IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

DIANA HEUSER, on behalf of herself and all others similarly situated,

Plaintiff,

v.

NEXTIER BANK, N.A.,

Defendant.

Civil Division

Case No. AD-2023-10076

BRIEF IN SUPPORT OF DEFENDANT'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

Filed on Behalf of Defendant

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BRIEF IN SUPPORT OF DEFENDANT'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

Pursuant to Rules 1028(a)(4) and 1028(a)(2) of the Pennsylvania Rules of Civil Procedure, by and through its undersigned counsel, Defendant, NexTier Bank, N.A. ("NexTier"), hereby submits this Brief in Support of its Preliminary Objections to the Complaint filed by Plaintiff, Diana Heuser ("Plaintiff").

I. INTRODUCTION

In this action, Plaintiff's counsel recycles a complaint filed against various other banks to allege baseless claims against NexTier that do not even fit Plaintiff's actual experience. Her lawyers contend that she was charged multiple overdraft fees on a single withdrawal or debit request and incurred an overdraft fee when there was a so-called "authorized positive, settle negative" ("APSN") debit transaction. These contentions, however, are demonstrably inaccurate and meritless as to NexTier. Plaintiff's Deposit Account Agreement specifically authorizes NexTier to assess a fee on any withdrawal that results in an overdraft or any attempted withdrawal that is returned due to insufficient funds, and Plaintiff's monthly Account statements confirm that NexTier did not charge an overdraft fee on any of the alleged APSN debit transactions that are referenced in the Complaint. Indeed, the transactions referenced in the Complaint, when examined along with her monthly statements, show that ***NexTier did not implement the overdraft practices her lawyers allege.*** Plaintiff regularly (and deeply) overdrafts her Account and has done so for years. Indeed, although unnecessary to the disposition of these Preliminary Objections, she herself has benefited significantly from NexTier's lenient, customer friendly overdraft practices.

In this seriously flawed effort, Plaintiff asserts three legal claims in five counts: (1) three counts of breach of contract/breach of implied duty of good faith and fair dealing (Counts I-III); (2) one count of unjust enrichment (Count IV); and (3) one count of violation of the Pennsylvania

Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. §201-1, *et seq.* ("UTPCPL") (Count V).

Each of Plaintiff's claims should be dismissed with prejudice for several reasons. Most notably, Plaintiff's claims are ripe for dismissal, particularly insofar as she contends that the overdraft or NSF fees were "excessive," "unfair" or "unconscionable" because they are preempted by the National Bank Act, 12 U.S.C. § 21, *et seq.* (the "NBA"), and Federal regulations promulgated thereunder by the Office of the Comptroller of the Currency (the "OCC"). Under the NBA, OCC regulations and the applicable Deposit Account Agreement, NexTier is afforded broad latitude to assess overdraft and NSF fees when a withdrawal, debit request or check is overdrawn (*i.e.*, "overdraft) or returned due to insufficient funds (*i.e.*, "NSF"). Additionally, a review of Plaintiff's monthly Account statements shows that NexTier did not charge overdraft or NSF fees in connection with any so-called APSN debit card transactions.

Moreover, Plaintiff's breach of contract claims should be dismissed because the documents governing Plaintiff's Account provided NexTier with the authority to assess the overdraft fee and foreign transaction fee referenced in Counts I and III, respectively, and because it did not assess any overdraft or NSF fee in connection with any of the referenced APSN transactions alleged in Count II. Plaintiff's claims in Counts I through III also are legally insufficient to the extent they rely on the implied duty of good faith and fair dealing because they are duplicative of her breach of contract claims and, in any event, the implied duty cannot override NexTier's federal legal authority or the express terms of the governing Agreement. They too should be dismissed. Likewise, Plaintiff cannot assert a claim for unjust enrichment against NexTier (Count IV) because, as demonstrated by her own allegations, the parties' relationship arises from an express contract (*i.e.*, the Deposit Account Agreement). Finally, Plaintiff's UTPCPL claim (Count V) is

legally insufficient because she has failed to allege any facts showing that NexTier acted deceptively or that she justifiably relied upon any action taken by NexTier.

Accordingly, Plaintiff's Complaint should be dismissed with prejudice.[1]

II. RELEVANT FACTUAL ALLEGATIONS AND BACKGROUND

On or about August 2011, Plaintiff (under a different name) opened a "checking" demand deposit account (the "Account") with Farmers & Merchants Bank of Western Pennsylvania ("F&M Bank"). In doing so, she signed a signature card, agreeing to the terms set forth in, among other things, the Deposit Account Agreement, the Rate and Fee Schedule, the Funds Availability Policy Disclosure and Electronic Funds Transfer Agreement and Disclosure, "as amended by the Financial Institution from time to time." A true and correct copy of her signed Signature Card is attached to NexTier's Preliminary Objections as **Exhibit 1**. On March 7, 2013, after she married Kenneth S. Heuser and changed her name, Plaintiff updated her information and added her husband to her Account at F&M Bank as a joint owner. A true and correct copy of the Plaintiff's second signed Signature Card is attached to NexTier's Preliminary Objections as **Exhibit 2**.

Defendant NexTier, which was formerly known as F&M Bank, is a federally chartered, national bank, that acquired and merged with NexTier Bank, N.A., a federally chartered, national bank headquartered in Butler County, Pennsylvania. *See* Compl. ¶7.[2] As a result of F&M Bank's acquisition of NexTier in 2014, F&M Bank changed its name to NexTier. Plaintiff has been a checking account customer of F&M Bank (later renamed NexTier) since 2011. *Id.* ¶¶5, 45.

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[1] Plaintiff's Complaint should be dismissed in its entirety. If any part of her Complaint is allowed to survive, NexTier also has filed a preliminary objection under Pa. R. Civ. P. 1028(a)(2) in the nature of a motion to strike, among other things, her numerous allegations about other banks and credit unions that have nothing to do with NexTier.

[2] *See also* Office of the Comptroller of the Currency's Financial Institutions List available at https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html (listing NexTier Bank, National Association).

Per the Signature Card, the Account is governed expressly by the Deposit Account Agreement, the Rate and Fee Schedule, the Funds Availability Policy Disclosure and Electronic Funds Transfer Agreement and Disclosure (the "Deposit Account Agreement" or "Agreement"). A true and correct copy of the Agreement is attached to NexTier's Preliminary Objections as **Exhibit 3**.[3] The Agreement sets forth the terms and conditions for the Account, including the assessment of overdraft and NSF fees. *Id.* at p. 2. Specifically, the Agreement provides that an "overdraft" occurs when "there are insufficient funds available in your Account to cover a withdrawal or debit presented against your Account..." *Id.*

The Agreement expressly provides that NexTier "may assess a service charge on any withdrawal created by check, in-person withdrawal, ATM withdrawal, or other electronic means that results in an overdraft, whether we pay the overdraft or not." *Id.* The Fee Schedule incorporated into the Agreement plainly disclosed that NexTier charges $36.00 for an "Overdraft (Paid Item)" fee or a "NSF (Returned Item)" fee. *Id.*[4]

Notwithstanding her assertion of three claims directly premised on the Deposit Account Agreement, Plaintiff fails to attach the Agreement and only vaguely refers to the Agreement's

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[3] "It is well established that the legal relationship between a financial institution and its depositors is based in contract, and that the contract terms are contained in the signature cards and deposit agreements." *First Fed. Sav. & Loan Ass'n v. Office of the State Treasurer*, 669 A.2d 914, 915 (Pa. 1995). *Accord Piccirilli v. Bureau of Unclaimed Property*, 2021 WL 1783248, *4 (Pa. Commw. May 5, 2021) (same); *Perlberger Law Associates, P.C. v. Wells Fargo Bank, N.A.*, 2022 WL 2819136, *5 (E.D. Pa. July 19, 2022) (same); *Johnson v. PNC Bank, N.A.*, 2012 WL 5476667, *1 (C.P. Phila. Cty. Oct. 17, 2012) (same); *Atkins v. Wachovia Bank, N.A.*, 2007 WL 5479841, *2 (C.P. Phila. Cty. Dec. 4, 2007) (same). Accordingly, courts regularly hold that a party signing a signature card that incorporates an account agreement is bound by the terms of that agreement. *Perlberger*, 2022 WL 2819136, at *5 (citing cases).

[4] Each customer of F&M Bank and NexTier was sent a "Welcome Packet in the Fall of 2014 that included a copy of NexTier's Schedule of Fees, which disclosed the amount of the overdraft fee, and a one-page description of NexTier's overdraft practices, which also disclosed the amount of the overdraft fee. A true and correct copy of the Welcome Packet (with these disclosures) is attached as **Exhibit 4** to Defendant's Preliminary Objections.

terms "on information and belief." *See, e.g.*, Compl. ¶¶27, 29, 31, 33-34, 46. She does not dispute (because she cannot) that the amount of the overdraft or NSF fee ($36.00) was disclosed to her.

Plaintiff conclusorily alleges that NexTier assessed "multiple fees" on the same "item" on January 5, 2022. Compl. ¶¶42-44. In making this allegation, Plaintiff appears to base her allegation on her monthly statement for the Account for the period December 25, 2021 through and ending January 24, 2022. A true and correct copy of Plaintiff's January 2022 Monthly Account Statement for the period December 25, 2021 to January 24, 2022 is attached to NexTier's Preliminary Objections as **Exhibit 5**. Plaintiff also alleges that NexTier purportedly assessed so-called "Authorize Positive, Settle Negative" fees ("APSN fees") to the Account on December 29, 2021, January 24, 2022, and August 17, 2022. *Id.* ¶¶96-98. Specifically, she alleges that on each date NexTier assessed an overdraft fee in connection with each of these transactions because the Account balance was negative at the time that the transactions were posted to the Account. *Id.* Again, Plaintiff bases her allegation on her monthly statements for the Account for the period December 25, 2021 through January 24, 2022 (**Exhibit 5**), the period January 25, 2022 through February 24, 2022 (**Exhibit 6**) as well as the period July 23, 2022 through August 24, 2022. A true and correct copy of Plaintiff's August 2022 Monthly Account Statement for the period July 23, 2022 to August 24, 2022 is attached to NexTier's Preliminary Objections as **Exhibit 7**.[5] Lastly, Plaintiff alleges that NexTier assessed a so-called "foreign transaction" fee of $1.01 in connection

[5] Each of Plaintiff's monthly statements informed her when she incurred an overdraft fee (*i.e.*, when an item was paid by NexTier even though the Account had a negative balance because she lacked sufficient funds in the Account) and when she incurred an NSF fee (*i.e.*, when an item was returned due to insufficient funds). *See* **Exhibits 5, 6, and 7**. Moreover, her monthly statements informed her of the total amount of overdraft fees and NSF fees she incurred each month and the total amount of such fees year-to-date. *See, e.g.*, **Exhibits 5, 6, and 7**.

with a purchase that she made on August 1, 2022. *Id.* ¶¶105-106. This allegation also is based on her monthly statement for the period July 23, 2022 through August 24, 2022. **Exhibit 7**.

Plaintiff asserts three different claims for breach of contract, including breach of the duty of good faith and fair dealing, against NexTier: one for NexTier's alleged assessment of an overdraft fee; a second for NexTier's alleged assessment of the so-called APSN fees; and a third for NexTier's alleged assessment of the $1.01 foreign transaction fee. *Id.* at ¶¶144-188. Plaintiff then asserts an unjust enrichment claim and a UTPCPL claim. *Id.* at ¶¶189-207.

III. APPLICABLE LEGAL STANDARDS

For purposes of ruling on preliminary objections, the Court must accept well-pleaded material factual allegations as true; however, conclusions of law, unwarranted factual inferences, argumentative allegations, and expressions of opinion are not admitted as true. *Small v. Horn*, 722 A.2d 664, 668 (Pa. 1998). In that regard, preliminary objections should be sustained if "the complaint fails to set forth a valid cause of action." *Lerner v. Lerner*, 954 A.2d 1229, 1235 (Pa. Super. Ct. 2008).

Rule 1019(h) provides that "[w]hen any claim ... is based upon an agreement, the pleading shall state specifically if the agreement is oral or written." Pa. R. Civ. P. 1019(h). "When any claim ... is based upon a writing," the plaintiff "shall attach a copy of the writing" or "if the writing or copy is not accessible" to the plaintiff, she must "so state, together with the reason," and "set forth the substance of the writing." Pa. R. Civ. P. 1019(i).

Where, as here, the plaintiff alleges the existence of a written agreement and fails to attach the document, Pennsylvania law is well-settled that the defendant may attach the document to its preliminary objections and the Court may consider its contents. *Conrad v. City of Pittsburgh*, 218 A.2d 906, 907 (Pa. 1966); *Detweiler v. School Dist. of Borough of Hatfield*, 104 A.2d 110, 113 (Pa. 1954); *Regal Indus. Corp. v. Crum and Forster, Inc.*, 890 A.2d 395, 399 (Pa. Super. Ct.

2005); *Satchell v. Insurance Placement Facility of Pennsylvania,* 361 A.2d 375, 377 (Pa. Super. Ct. 1976); *Kloniecke v. GT Motors, Inc.*, No. 806 MDA 2020, 2021 WL 276177, *4 (Pa. Super. Ct. Jan. 27, 2021) ("Where a plaintiff's claim is based on written documents and the plaintiff fails to attach the documents to its complaint, the defendant may submit those documents with its preliminary objections and the court may consider those documents in ruling on a demurrer.").

The same is true of the plaintiff's monthly Account statements disclosing the assessment of the challenged fees when the plaintiff's claim arises from the charging of the fee. *See Kloniecke*, No. 806 MDA 2020, 2021 WL 276177, at *4 (court properly considered warranty disclaimer attached to preliminary objections); *Abrams v. Toyota Motor Credit Corp.*, 2001 WL 1807357, at *3 (C.P. Phila. Cty. Dec. 5, 2001) (court may consider documentation relating to assessment of termination fee forming basis of claim on preliminary objections). Here, Plaintiff directly challenges the assessment of overdraft fees that were charged to her Account on these statements. Her monthly Account statements disclosed the charging of these individual overdraft fees and the deduction of these fees from her Account, so her claim is based on these written documents too. Given her failure to attach any of these writings, NexTier is permitted to attach them to its Preliminary Objections to assist the Court in evaluating the legal sufficiency of her claims.

IV. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE UNDER RULE 1028(a)(4) FOR FAILURE TO STATE ANY CLAIM.

A. Plaintiff's State Law Claims Are Preempted by the National Bank Act and OCC Regulations.

The NBA was enacted to establish a national banking system, free from excessive state regulation. *See Marquette Nat'l Bank v. First Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978). Consistent with governing conflict-preemption standards, "[s]tate regulation of banking is permissible when it 'does not prevent or significantly interfere with the national bank's exercise

of it powers.'" *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 558-59 (9th Cir. 2002). Conversely, "[s]tate attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the [NBA], or impair the efficiency of national banks to discharge their duties." *First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923). "[W]hen state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007); *see also Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (noting that the NBA preempts the application of state laws that would "impair significantly" powers that are incidental to the business of banking).

"[S]tate laws that 'obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers' are preempted." *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555 (9th Cir. 2010) (*citing* 12 C.F.R. §34.4(a)); *see also Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 353 (2d Cir. 2008) (holding that a "state statute does not escape on the theory that, on its face, it only regulates non-bank entities" if it "significantly interferes with national banks' ability to carry on" an NBA-authorized activity). In addition, "the usual presumption against federal preemption of state law is inapplicable to federal banking regulation." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 956 (9th Cir. 2005).

Through her common law and state law theories, Plaintiff attempts to place significant restrictions and/or limitations on NexTier's federal banking powers and seeks to reshape its core banking practices. By seeking to utilize common and statutory law theories to dictate how NexTier posts transactions, charges NSF and overdraft fees, and/or discloses its deposit-related and fee-related practices, Plaintiff's misguided claims directly interfere with NexTier's power to receive deposits and engage in the business of banking pursuant to 12 U.S.C. § 24(Seventh), impermissibly

seek to regulate bank deposit-taking and operational powers under 12 C.F.R. § 7.4007, and improperly impose a conflicting state standard on the establishment of charges and fees and the method of calculating them pursuant to 12 C.F.R. §7.4002.

As a result, and as set forth more fully below, Plaintiff's claims are preempted by federal banking law and should be dismissed with prejudice.

1. Plaintiff's Claims Related to NexTier's Deposit-Taking Powers and Disclosure Methods Are Preempted.

The NBA expressly authorizes national banks to "receiv[e] deposits" and "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). The Office of the Comptroller of the Currency ("OCC") also may "authorize additional activities if encompassed by a reasonable interpretation of § 24 (Seventh)." *Bank of Am.*, 309 F.3d at 562 (quoting *Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000)).

The OCC's regulations — in particular, the OCC's preemption regulation relating to a national bank's exercise of its deposit-taking powers, 12 C.F.R. § 7.4007 ("Section 7.4007") — preempts Plaintiff's claims. Section 7.4007 is a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley v. Citibank*, 517 U.S. 735, 741 (1996). As such, Section 7.4007 preempts state law with the full force of federal law and is binding upon courts. *See Fid. Fed Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (noting that "[f]ederal regulations have no less pre-emptive effect than federal statutes.").

As the Supreme Court has held, "grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally *limited* by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32 (emphasis added). Indeed, in one of its earliest

interpretations of the NBA, the Supreme Court determined that, insofar as the banking powers of national banks are concerned, "the States can exercise no control over them, nor in any wise [*sic*] affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). This fundamental NBA preemption principle has not changed: "In the years since the NBA's enactment, [the Court has] repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11 (citing cases).

Critically, states may not "prevent or significantly interfere with [a] national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33. Furthermore, "[w]hen state laws significantly impair the exercise of authority, enumerated or incidental under the NBA, the state laws must give way." *Monroe Retail, Inc. v. RBS Citizen, N.A.*, 589 F.3d 274, 283 (6th Cir. 2010) (citing *Watters*, 550 U.S. at 12). "[T]he level of 'interference' that gives rise to preemption under the NBA is not very high." *Id.*

With the above principles in mind, pursuant to OCC regulations, "[a] national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to terms, conditions, and limitations prescribed by the Comptroller of Currency and any other applicable Federal law." 12 C.F.R. § 7.4007(a). Importantly, under Section 7.4007, a bank's deposit taking powers include not only the power to "receive deposits," but also "any activity incidental to receiving deposits." Under any reasonable interpretation, the manner in which a customer is allowed to access her deposits, or the manner in which transactions in a customer's deposit account are posted, logically fall within a bank's deposit taking powers. Indeed, the OCC has expressly recognized that the payment of items drawn against deposited funds

is clearly "incidental" to a bank's holding of deposits. *See* OCC Interpretive Letter No. 1082, 2007 WL 5393636 (May 17, 2007).

"The deposit and withdrawal of funds 'are services provided by banks since the days of their creation...and "such activities define the business of banking."'" *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 723 (9th Cir. 2012) (*citing Bank of Am.*, 309 F.3d at 563). In *Gutierrez*, the court found that the plaintiff's claims under the "unfair" and "fraudulent" prongs of the California Unfair Competition Law were preempted because they constituted an improper state law challenge to a national bank's assessment of overdraft fees and its high-to-low posting order of debit card transactions. *Id.* at 724-26. In so holding, the court applied OCC interpretive letters that considered high-to-low posting orders and associated overdraft fees to be "a pricing decision authorized by Federal law within the powers of a national bank." *Id.* at 724. The court further stated that whether the bank's internal decision-making processes regarding posting orders complied with the "safe and sound banking principles" under Section 7.4002(b)(2) is an inquiry that falls squarely within the OCC's supervisory powers. *Id.* at 724-25. In addition, it held that the bank's decision to resequence the posting order fell within the OCC's definition of a pricing decision and that a court could not disregard the OCC's determination of what constitutes a legitimate pricing decision or apply state law in a way that interferes with enumerated and incidental power. *Id.* at 725.

Similarly, in *In re TD Bank, N.A.*, 150 F.Supp.3d 593, 609 (D.S.C. 2015), the court found that a "good faith" or "fairness" limitation on a national bank's power to choose a debit-account transaction posting method and elect to honor transactions into an overdraft was preempted, whether applied through the implied covenant of good faith and fair dealing, a common law, conversion claim, the doctrines of unconscionability and unjust enrichment, or state consumer

protection laws. The court held that the plaintiff's attempt to assert these claims constituted a limitation on transaction posting order and discretionary authorization of debit transactions and significantly interfered with the bank's exercise of its incidental powers. *Id.* In explaining its ruling, the court determined that the plaintiff's claims sought to dictate the bank's "*method* of deciding when to honor debits that will drive deposit accounts into overdraft and *method* of posting transactions for purposes of balance calculation." *Id.* at 611 (emphasis within). Such claims "amount to *de facto* state regulation of discretionary functions specifically reserved to the sound judgment of a national bank." *Id.*

Moreover, "[a] national bank may exercise its deposit-taking powers without regard to state law limitations concerning: . . . (ii) [c]hecking accounts; [and] (iii) [d]isclosure requirements." 12 C.F.R. § 7.4007(b)(2) and (3). Critically, courts have consistently found that state law claims challenging national banks' disclosure methods and practices are preempted. *See, e.g. Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79 (1954) (holding that the NBA preempted a state statute prohibiting national banks from using the word "saving" or "savings" in advertising); *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.*, 1 F.Supp.3d 34, 48 (E.D.N.Y. 2014) (holding that "inasmuch as the Plaintiffs seek to impose liability on HSBC for the bank's failure to sufficiently disclose its posting method, that argument is preempted); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037-38 (9th Cir. 2008) (concluding that state law requirements for convenience check disclosures were preempted by the NBA and the OCC's regulations); *In re TD Bank, N.A.*, 150 F.Supp.3d at 611-12 (holding that the NBA preempted certain state law consumer protection claims based on disclosures related to the order in which a bank processed transactions); *Smith v. Wells Fargo Bank, N.A.*, 158 F.Supp.3d 91, 105 (D. Conn. 2016) (holding that the NBA preempts state regulation of a national bank's disclosures); *Montgomery v. Bank of America Corp.*,

515 F.Supp.2d 1106, 1114 (C.D. Cal. 2007) (holding that 12 C.F.R. §7.4007 expressly preempted the plaintiff's state law claims to the extent they were "based on defendants' alleged improper disclosure of the NSF/OD fee structure").

In *Gutierrez*, the court held that "[t]he requirement to make particular disclosures falls squarely within the purview of federal banking regulation and is expressly preempted." 704 F.3d at 726. The court found that a California state law could not impose liability on a national bank that was simply based on the bank's failure to disclose its chosen posting method and subsequent assessment of overdraft fees. *Id.* The court explained that "[i]mposing liability for the bank's failure to sufficiently disclose its posting method leads to the same result as mandating specific disclosures" and that "[b]oth remedies are tantamount to state regulation of disclosure requirements." *Id.*

By seeking to interfere with NexTier's deposit-taking powers and to recover the fees that she was assessed, Plaintiff is attempting to impose state law restrictions or requirements concerning NexTier's "checking accounts" as well as NexTier's "disclosure" of its deposit-related and fee-related practices. Essentially, Plaintiff is attempting to dictate the manner in which her depository account will operate, including the order and timing of debits, and the form and content of NexTier's disclosures. In addition, throughout the Complaint, Plaintiff cites heavily to inapplicable guidance from the Federal Deposit Insurance Corporation ("FDIC") and Consumer Financial Protection Bureau ("CFPB") pertaining to the assessment of overdraft and NSF fees as well as anecdotal examples regarding the fees that other non-party, unaffiliated banks and credit unions may or may not decide to assess.[6] By focusing on such guidance and irrelevant anecdotes

[6] Plaintiff's citations to guidance issued by the CFPB and FDIC are both inapposite and misleading since neither of these entities have supervisory authority over NexTier. 12 C.F.R. §7.4000. *See also* 12

in place of the specific facts as to her experience with NexTier, Plaintiff has made it clear that she is asserting an impermissible challenge as to the perceived fairness of NexTier's fee assessments, and posting and disclosure methods.

In sum, because Plaintiff's claims amount to an attempt to exercise *de facto* state law regulation of deposit taking powers and disclosure functions, they are preempted pursuant to the NBA and Section 7.4007(b)(2) and (3).

2. Plaintiff's Claims Related to the Manner in Which NexTier Calculates and Charges Fees Are Preempted.

Plaintiff's allegations arising out of NexTier's assessment of overdraft fees and NSF fees also are preempted by the NBA. Pursuant to OCC regulations, "[a] national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the [OCC] and any other applicable Federal law." 12 C.F.R. § 7.4007(a). In addition, a national bank is expressly authorized to assess "non-interest charges and fees, including deposit taking activities." 12 C.F.R. § 7.4002(a). "The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles." 12 C.F.R. § 7.4002(b)(2). In addition, "[a] national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers..."[t]he deterrence of misuse by customers of banking services." *Id.*

The payment of items drawn against deposited funds is "incidental" to the bank's holding of the deposits. As the OCC has expressly recognized:

U.S.C. §484. Critically, Plaintiff fails to cite to any guidance issued by the OCC, the exclusive federal regulator of federally chartered, national banks, such as NexTier.

> The process by which a bank honors overdraft items is typically part of the Bank's administration of a depositor's account. Creating and recovering overdrafts have long been recognized as elements of the discretionary deposit account services that banks provide. 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. These activities are part of or incidental to the business of receiving deposits.

OCC Interpretive Letter No. 1082, 2007 WL 5393636 at *2 (May 17, 2007) (footnotes omitted).

The OCC has also expressly determined that the power to impose fees necessarily includes the power to determine the order in which to post debits. *See* OCC Interpretive Letter No. 916, 2001 WL 1285359, at *1 (May 22, 2001) (stating that a national bank "may establish a given order of posting as a pricing decision pursuant to section 24(Seventh) and section 7.4002"). As explained by the OCC:

> A bank's authorization to establish fees pursuant to 12 C.F.R. 7.4002(a) necessarily includes the authorization to decide how they are computed. . . . The number of items presented against insufficient funds is determined by the order of posting a bank uses.
>
> . . . .
>
> Given the factors considered by the Bank noted above, we conclude that the Bank's process for deciding the order of check posting is consistent with the safety and soundness considerations set forth in section 7.4002(b) and that the Bank may therefore post checks in the order it desires pursuant to the authority vested in the Bank by section 7.4002(a) and section 24(Seventh) of the [NBA].

Id. at *3-4; *see also* OCC Interpretive Letter No. 997, 2002 WL 32639293, at *4 (April 15, 2002). *See Monroe Retail, Inc. v. RBS Citizen, N.A.,* 589 F.3d 274, 284 (6th Cir. 2010) ("The OCC has consistently interpreted § 7.4002(a) as including the authorization to determine the order in which banks may post fees to an account.").

The OCC's interpretations of its own regulations are controlling unless "plainly erroneous or inconsistent with the regulation," which they clearly are not. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). Indeed, courts have repeatedly rejected state law claims disputing

fees, including overdraft fees, charged by national banks. *See e.g. Martinez,* 598 F.3d at 556 (holding that the NBA preempted the plaintiffs' claim that a national bank assessed excessive fees because the OCC has clearly provided that the establishment of fees and the method of calculating them are "business decisions to be made by each bank"); *Gutierrez,* 704 F.3d at 724-25 (holding that the NBA preempted the plaintiff's claims that challenged a national bank's right to post transactions in the order of its choosing); *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197-98 (11th Cir. 2011) (holding that a state statute that prohibited banks from charging fees to non-customers was preempted by the NBA because it was "in substantial conflict with federal authorization to charge such fees"); *Montgomery*, 515 F. Supp. 2d at 1113 (holding that "plaintiff's state law claims, which are all based on the amount of and means of disclosure of [overdraft] fees assessed by defendants, are preempted by 12 C.F.R. § 7.4002"); *Monroe Retail, Inc. v. Charter One Bank, N.A.*, 624 F. Supp. 2d 677, 679, 686-88 (N.D. Ohio 2007) (holding that creditor-garnishors' argument that "banks may not impose additional garnishment fees on customer accounts prior to full recovery" of amount owed was preempted); *Bank of Am.*, 309 F.3d at 564 (holding that § 7.4002 preempted conflicting state limitations on the authority of national banks to collect fees for providing deposit and lending-related ATM services); *Wells Fargo Bank of Texas N.A. v. James*, 321 F.3d 488, 495 (5th Cir. 2003) (holding that state law prohibiting a bank from charging check cashing fees was in "irreconcilable conflict" with § 7.4002(a)); *Bank of Am., N.A. v. Sorrell*, 248 F. Supp. 2d 1196, 1198 (N.D. Ga. 2002) (finding preemption of a state law prohibiting banks from charging check cashing fees to non-accountholders); *Metrobank, N.A. v. Foster*, 193 F. Supp. 2d 1156, 1161 (S.D. Iowa 2002) (holding Iowa law prohibiting national banks from charging ATM fees to non-accountholders was "an obstacle to the rights given . . . by [§ 7.4002]" and was therefore preempted).

The OCC has determined consistently that the power to impose fees necessarily includes the power to determine, *inter alia*, whether to return or pay an item, the order in which to post debits and the amount of the fee. Dictating how a national bank assesses fees and posts debits, however, effectively "mandates the order in which [national] banks carry out their daily account-balancing and account-management functions" and is "unduly burdensome." *Monroe Retail, Inc.*, 589 F.3d at 284. In addition, OCC regulations expressly state that national banks are permitted to set fees in order to deter misuse by customers of banking services and in order to maintain the safety and soundness of the institution. 12 C.F.R. § 7.4002(b)(2). NexTier's decision to assess NSF fees and overdraft fees, which is aimed at deterring misuse of its accounts and protecting its safety and soundness, falls squarely within these enumerated powers.

Critically, each of Plaintiff's claims seek to significantly interfere with and impose impermissible restrictions upon NexTier's federal authority to make these decisions and assess NSF or overdraft fees when its customer's Account was overdrawn. As a result, they are preempted and should be dismissed with prejudice.

B. Count I of the Complaint Should Be Dismissed Because the Deposit Account Agreement Authorized NexTier to Assess the Overdraft Fee at Issue.

To establish a breach of contract claim, the plaintiff must allege facts showing that there was a contract, that the defendant breached a specific provision of the contract, and that the plaintiff suffered damages as a result of the breach. *Discover Bank v. Stucka*, 33 A.3d 82, 87 (Pa. Super. Ct. 2011). Initially and most critically, Count I is legally insufficient because NexTier was authorized to assess an overdraft fee to Plaintiff in connection with the transaction at issue.

"An overdraft arises when a customer of a bank draws from that bank more money than is standing to his [or her] credit in his [or her] account with the bank." Henry J. Bailey, *Brady on Bank Checks: The Law of Bank Checks* 348 (3d ed. 1962). In Count I, Plaintiff alleges

(erroneously) that NexTier assessed "multiple fees on an item" on January 5, 2022. Compl. ¶42. While Plaintiff is not specific, she appears to allege that she was charged more than one fee on what she refers to as a "RETRY PYMT." Compl. ¶¶42-44. A review her January 2022 Account statement shows that the only RETRY PYMT that was made on January 5, 2022 was an electronic payment request submitted by Discover in the amount of $50.00. **Exhibit 5** at p. 3. There was a prior, separate payment request by Discover attempting to withdraw funds in the amount of $50.00 – presumably at Plaintiff's direction – for an electronic payment on December 31, 2021. This payment request was returned by NexTier on January 3, 2022 because the Account contained insufficient funds. *Id.* at p. 2-3.

In accordance with the Agreement, NexTier was authorized and permitted to charge a "Returned Item" or NSF fee when the December 31, 2021 Discover payment request was presented and the Account lacked the necessary funds to pay the item. NexTier had the right, in its sole discretion, to either return the item as drawn on insufficient funds or to pay the item. When Discover submitted the separate withdrawal request on January 5, 2022, the Account continued to be overdrawn but NexTier nevertheless permitted the funds to be withdrawn and the item was paid. *Id.* at p. 3.[7] Because this withdrawal was effectuated at a time when the Account clearly and unequivocally had a negative balance, NexTier assessed an overdraft fee of $36.00 to the Account on January 6, 2022 in accordance with the terms of the Agreement. *Id.* Each of these transactions is more clearly illustrated by the following chart summarizing the relevant portion of Plaintiff's January 2022 Account statement:

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[7] NexTier's decision to permit this withdrawal to be completed despite the fact that the Account had a negative balance on January 5, 2022 undoubtedly conferred a direct benefit upon Plaintiff insofar as Discover likely would have assessed a fee against her in the event that this payment was returned again due to insufficient funds.

Post Date	Description	Debits	Credits	Balance	Comment
12/30/2021	PPG INDUSTRIES PAYROLL		$288.81	$10.08	
12/30/2021	STATE FARM RO 27 SFPP 13	$215.97		($205.89)	OD-1 - fee charged 12/31/21
12/30/2021	CHECK #607	$250.00		($455.89)	OD-2 - fee charged 12/31/21
12/31/2021	CAPITAL ONE MOBILE PMT	$100.00		($555.89)	Returned NSF charged 1/3/22
12/31/2021	DISCOVER E-PAYMENT 8180	$50.00		($605.89)	Returned NSF charged 1/3/22
12/31/2021	AMAZON MARKETPLA RETURN FEE	$25.00		($630.89)	OD-3 - fee charged 1/3/22
12/31/2021	OVERDRAFT FEES	$72.00		($702.89)	2 OD Fees from 12/30/21
1/3/2022	RETURNED ITEM, INSUFFICIENT FUNDS, DISCOVER E-PAYMENT 8180		$50.00	($652.89)	Credit on 12/31/21 return
1/3/2022	RETURNED ITEM, INSUFFICIENT FUNDS, CAPITAL ONE MOBILE PMT		$100.00	($552.89)	Credit on 12/31/21 return
1/3/2022	FIRSTENERGY OPCO FE ECHECK	$111.49		($664.38)	Returned NSF charged 1/4/22
1/3/2022	CAPITAL ONE MOBILE PMT	$50.00		($714.38)	Returned NSF charged 1/4/22
1/3/2022	PAYPAL INST XFER DISNEY PLUS	$7.42		($721.80)	Returned NSF charged 1/4/22
1/3/2022	OVERDRAFT FEES	$36.00		($757.80)	1 OD Fee from 12/31/21
1/3/2022	RETURNED ITEM FEES	$72.00		($829.80)	2 NSF Fees from 12/31/21
1/4/2022	RETURNED ITEM, INSUFFICIENT FUNDS, PAYPAL INST XFER DISNEY PLUS		$7.42	($822.38)	Credit on 1/3/22 return
1/4/2022	RETURNED ITEM, INSUFFICIENT FUNDS, CAPITAL ONE MOBILE PMT		$50.00	($772.38)	Credit on 1/3/22 return
1/4/2022	RETURNED ITEM, INSUFFICIENT FUNDS, FIRSTENERGY OPCO FE CHECK		$111.49	($660.89)	Credit on 1/3/22 return
1/4/2022	COMENITY PAY BH WEB PYMT	$100		($760.89)	Returned NSF charged 1/5/22
1/4/2022	RETURNED ITEM FEES	$108.00		($868.89)	3 NSF Fees from 1/4/22
1/5/2022	RETURNED ITEM, INSUFFICIENT FUNDS, COMENITY PAY BH WEB PYMT		$100.00	($768.89)	Credit on 1/4/22 return
1/5/2022	DISCOVER RETRY PYMT 8180	$50.00		($818.89)	OD-4 - fee charged 1/6/22
1/5/2022	RETURNED ITEM FEES	$36.00		($854.89)	1 NSF Fee from 1/4/22
1/6/2022	PPG INDUSTRIES PAYROLL		$1,544.79	$689.90	
1/6/2022	OVERDRAFT FEES	$36.00			1 OD Fee charged from 1/5/2022

Exhibit 5.[8]

The overdraft fee at issue was expressly authorized by the Agreement, which explained that an "overdraft" occurs when "there are insufficient funds available in your Account to cover a withdrawal or debit presented against your Account." *See* **Exhibit 3** at p. 2. In addition, the Agreement expressly provides that NexTier "may assess a service charge on any withdrawal created by check, in-person withdrawal, ATM withdrawal, or other electronic means that results in an overdraft, whether we pay the overdraft or not." *Id.* Moreover, both the Fee Schedule that is incorporated into the Agreement and the Welcome Packet that Plaintiff received plainly disclosed that NexTier charges $36.00 for an overdraft fee. *See* **Exhibits 3 & 4**. In addition, in

[8] To assist the Court, NexTier's counsel has color coded the entries and provided comments to explain methodically the Plaintiff's transactions, her overdrafts triggering overdraft ("OD") fees, and the fact that NexTier did not assess OD fees in connection with the debit card transactions referenced in the Complaint. This "simple shapes and colors" approach demonstrates clearly that Plaintiff's allegations are badly mistaken. This is but one example of how much and how deeply Plaintiff overdrew her Account.

the Welcome Packet, NexTier notified Plaintiff that its practice was to charge a fee of up to $36.00 "each time we pay an overdraft." *See* **Exhibit 4.**

In addition, the OCC has long recognized that national banks may utilize NSF fees and overdraft fees in order to deter misuse of banking services:

> Certain deposit account services provided by banks, such as the honoring of checks drawn against nonsufficient funds, have the potential for misuse. It has been the Office position that service charges should discourage customers from frequently writing checks in amounts greater than their account balances. Such a practice, if left uncontrolled, provides a customer with automatic loans. Alternatively, the bank could automatically dishonor all checks drawn on nonsufficient funds. A bank, however, may hesitate to do this because of the embarrassment to the customer. ***An appropriate option, the Office believes, is to establish service charges to be levied in connection with the writing of nonsufficient funds checks by borrowers to discourage customers from frequently writing such checks.***

OCC Interpretive Ruling Re Nat'l Bank Serv. Charges, 48 Fed. Reg. 54319-01, 1983 WL 110730 at *54319 (Dec. 2, 1983) (emphasis added).

Moreover, several different courts across the country have examined and rejected nearly identical breach of contract claims and have found that similar language in an account agreement authorized a financial institution to assess an overdraft or NSF fee each time that a merchant presented (or re-presented) a transaction for payment.

For instance, in *Thompson v. Municipal Credit Union*, 2022 WL 2717303 (S.D.N.Y. July 13, 2022), the court rejected a nearly identical claim and held that the account agreement provided the defendant with the authority to assess an NSF fee each time that an electronic payment was rejected due to insufficient funds. The account agreement stated that the defendant had the right to assess a service charge "[e]ach time" an ACH debit request or bill payment that the plaintiff authorized or drew was "presented and returned as unpayable for any reason." *Id.* at *6. The court found that the phrase "each time" did not limit the defendant to imposing a single fee for each single ACH debit request, bill payment, check or share draft and that the defendant had the right

to assess a new fee each time that a transaction was presented for payment. *Id.* The court ultimately dismissed the plaintiff's breach of contract claim and concluded that the defendant complied with the terms of the account agreement when it was charged a new NSF fee after a represented transaction was rejected due to insufficient funds. *Id*; *see also Stubbs v. Spire Credit Union*, 2023 WL 1460269, at *6 (Minn. Dist. Ct. Jan. 31, 2023) (citing to *Thompson* and holding that the clear and unambiguous language of the parties' account agreement, which disclosed that a fee would be charged "each time" an item was presented for payment, permitted the defendant to charge an overdraft fee for each "retry" item submitted by a merchant for payment).

Similarly, in *Lambert v. Navy Federal Credit Union*, 2019 WL 3843064, at *4 (E.D. Va. 2019), the court held that the defendant had the contractual right to charge a fee for each presentment of an ACH electronic request for payment even if the request was by the same merchant, in the same amount, and for the same purpose. The court found that the language in the account agreement that authorized the defendant to assess a fee "for each returned debit item" was unambiguous and permitted the defendant to charge an NSF fee when an item that was re-presented by a merchant was rejected due to insufficient funds. *Id.* at *3. The court ultimately dismissed the plaintiff's breach of contract claim and held that the account agreement unambiguously provided the defendant with the right to assess an NSF fee each time that a request for payment was returned due to insufficient funds without regard to whether the returned item was a re-presentment of a previously rejected request. *Id.* at *5; *see also Page v. Alliant Credit Union*, 52 F.4th 340, 349 (7th Cir. 2022) (affirming the dismissal of the plaintiff's breach of contract claim and holding that the account agreement permitted the defendant to charge an NSF fee each time that a payee attempted to make an ACH debit from an account with insufficient funds).

In *Ross v. Navy/Army Community Credit Union*, 2022 WL 100110, at *3-5 (S.D. Tex. Jan. 11, 2022), the court dismissed a nearly identical breach of contract claim and held that the account agreement unambiguously provided the defendant with the authority to assess the NSF fees at issue. Although the plaintiff authorized PayPal to withdraw an amount from her checking account, the defendant rejected it and assessed an NSF fee because the account contained insufficient funds. *Id.* at *1. When PayPal made another request for payment six days later, the defendant once again rejected the transaction due to insufficient funds and charged an additional NSF fee. *Id.* The court applied the portion of the account agreement stating that an NSF fee would be charged "if an item is presented without sufficient funds", and it held that this language was indifferent to how many times an item has been presented and rejected. *Id.* at *4. In addition, the court held that this language did not place a limit on how many fees the defendant may charge if an item is presented multiple times and an accountholder lacks sufficient funds. *Id.*

In *Winamaki v. Umpqua Bank*, 322 Or.App. 588, 593-94 (2022), the court affirmed the dismissal of a virtually identical breach of contract claim and held that the parties' account agreement permitted the defendant to assess an NSF fee on a re-presented item. In the account agreement, the defendant notified the plaintiff that a fee may be assessed "each time we pay or return a transaction that overdraws your checking account." *Id.* at 594. The court held that this language unambiguously authorized the defendant to charge a fee each time that it paid or returned a transaction where the plaintiff's account contained insufficient funds, including the times that the defendant paid or returned transactions reprocessed by a merchant. *Id.*; *see also Saunders v. Y-12 Federal Credit Union*, 2020 WL 6499558, at *5 (Ten. Ct. App. Nov. 5, 2020) (affirming the dismissal of a nearly identical breach of contract claim and holding that the account agreement – which notified the plaintiff that her account "may be subject to a charge for each overdraft" –

permitted the defendant to charge an overdraft fee to a re-presented item); *Choy v. Space Coast Credit Union*, 2020 WL 3039243, at * 3 (Fla. Cir. Ct. May 11, 2020) (dismissing the plaintiff's breach of contract claim and holding that a review of the account agreement "leads to the inescapable conclusion that Defendant is clearly empowered to charge more than one NSF fee if a transaction is resubmitted").

Here, NexTier was authorized to assess an overdraft fee on each withdrawal request (check, ACH, debit, ATM withdrawal, *etc.*) presented because, among other things, the Welcome Packet clearly disclosed that NexTier's practice was to charge an overdraft fee "each time we pay an overdraft." *See* **Exhibit 4**. NexTier's use of the phrase "each time" unambiguously conveyed that it had the right to assess a new fee each time that a transaction was presented for payment. The Deposit Account Agreement also conveyed unambiguously that NexTier "may assess a service charge on **any withdrawal**...that results in an overdraft." *See* **Exhibit 3** at p. 2. The term "any withdrawal" clearly authorized NexTier to charge a fee each time that it paid or returned a transaction when the Account contained insufficient funds regardless of whether the transaction at issue was re-presented by a merchant.

In addition, Discover only made these withdrawal requests on December 31, 2021 and January 5, 2022, respectively, because Plaintiff owed it a debt and she provided it with her account number and routing number so that it could attempt to remove funds from her Account to satisfy this debt. Plaintiff and Discover were solely responsible for deciding the timing of each of these withdrawal requests, and NexTier's role was limited to satisfying its obligation to honor or refuse Discover's withdrawal request.[9] Plaintiff had the ability to ask Discover to place a stop payment

[9] The OCC has confirmed that "it supports national banks' participation in the ACH Network to serve the needs of legitimate bank customers and to diversify sources of revenue." *See* OCC Bulletin 2006-39 (Sept. 1, 2006). The OCC further noted that when a national bank such as NexTier acts as a receiving

order on the $50.00 withdrawal request and/or utilize a different account to pay this debt owed to Discover given that her NexTier Account was overdrawn for days. However, Plaintiff authorized the Discover withdrawal requests and continued her practice of further overdrawing the Account, presumably because she wished to avoid the negative consequences (*e.g.*, late charge and/or balance acceleration) associated with failing to repay Discover.

In seeking to place blame upon NexTier for assessing an overdraft fee on January 6, 2022, Plaintiff is essentially arguing that NexTier was required to provide her with a loan and pay Discover despite the fact that the Account contained insufficient funds. Moreover, Plaintiff's misguided contentions overlook the fact that NexTier provided Plaintiff with an accommodation by honoring (instead of rejecting) Discover's January 5, 2022 withdrawal request. After providing Plaintiff with this accommodation, NexTier acted within its well-established federal and contractual authority to assess an overdraft fee in an attempt to deter and discourage Plaintiff from continuing to overdraw the Account.[10] It was not "deceptive" or "abusive" for NexTier to assess this overdraft fee, and stripping NexTier of the authority to do so would eliminate any incentive for Plaintiff to ensure that the Account contains sufficient funds before authorizing merchants to submit withdrawal requests.

Thus, NexTier clearly and unequivocally disclosed to Plaintiff that it had the authority to assess an overdraft fee each time that a withdrawal request resulted in an overdraft to the Account. While Count I is premised upon Plaintiff's guesses regarding the disclosures that NexTier provided to her, it is belied by the actual terms and conditions governing the Account. Because NexTier

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depository financial institution in an ACH debit transaction, the bank's account can be overdrawn when it allows a debit to post and the account contains insufficient funds to honor the debit.

[10] In the Deposit Account Agreement, Plaintiff agreed to immediately "deposit funds sufficient to cover the overdraft plus any service charge we impose." *See* **Exhibit 3** at p. 2.

possessed the authority to assess the overdraft fee challenged in Count I, this claim is legally insufficient and should be dismissed with prejudice.

C. Count II of the Complaint Must Be Dismissed Because Plaintiff's Monthly Statements Demonstrate that NexTier Did Not Assess the APSN Fees as Plaintiff Alleges in the Complaint.

Next, a simple review similarly confirms that NexTier did not charge an overdraft or NSF fee in connection with debit transactions involving any of the three supposed APSN situations. Compl. ¶¶ 96-98. Indeed, the transactions cited by Plaintiff affirmatively refute her central theory.

1. December 27-29, 2021 Account Transactions

Post Date	Description	Debits	Credits	Balance	Comment
12/27/2021	XX8189 POS PURCHASE 12/25 21:30 SHEETZ 0194 00 FALLS CREEK PA	$42.50		$529.11	
12/27/2021	XX1908 POS PURCHASE 12/24 17:47 CIRKUL, INC. 786-529-6354 FL	$28.62		$500.49	
12/27/2021	TIMBERLAND FCU ACH PMT	$303.50		$196.99	
12/27/2021	CAPITAL ONE MOBILE PMT	$100.00		$96.99	
12/27/2021	DISCOVER E-PAYMENT 8180	$90.48		$6.51	
12/27/2021	PAYPAL INST XFER ITWORKSMARK	$36.00		($29.49)	ACH - OD-1 fee charged 12/28/21
12/28/2021	COMENITY PAY VI WEB PYMT	$75.00		($104.49)	ACH - OD-2 - fee charged 12/29/21
12/28/2021	PAYPAL INST XFER PPLUS	$3.74		($108.23)	ACH - OD-3 - fee charged 12/29/21
12/28/2021	OVERDRAFT FEES	$36.00		($144.23)	1 OD fee from 12/27/21
12/29/2021	XX8189 POS PURCHASE 12/27 16:06 SHEETZ 0445 00 KITTANNING PA 001 005056	$62.50		($206.73)	OD-4 - No fee - APSN
12/29/2021	OVERDRAFT FEES	$72.00		($278.73)	2 OD fees from 12/28/21

Exhibit 5.

Plaintiff appears to allege vaguely that NexTier charged an overdraft fee to her Account in connection with the debit card purchase that she made at Sheetz on December 27, 2021 (and that was processed on December 29, 2021) in the amount of $62.50. *See* **Exhibit 5** at p. 1. However, the overdraft fees of $72.00 that NexTier assessed to the Account on December 29, 2021 were comprised of two different overdraft fees in the amount of $36.00. *Id.* These fees pertained to the two transactions that were posted to the Account on December 28, 2021 that resulted in overdrafts. *Id.* Critically, NexTier did not assess an overdraft fee to the Account in connection with the debit card purchase that Plaintiff made at Sheetz. *Id.*

To the extent that Plaintiff argues that this Sheetz debit card transaction should have been processed earlier, Plaintiff does not allege any fact suggesting that Sheetz submitted the transaction earlier and she admits that NexTier does not control when the vendor or merchant processes its transactions. More importantly, if this Sheetz transaction was processed earlier, she would have overdrawn her account earlier and incurred an overdraft fee for the Timberland and/or Capital One payments.

2. January 21-26, 2022 Account Transactions

Post Date	Description	Debits	Credits	Balance	Comment
1/21/2022	DISCOVER E-PAYMENT 8180 XX8189 POS PURCHASE 01/20 02:34	$50.00		$43.53	
1/24/2022	SHEETZ 0445 00 KITTANNING PA	$65.40		($21.87)	OD 1 - No fee - APSN
1/24/2022	XX1908 POS PURCHASE 01/20 10:12 AMAZON.COM* XX8189 POS PURCHASE 01/20 02:20	$31.74		($53.61)	OD 2 - No fee - APSN
1/24/2022	SHEETZ 0445 00 KITTANNING PA	$6.42		($60.03)	OD 3 - No fee - APSN
1/24/2022	PEOPLES TWP LLC GAS BILL	$150.00		($210.03)	ACH - OD-4 - fee charged 1/25/22
1/24/2022	CHECK #608	$250.00		($460.03)	OD-5 - fee charged 1/25/22
1/25/2022	LENAPE TECH PAYROLL		$780.02	$319.99	
1/25/2022	WEB XFER FROM PERSONAL INTERE 3747396		$120.00	$439.99	
1/25/2022	TIMBERLAND FCU ACH PMT	$303.50		$136.49	
1/25/2022	PEOPLES TWP LLC GAS BILL	$148.00		($11.51)	OD-6 - fee charged 1/26/22
1/25/2022	CAPITAL ONE MOBILE PMT	$100.00		($111.51)	OD-7 - fee charged 1/26/22
1/25/2022	COMENITY PAY BH WEB PMT	$50.00		($161.51)	OD-8 - fee charged 1/26/22
1/25/2022	OVERDRAFT FEES	$72.00		($233.51)	2 OD Fees from 1/24/22
1/26/2022	OVERDRAFT FEES	$108.00		($341.51)	3 OD Fees from 1/25/22

Exhibit 5 (as to transactions through January 24, 2022); **Exhibit 6** (Heuser Monthly Account Statement for period January 25, 2022 to February 24, 2022).

While Plaintiff seemingly alleges that NexTier assessed an overdraft fee in connection with one or more of the debit card purchases that she made on January 24, 2022, this too is inaccurate. The overdraft fees of $72.00 that NexTier assessed to the Account on January 25, 2022 were comprised of two different overdraft fees in the amount of $36.00. **Exhibits 5 & 6** at p. 1. These fees pertained to the Peoples Township LLC gas bill payment of $150.00 that was posted to the Account on January 24, 2022 and the check in the amount of $250.00 that was posted to the account

on the same date, both of which resulted in an overdraft. **Exhibits 5 & 6** at p. 5. Neither overdraft fee was assessed in connection with Plaintiff's debit card purchases.

3. August 16-17, 2022 Account Transactions

Post Date	Description	Debits	Credits	Balance	Comment
8/16/2022	XX1908 POS PURCHASE 08/15 16:22 PAYPAL	$264.12		$36.98	
8/16/2022	CAPITAL ONE MOBILE PMT 3MA 10XWWW7FMKYXQ	$50.00		($13.02)	ACH OD-1 charged 8/17/22
	XX8189 POS PURCHASE 08/15 00:02 SHEETZ 0445 00				
8/17/2022	KITTANNING PA 001 017333	$63.30		($76.32)	Overdraft 2 - No fee
8/17/2022	OVERDRAFT FEES	$36.00		($112.32)	1 OD Fee from 8/16/22
8/18/2022	PPG INDUSTRIES PAYROLL 298033		$267.96	$185.64	

Exhibit 7 (Heuser Monthly Account Statement for period July 23, 2022 to August 24, 2022).[11]

Plaintiff's final APSN fee allegation is equally misguided. While Plaintiff seemingly contends that NexTier assessed an overdraft fee to the Account on August 17, 2022 stemming from the debit card purchase that was posted on that same day, this overdraft fee was assessed in connection with the Capital One payment that Plaintiff made in the amount of $50.00 on August 16, 2022. *See* **Exhibit 7** at p. 6. As a result, Plaintiff's conclusory allegations in support of Count II likewise are fatally undermined by her relevant monthly Account statements. Plaintiff cannot establish the necessary elements of any of her breach of contract claims because she has failed to allege facts demonstrating that NexTier breached the terms of the Agreement.

Because these simple reviews of the Plaintiff's monthly statements demonstrate her flawed allegations and these disclosure documents affirmatively show that her allegations are without merit, Plaintiff's breach of contract claim in Count II of the Complaint should be dismissed with prejudice.

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[11] For the sake of brevity, NexTier has not included all of the transactions that were posted to the Account on August 18, 2022. With that said, a cursory review of the transactions that were posted shows that, contrary to Plaintiff's allegations, NexTier did not assess an overdraft fee in connection with the debit card purchase that Plaintiff made on August 17, 2022.

D. Count III of the Complaint Should Be Dismissed Because NexTier is Authorized to Charge a Foreign Transaction Fee by the Deposit Account Agreement and the National Bank Act.

In Count III, Plaintiff alleges that NexTier breached the Agreement by charging a foreign transaction fee. Compl. ¶¶174-188. In support of this claim, Plaintiff alleges only that "on August 1, 2022, Plaintiff made a purchase from a vendor identified as "WEIKEGUO" for $55.94, and NexTier assessed a $1.01 [foreign transaction] fee on her transaction." *Id.* ¶106.[12] Plaintiff does not allege any facts as to the location of the vendor, the nature of the product purchased, whether the product was purchased at a store located in the United States or, more likely, whether the product was purchased over the internet from an unknown source for whom she does not know the location or identity of the seller.

Instead, Plaintiff contends that NexTier was not authorized to charge any foreign transaction fee based on ***her location*** when she engaged in the transaction, regardless of any other facts or circumstances. Specifically, Plaintiff alleges that she "understood the above transactions to be made in the United States ***because Plaintiff herself was located in the United States*** when she made the foregoing transactions." *Id.* ¶107 (emphasis added). She also alleges that the ***vendor*** (not NexTier) identified the purchase price of the product in "U.S. Dollars." *Id.* ¶108. She asserts that she "reasonably understood from the Contract that she would only be charged an FT Fee on transactions made while she was traveling abroad." *Id.* 109. Of course, Plaintiff fails to point to any language in the Agreement purportedly supporting this contrived expectation or, more to the point, where NexTier agreed to any such understanding.

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[12] The relevant monthly statement identifies the August 1, 2022 transaction as a July 28, 2022 "POS PURCHASE" via PAYPAL from WEIKEUGUO. **Exhibit 5**. The $1.01 fee is described as "VISA International Fee Assessment PAYPAL WEIKGUO." *Id.* The POS Purchase indicates that the Plaintiff made a purchase on-line using her debit card via PayPal and the Visa network. *Id.*

The Electronic Funds Transfer Agreement and Disclosure portion of the Agreement between NexTier and Plaintiff provided: "***When you use your Check Card at a merchant that settles in currency other than U.S. dollars,*** the charge will be converted into the U.S. dollar amount. The currency conversion rate used to determine the transaction amount in U.S. dollars is either a government mandated rate in effect or a rate selected by Visa from the range of rates available in wholesale markets...." **Exhibit 3** (Deposit Account Agreement incorporating Electronic Funds Transfer Agreement and Disclosure p. 2) (emphasis added).

Simply put, Plaintiff cannot reconcile her purported subjective expectation with the unambiguous language of the Agreement. Nothing in the Agreement ties the assessment of the foreign transaction fee to the Plaintiff's location when she conducts a transaction. The Agreement makes it clear that the currency conversion and any foreign transaction fee are triggered when the customer uses her check card at a merchant that settles in currency other than U.S. dollars. NexTier does not control who the Plaintiff purchases products from or where such vendors are located. Moreover, nothing in the Agreement states that Plaintiff can use her debit card to conduct electronic "POS" or "point of sale" transactions with vendors any place in the world without incurring a nominal transaction fee. Plaintiff used NexTier's banking services to conduct this transaction and there was nothing unfair or unconscionable about the assessment of a nominal fee for her doing so. Plaintiff offers nothing but boilerplate conclusions and rhetoric in Count III. Accordingly, NexTier was authorized under the Agreement to charge the foreign transaction fee and Plaintiff has failed to allege facts sufficient to sustain her claim. Count III should be dismissed with prejudice for this reason alone.

As with the overdraft and NSF fees, a national bank, such as NexTier, is expressly authorized to charge the "VISA international" fee or "foreign transaction" fee under 12 C.F.R.

§7.4002(a), the OCC regulation permitting the assessment of "non-interest charges and fees." Moreover, as with overdrafts, the "establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles." 12 C.F.R. §7.4002(b)(2).

E. Plaintiff's Breach of Contractual Duty of Good Faith Claims Are Legally Insufficient Because They are Duplicative and Subsumed Within Her Breach of Contract Claims.

Plaintiff's claims for breach of the implied contractual duty of good faith and fair dealing should be dismissed because the duty to act in good faith does ***not*** create or support an independent cause of action under Pennsylvania law. *See LSI Title Agency, Inc. v. Evaluation Servs.*, 951 A.2d 384, 391-92 (Pa. Super. Ct. 2008). In Pennsylvania, a claim for breach of good faith is "subsumed in a breach of contract claim." *Id.* at 391. Plaintiff does not plead any separate claims in this regard but merely refers to the implied duty in her breach of contract claims. Compl. ¶¶149-154, 164-169, 179-185. Indeed, Plaintiff offers nothing but legal conclusions and boilerplate allegations. *Id.* Therefore, because she does not (and cannot) allege any distinct, cognizable claims for breach of the duty of good faith, her Complaint does not state any independent causes of action in this regard.

Separately and most importantly, Pennsylvania law is well-established that the implied covenant of good faith cannot be used to modify or override express contractual terms. *Witmer v. Exxon Corp.*, 434 A.2d 1222, 1226-27 (Pa. 1981); *Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank*, 560 A.2d 151, 154-55 (Pa. Super. Ct. 1989) (affirming grant of preliminary objections dismissing breach of duty of good faith claim); *see also AAMCO Transmissions, Inc. v. Wirth*, 2011 WL 6088671, at *12 (E.D. Pa. Dec. 7, 2011) (holding that the doctrine of implied covenant

of good faith and fair dealing is "inapplicable where the contract or agreement expressly covers the complained of conduct, and it may not be used to override an express contractual term").

Because any such purported claims are not independent causes of action, they are legally insufficient and should be dismissed with prejudice.

F. Plaintiff's Unjust Enrichment Claim Is Barred Because, According to Her Allegations, the Parties' Relationship Arises from a Written Agreement.

Plaintiff's unjust enrichment claim also is legally deficient and should be dismissed with prejudice. It is well-established under Pennsylvania law "that the doctrine of unjust enrichment is inapplicable when the relationship between the parties is founded upon a written agreement or express contract." *Wilson Area Sch. Dist. v. Skepton*, 895 A.2d 1250, 1254 (Pa. 2006) (citations omitted); *Roman Mosaic & Tile Co., Inc. v. Vollrath*, 313 A.3d 305 (Pa. Super. Ct. 1973) ("The doctrine of unjust enrichment is clearly 'inapplicable when the relationship between the parties is founded on a written agreement or express contract.").

Because the relationship between Plaintiff and NexTier arises from and is governed by an express contract, *i.e.*, the Agreement, the doctrine of unjust enrichment is inapplicable to this case. In fact, in Count IV, Plaintiff expressly incorporates the "preceding paragraphs" of her Complaint averring the existence of the written Agreement. Compl. ¶189. Moreover, her attempt to suggest that the unjust enrichment claim is "brought solely in the alternative" and "applies only if the parties' contracts are deemed unconscionable or otherwise unenforceable" is legally insufficient because Plaintiff has not pled facts supporting these purported legal conclusions. *Toppy v. Passage Bio, Inc.*, 285 A.3d 672, 688 (Pa. Super. Ct. 2022) (affirming order sustaining preliminary objections as to unjust enrichment claim where contract alleged). Nor can she plead any such facts because the NBA specifically authorizes NexTier to assess and collect overdraft and NSF fees and

the NBA supersedes state law under the Supremacy Clause. As a result, Count IV of the Complaint should be dismissed with prejudice.

G. Plaintiff's UTPCPL Claim Fails as a Matter of Law for Multiple Independent Reasons.

The UTPCPL allows "any person" who purchases or leases goods or services to bring an action for an unfair or deceptive trade practice as defined under the law. *See* 73 P.S. § 201-9.2. The UTPCPL lists 20 specific types of actionable conduct, plus a "catch-all" provision prohibiting: "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. §·201-2(4)(i)-(xxi).

To assert a UTPCPL claim, a plaintiff must plead: 1) a violation of one of these subsections, 2) justifiable reliance, 3) causation, and 4) damages. *Kern v. Lehigh Valley Hosp.*, 108 A.3d 1281, 1290 (Pa. Super. Ct. 2015). A plaintiff alleging deceptive conduct under the UTPCPL's catch-all provision must prove that he justifiably relied on the defendant's alleged deceptive conduct or statements. *Kirwin v. Sussman Automotive*, 149 A.3d 333, 336-37 (Pa. Super. Ct. 2016); *see also Hunt v. United States Tobacco Co.*, 538 F.3d 217, 219 (3d Cir. 2008) (affirming dismissal of UTPCPL claim for failure to sufficiently allege justifiable reliance); *Walkup v. Santander Bank, N.A.*, 147 F.Supp.3d 349, 358 (E.D. Pa. 2015) (holding that "a plaintiff's loss-causing reliance on the prohibited conduct must be justifiable for such conduct to give rise to a UTCPL claim"). Notably, even under the UTPCPL's "catchall provision," a plaintiff "must still plead and prove justifiable reliance and causation, because the legislature never intended the statutory language directed against consumer fraud to do away with the traditional common law elements of reliance and causation." *Am. Express Bank, FSB v. Martin*, 200 A.3d 87, 94–95 (Pa. Super. Ct. 2018) (internal quotations and alterations omitted). The Pennsylvania Supreme Court has made this crystal clear: "Regardless of which unfair method of competition a plaintiff challenges in a private

cause of action, therefore, Section 201-9.2 requires the plaintiff to establish justifiable reliance." *Gregg v. Ameriprise Financial, Inc.*, 245 A.3d 637, 646 (Pa. 2021).

Because Plaintiff is alleging that NexTier engaged in deceptive conduct under the UTPCPL's catch-all provision, she is required to prove that she justifiably relied on any supposedly deceptive conduct that she alleges NexTier engaged in. However, as set forth more fully below, Plaintiff's claim should be dismissed because she cannot show that NexTier acted deceptively or that she justifiably relied upon any action or inaction taken by NexTier.

1. Plaintiff Has Failed to Allege Facts Demonstrating Any Actionable Conduct by NexTier.

To assert a "catch-all" UTPCPL claim, the plaintiff must plead facts supporting the elements of common-law fraud when claiming "other fraudulent conduct," *Prime Meats, Inc. v. Yochim*, 619 A.2d 769, 773 (Pa. 1993), or by otherwise alleging "deceptive conduct which creates a likelihood of confusion or of misunderstanding." *Gregg*, 245 A.3d at 648. "Deceptive" has been defined as "[a]n act or practice" that "has the capacity or tendency to deceive," and the "acts and practices are capable of being interpreted in a misleading way." *Id.*

Plaintiff's allegations that NexTier acted deceptively or fraudulently are premised entirely upon her allegations that NexTier improperly assessed certain fees to the Account. *See* Compl. ¶¶200-01. Plaintiff alleged that NexTier charged "multiple fees on an item" but her monthly statements refute this assertion. Likewise, she alleged that NexTier assessed overdraft fees on transactions that were authorized into a sufficient available balance, but again her monthly statements confirm the inaccuracy of this allegation. She alleged conclusorily that NexTier misrepresented or omitted its fee assessment policy and practice in the Agreement, but NexTier's policy was set forth clearly in its Agreement (and other disclosures too). Plaintiff's conclusory allegations as to the "foreign transaction" fee also are flawed in that they ignore NexTier's relevant

disclosures. Thus, as set forth more fully *supra*, NexTier did not assess the NSF and overdraft fees as Plaintiff contends and it did not engage in any "deceptive" conduct.

Plaintiff has failed to allege facts demonstrating that NexTier acted deceptively. Accordingly, her UTPCPL claim in Count V should be dismissed with prejudice.

2. Plaintiff Has Failed to Allege Facts Demonstrating That She Justifiably Relied Upon any Allegedly Actionable Conduct by NexTier.

Plaintiff also has not demonstrated that she justifiably relied upon NexTier's allegedly actionable conduct to her detriment. In her Complaint, Plaintiff alleges conclusorily that she and putative class members "relied upon NexTier's affirmative misrepresentations and material omissions to their detriment." *See* Compl. ¶203. Plaintiff does not allege that she read any specific part of the Agreement or any other disclosures and relied on it to her detriment. Moreover, because Plaintiff did not retain a copy of the Agreement, it naturally follows that she likely possesses no knowledge regarding the disclosures that NexTier made in the Agreement. To the extent Plaintiff was unaware of the disclosures that NexTier provided regarding its ability to assess overdraft and/or NSF fees to the Account, it would be impossible for her to take any action (*e.g.*, the completion of a debit card transaction or ACH transfer) in reliance upon those disclosures.

In *Toy v. Metro. Life Ins. Co.*, the Pennsylvania Superior Court explained that justifiable reliance requires some action or forbearance by the plaintiff. 863 A.2d 1 (Pa. Super. Ct. 2004), *aff'd*, 928 A.2d 186 (Pa. 2007). Specifically, the Superior Court explained:

> It is the fundamental principal of the law of fraud, regardless of the form of the relief sought, that in order to secure redress, the representee must have relied upon the statement or representation ***as an inducement to his action or injurious change of position***. The recipient of a fraudulent transaction can recover against its maker . . . if, but only if, (a) he relies on the misrepresentation in acting or refraining from action, and (b) his reliance is justifiable.

Id. at 11 (emphasis added); *see also Kirwin,* 149 A.3d at 337; *Cessna v. REA Energy Coop., Inc.*, 258 F. Supp. 3d 566, 580 (W.D. Pa. 2017) ("Justifiable reliance in this context means more than a mere causal connection between the wrongful conduct and the harm; the plaintiff must show that he justifiably bought the product in the first place (or engaged in some other detrimental activity) ***because of the misrepresentation.***") (emphasis added) (internal quotations omitted).

Plaintiff's UTPCPL claim should be dismissed because she has not (and cannot) plead facts demonstrating that she justifiably relied upon any action or inaction taken by NexTier. Plaintiff does not come close to pleading justifiable reliance or causation. She does not allege that she even read the Deposit Account Agreement, much less relied upon any of the provisions contained therein. Nor does she allege that she would not have overdrawn her Account or otherwise submitted items for payment when she lacked sufficient funds. She certainly does not allege that she would have refrained from purchasing the product from WEIKEGUO had she known where the seller was located, whether the transaction required a settlement in a different currency, or that she would incur a nominal, completely immaterial $1.01 fee.

Plaintiff does not include a single allegation that she read or relied upon any specific statement, representation, or policy of NexTier prior to taking any action. For instance, Plaintiff does not allege that she only wrote checks, made debit card purchases, or approved ACH transfers ***because of*** an action that NexTier took or any supposed representation that it made. To the extent that Plaintiff attempts to allege that she took one or more of these actions based upon certain language contained in the Agreement, this argument should be rejected because she pled that the Agreement was not "assessable [sic] or available to the Plaintiff despite efforts to obtain it." *See, e.g.,* Compl. ¶146. Simply put, the terms of the Agreement cannot cause Plaintiff confusion, misunderstanding, misrepresentation, or deception if she did not read it.

In sum, because Plaintiff has not (and cannot) plead justifiable reliance, her UTPCPL claim in Count V should be dismissed with prejudice. *See, e.g., Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001) ("plaintiff must allege reliance, that he purchased Ultra [gasoline] because he heard and believed Sunoco's false advertising that Ultra would enhance engine performance"); *McCabe v. Marywood Univ.*, 166 A.3d 1257, 1263 (Pa. Super. Ct. 2017) (sustaining preliminary objections to UTPCPL claim when the harm alleged did not result from the alleged misrepresentations); *Cessna*, 258 F. Supp. 3d at 582 (holding that members of electric cooperative failed to allege justifiable reliance where they did not allege that misrepresentations about disbursements of proceeds caused them to join cooperative or take any other detrimental action); *Hunt*, 538 F.3d at 227 (dismissing catch-all UTPCPL claim because plaintiff failed to allege that the defendant's deception induced him to purchase its products or engage in any other detrimental activity); *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 438 (Pa. 2004) (sustaining preliminary objections when plaintiff failed to plead justifiable reliance).

Thus, Plaintiff has failed to allege facts demonstrating that she justifiably relied on any misrepresentation or other actionable conduct. Accordingly, her UTPCPL claims should be dismissed with prejudice.

V. PLAINTIFF'S NUMEROUS ALLEGATIONS AS TO OTHER BANKS AND CREDIT UNIONS SHOULD BE STRICKEN AS IMPERTINENT AND SCANDALOUS.

Rule 1028(a)(2) provides that preliminary objections may be filed for failure of a pleading to conform to law or rule of court or "inclusion of scandalous or impertinent matter." Pa. R. Civ. P. 1028(a)(2). "To be scandalous and impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action." *Common Cause/Pennsylvania v. Commonwealth of Pennsylvania*, 701 A.2d 108, 115 (Pa. Commw. Ct. 1998), *aff'd*, 757 A.2d 367 (Pa. 2000). *Accord Biros v. U Lock, Inc.*, 255 A.3d 489, 497 (Pa. Super. Ct. 2021).

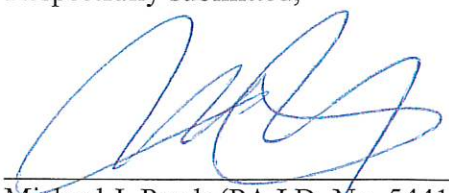
Throughout her Complaint, Plaintiff makes allegations regarding various other unaffiliated banks and credit unions that are not parties to this lawsuit. Specifically, she references the following ***thirteen (13)*** irrelevant financial entities: JPMorgan Chase (Compl. ¶23), Community Bank, N.A. (*Id.* ¶39), Canvas Credit Union (*Id.* ¶80), USAA, Discover, Barclays, Capital One, Boeing Employees' Credit Union (*Id.* ¶102), Bank of America (*Id.* ¶116-117), TD Bank (*Id.* ¶118), Ally Bank (*Id.* ¶119), American Airlines Federal Credit Union (*Id.* ¶120), and South State Bank (*Id.* ¶121). None of these allegations or entities has any relevance or pertinence to Plaintiff's relationship or dealings with NexTier. Moreover, none of the terms of any contract between any of these other banks or credit unions has any relevance to any element of Plaintiff's claims. Indeed, notwithstanding her failure to specify the language of her Agreement or to attach it, Plaintiff interjects numerous quotations of the completely irrelevant and impertinent, alleged agreements of these other banks or credit unions. Because these other alleged agreements have no relevance to her claims and their inclusion in this matter would only prejudice NexTier before this Court and confuse or distract any fact finder, they should be stricken under Rule 1028(a)(2). *Common Cause/Pennsylvania*, 701 A.2d 108 at 115 (striking allegations); *Biros*, 255 A.3d at 497 (affirming order striking allegations). Additionally, Plaintiff's counsel's various references in the Complaint to supposed studies, articles, advocacy statements, inapplicable regulatory or agency statements, and other consumer complaints against other banks (Compl. ¶¶14-22, 52, 55-57, 85-92, 101) – none of which relate to NexTier directly or have any relevance to Plaintiff's claims against NexTier – should be stricken for the same reasons.

VI. CONCLUSION

For all the reasons, Defendant NexTier Bank, N.A. respectfully requests that the Court enter an Order sustaining Defendant's Preliminary Objections and dismissing Plaintiff's Complaint with prejudice.

Dated: April 10, 2023

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant NexTier Bank, N.A.'s Brief in Support of Defendant's Preliminary Objections to Plaintiff's Complaint was served via electronic mail this 10th day of April 2023 as follows:

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I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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