one of the largest in country with ample resources,

[11] Plaintiffs cite two federal district courts that have held otherwise, but this court is not persuaded by their terse reasoning. *See Corrado v RP Realty Partners, LLC*, 2010 WL 571970, at *2 (MD Fla 2010); *Voeks v Pilot Travel Centers*, 560 FSupp2d 718, 724 (ED Wis 2008). *Hughes*, 731 F3d 672, a federal Circuit Court of Appeals decision authored by Judge Posner, was decided in 2013, after these district court cases and is more persuasive. *See Gawarecki v ATM Network, Inc.*, 2014 WL 2600056, at *16 (D Minn 2014) (The Seventh Circuit [i.e., *Hughes*] found that the $100 to $1,000 statutory damages range for individual actions is per lawsuit, rather than per transaction"). In any event, § 1693m(a)(2)(A) clearly states that the limit is $1,000 in an individual action. This court finds it instructive that § 1693m(b)(1), which lists the factors the court is to consider when setting the amount of the penalty, includes the frequency of noncompliance, which suggests that a large number of violations merely militates in favor of a penalty closer to $1,000. Hence, the number of violations goes to the where in the permissible range the amount is to be set. § 1693m(b)(1) does not suggest that a court is permitted to contravene § 1693m(a)(2)(A)'s express limitation of a $1,000 penalty per individual lawsuit.

[12] The Bank does not argue it is entitled to immunity under §§ 1693m(c) & (d) for bona fide error or good faith compliance. This argument would be factual and would preclude summary judgment.

should not be excused from adhering to its regulatory requirements, the Bank's overall course of conduct here cuts against the negative stereotypes some attribute to large banks. Despite plaintiffs' gross negligence and the legal infirmity of the majority of their claims, the Bank not only responded to plaintiffs, but actually went above and beyond by reimbursing plaintiffs money it could have withheld. Under these circumstances, the court finds it appropriate to impose the minimum fine of $100.[13]

Finally, plaintiffs' cross-motion for leave to amend is denied. For the reasons discussed above, the PFAC's increased damages demands are clearly devoid of merit. *See McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012). Accordingly, it is

ORDERED that the parties' motion and cross-motion are decided as follows: (1) summary judgment is granted to defendant Bank of America, N.A. against plaintiffs Brian Schochet and Claire Schochet on all claims except plaintiffs' claim under 15 USC § 1693f(c); (2) summary judgment is granted to plaintiffs against defendant on plaintiffs' 15 USC § 1693f(c) claim to the extent set forth herein; (3) plaintiffs' cross-motion for leave to amend is denied; and (4) the Clerk is directed to enter judgment in favor of said plaintiffs and against said defendant in the amount of $100.

Dated: January 7, 2016

ENTER:

J.S.C.

[13] It should be noted that § 1693g(f) provides that "[o]n a finding by the court that an **unsuccessful** action under this section was brought in bad faith or for purposes of harassment, the court **shall** award to the defendant attorney's fees reasonable in relation to the work expended and costs" (emphasis added). Despite the frivolity of many of the claims asserted, the court may not award statutory attorneys' fees since plaintiffs prevailing on a technical statutory violation prevents this action from being deemed "unsuccessful." *See Gotham Partners, L.P. v High River Ltd. P'ship*, 76 AD3d 203, 204 (1st Dept 2010) (prevailing party may not recoup legal fees from losing party "except where authorized by statute, agreement or court rule"), quoting *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 (2004).