

Melody Kiefer 9:05 am 2/2/23
Butler, PA 16001

BUTLER COUNTY, PENNSYLVANIA LOCAL RULES OF CIVIL PROCEDURE

RULE 1205.2(b) COVER SHEET

All complaints in civil action filed at the office of the Butler County Prothonotary shall be accompanied with a cover sheet which in substance similar to the following:

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA
DIANA HEUSER, on behalf
of herself and all other similarly situated,

CIVIL ACTION

Plaintiff,

Case No.

23-10076

v.

NEXTIER BANK, N.A.,

Defendant.

Type of Document: Complaint in Civil Action

If this is a Complaint, designate whether the case is subject to Compulsory Arbitration (jurisdictional amount \$35,000) or not.

 amount in controversy does not exceed \$35,000

 X amount in controversy exceeds \$35,000

 issues in case are not subject to Compulsory Arbitration

Does this complaint involve consumer credit card collection Y X N

Does this complaint involve residential mortgage foreclosure proceedings Y X N

Filed on behalf of DIANA HEUSER (Plaintiff / Defendant)

Counsel of record for this party Kenneth J. Grunfeld (Name of attorney primarily responsible)

Supreme Court I.D. No. 84121

Golomb Spirt Grunfeld, P.C. (Firm Name, if any)

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**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA
CIVIL ACTION**

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

Plaintiff,

v.

NEXTIER BANK, N.A.,

Defendant.

Civil Division

No.: _____

Type of Pleading:

CLASS ACTION COMPLAINT

Filed on Behalf of:
Plaintiff DIANA HEUSER

Counsel of Record

Kenneth J. Grunfeld, Esquire
PA Identification No. 84121

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**TRIAL BY JURY DEMANDED
AS TO ALL TRIABLE COUNTS**

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA
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DIANA HEUSER, on behalf of
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NEXTIER BANK, N.A.,

Defendant.

: Civil Division
:
: No.: _____
:
:
:
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:
:

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

**Office of Prothonotary, Butler County
Butler County Government Center
124 West Diamond Street
Butler, PA 16001
(724) 284-5214**

**Butler County Bar Association
240 S. Main Street
Butler, PA 16001
(724) 841-0130**

**IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA
CIVIL ACTION**

DIANA HEUSER, on behalf of	:	Civil Division
herself and all others similarly situated,	:	
	:	No.: _____
Plaintiff,	:	
v.	:	
NEXTIER BANK, N.A.,	:	
	:	
Defendant.	:	

CLASS ACTION COMPLAINT

AND NOW, Plaintiff Diana Heuser brings this Class Action Complaint against Defendant NexTier Bank, N.A. (“Defendant”), and alleges as follows based on information and belief:

INTRODUCTION

1. This case concerns Defendant’s unlawful business practices of (1) assessing multiple fees on an item; (2) assessing and collecting overdraft fees (“OD Fees”) on debit card transactions authorized on sufficient funds.; and (3) assessing Foreign Transaction Fees (“FT Fees”) on transactions that are made in the United States.

2. Besides being deceptive, upon information and belief these practices breach promises made in Defendant’s adhesion contract effective at the time of the fees at issue.

3. Plaintiff and other customers of Defendant have been injured by Defendant’s improper fee maximization practices. Plaintiff, individually and on behalf of the classes of individuals preliminarily defined below, brings claims for Defendant’s breach of contract, including the duty of good faith and fair dealing, and/or unjust enrichment, and violation of the Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §§ 201-1 *et seq.*

4. Plaintiff, like thousands of others, has fallen victim to Defendant's fee revenue maximization scheme.

PARTIES

5. Plaintiff is a natural person who is a citizen of Pennsylvania and a resident of Templeton, Pennsylvania. She was a customer of Defendant at all times relevant to the class allegations.

6. During the class period, Plaintiff resided in, and continues to reside in Pennsylvania. During the class period, Plaintiff incurred the fees complained of in Pennsylvania, charged by Defendant, based in Butler County. Accordingly, Plaintiff has suffered legally cognizable damages proximately caused by Defendant's misconduct.

7. Defendant is and has been a bank with more than \$1 billion in assets that is headquartered and does business in Pennsylvania, including in Butler County.

JURISDICTION AND VENUE

8. Personal jurisdiction is proper over Defendant because Defendant operates, conducts, engages in, and carries on its business in this State. Defendant further is incorporated in this State and maintains its headquarters in this State.

9. Exclusive jurisdiction exists in Pennsylvania state courts because Plaintiff is a Pennsylvania citizen and seeks to represent a class of Pennsylvania citizens and Defendant is a Pennsylvania citizen. Accordingly, there is no diversity between the parties.

10. Venue exists pursuant to 231 Pa. Code § 2179, because Defendant is headquartered in Indiana County, Pennsylvania and regularly conducts business in this county.

11. All conditions precedent to this action have occurred, been performed, or have been waived.

12. The claims of the named Plaintiff and of the members of the Class are brought under state law causes of action. No federal question exists in this matter.

13. Federal jurisdiction is inappropriate under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(4)(B), because two-thirds or more of the members of the proposed plaintiffs class in the aggregate are citizens of the state of Pennsylvania, as is the Defendant.

BACKGROUND FACTS

14. Overdraft fees and insufficient funds fees (“NSF fees”) are among the primary fee generators for banks. According to a banking industry market research company, Moebs Services, in 2018 alone, banks generated an estimated \$34.5 billion from overdraft fees. Overdraft Revenue Inches Up in 2018, <https://bit.ly/3cbHNKV>.

15. Unfortunately, the customers who are assessed these fees are the most vulnerable customers. Younger, lower-income, and non-white account holders are among those who were more likely to be assessed overdraft fees. Overdrawn: Consumer Experiences with Overdraft, Pew Charitable Trusts 8 (June 2014), <https://bit.ly/3ksKD0I>.

16. Because of this, industry leaders like Bank of America, Capital One, Wells Fargo, Alliant, and Ally have made plans to end the assessment of OD or NSF fees entirely. *See* Hugh Son, *Capital One to Drop Overdraft Fees for All Retail Banking Customers*, NBC News (Dec. 1, 2021), <https://nbcnews.to/3DKSu2R>; Paul R. La Monica, *Wells Fargo Ends Bounced Check Fees*, CNN (Jan. 12, 2022), <https://bit.ly/3iTAN9k>.

17. In line with this industry trend, the New York Attorney General recently asked other industry leading banks to end the assessment of all OD Fees by the summer of 2022. *NY Attorney General asks banks to end overdraft fees*, Elizabeth Dilts Marshall, Reuters (April 6, 2022).

18. The Federal Deposit Insurance Corporation (the “FDIC”) has expressed concern with the practice of assessing multiple fees on an item. In 2012, the FDIC determined that one bank’s assessment of more than one NSF Fee on the same item was a “deceptive and unfair act.” *In the Matter of Higher One, Inc., Consent Order*, Consent Order, FDIC-1 1-700b, FDIC-1 1-704k, 2012 WL 7186313.

19. In its latest issue of Consumer Compliance Supervisory Highlights, the FDIC again addressed the charging of multiple non-sufficient funds fees for transactions presented multiple times against insufficient funds in the customer’s account. (FDIC Consumer Compliance Supervisory Highlights, Mar. 2022). FDIC examiners have scrutinized this issue in recent exams, with some exams remaining open pending resolution of the issue.

20. In the Supervisory Highlights, the FDIC discussed potential consumer harm from this practice in terms of both deception and unfairness under the Federal Trade Commission Act Section 5’s prohibition on unfair or deceptive acts or practices. The FDIC stated that the “failure to disclose material information to customers about re-presentment practices and fees” may be deceptive.

21. During 2021, the FDIC identified consumer harm when financial institutions charged multiple NSF fees for the re-presentment of unpaid transactions. Terms were not clearly defined and disclosure forms did not explain that the same transaction might result in multiple NSF fees if re-presented. While case-specific facts would determine whether a practice is in violation of a law or regulation, the failure to disclose material information to customers about re-presentment practices and fees may be deceptive. This practice may also be unfair if there is the likelihood of substantial injury for customers, if the injury is not reasonably avoidable, and if there is no countervailing benefit to customers or competition. For example, there is risk of unfairness

if multiple fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for consumers to bring their account to a positive balance.

22. In its staff analysis of the issue, the American Bankers Association recommended that banks review their deposit account agreement to ensure it states clearly that a separate NSF fee will be assessed whenever the same item is resubmitted against insufficient funds. ABA also encouraged banks, if scrutinized by a regulator, to explain the significant logistical challenges with identifying items that have been resubmitted by the merchant for payment against insufficient funds. ABA is updating its staff analysis of this issue to reflect the Supervisory Highlights.

23. This abusive practice is not universal in the financial services industry. Indeed, major banks like Chase—the largest consumer bank in the country—do not undertake the practice of charging more than one fee on the same item when it is reprocessed. Instead, Chase charges one fee even if an item is reprocessed for payment multiple times.

24. Through the imposition of these fees, Defendant has made substantial revenue to the tune of tens of millions of dollars, seeking to turn its customers' financial struggles into revenue.

I. DEFENDANT ASSESSES TWO OR MORE FEES ON THE SAME ITEM RETURNED FOR INSUFFICIENT FUNDS

25. Defendant unlawfully maximizes its already profitable fees through the deceptive and, upon information and belief, contractually-prohibited practice of charging multiple NSF fees, or an NSF fee followed by an overdraft fee, on an item.

26. Unbeknownst to consumers, when Defendant reprocesses an electronic payment item, ACH item, or check for payment after it was initially rejected for insufficient funds, Defendant chooses to treat it as a new and unique item that is subject to yet another fee. But

Defendant's contract never states that this counterintuitive and deceptive result could be possible and, in fact, promises the opposite.

27. Upon information and belief, the Contract effective at the time of the fees at issue allows Defendant to take certain steps when paying a check, electronic payment item, or ACH item when the accountholder does not have sufficient funds to cover it. Specifically, Defendant may (a) pay the item and charge a \$36 fee; or (b) reject the item and charge a \$36 fee.

28. In contrast to the Contract, however, Defendant regularly assesses two or more \$36 fees on an item.

A. The Imposition of Multiple Fees on a Single Item Violates Defendant's Express Promises and Representations

29. Upon information and belief, in the Contract effective at the time of the fees at issue, Defendant never discloses that it will assess multiple fees on an item.

30. The same "item" on an account cannot conceivably become a new one when it is rejected for payment then reprocessed, especially when—as here—Plaintiff took no action to resubmit it.

31. Upon information and belief, there is zero indication anywhere in the Contract that the same "item" is eligible to incur multiple fees.

32. Even if Defendant reprocesses an instruction for payment, it is still the same "item." Its reprocessing is simply another attempt to effectuate an account holder's original order or instruction.

33. Upon information and belief, the Contract never discusses a circumstance where Defendant may assess multiple fees for a single check, electronic payment item, or ACH item that was returned for insufficient funds and later reprocessed one or more times and returned again.

34. In sum, upon information and belief, Defendant promises that one fee will be assessed on an item, and this term must mean all iterations of the same instruction for payment. As such, Defendant breached the Contract when it charged more than one fee per item.

35. Reasonable consumers understand any given authorization for payment to be one, singular “item.”

36. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same item will be treated as the same “item,” which Defendant will either authorize (resulting in an overdraft item) or reject (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere do Defendant and its customers agree that Defendant will treat each reprocessing of a check, electronic payment item, or ACH item as a separate item, subject to additional fees.

37. Customers reasonably understand, based on the language of the Contract, that Defendant’s reprocessing of checks, electronic payment items, and ACH items are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger fees. In other words, it is always the same item.

38. Banks and credit unions like Defendant that employ this abusive practice require their accountholders to expressly agree to it—something Defendant here never did.

39. For example, Community Bank, NA, discloses its fee practice in its online banking agreement as follows:

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

Overdraft and Unavailable Funds Practices Disclosure, Community Bank N.A. 5 (Nov. 12, 2019), <https://bit.ly/3uQafe7> (emphasis added).

40. Defendant's Contract effective at the time of the fees at issue provides no such authorization, and actually promises the opposite—Defendant may charge, at most, a fee, per item.

B. Plaintiff's Experience

41. In support of Plaintiff's claim, Plaintiff offers an example of a fee that should not have been assessed against Plaintiff's checking account. As alleged below, Defendant: (a) reprocessed a previously declined item; and (b) charged a fee upon reprocessing.

42. On January 5, 2022, Plaintiff was assessed multiple fees on an item.

43. Plaintiff understood the payment to be a single item as is laid out in the Contract, capable of receiving, at most, a single fee if Defendant returned it, or a single fee if Defendant paid it.

44. Defendant knew or should have known that the January 5, 2022 second reprocessing of the item was a "retry" of the first attempted item, because Defendant's own account statements state that the second attempt at processing was a "RETRY PYMT."

II. DEFENDANT ASSESSES OVERDRAFT FEES ON DEBIT CARD TRANSACTIONS THAT WERE AUTHORIZED ON SUFFICIENT FUNDS

A. The Contract

45. At all times material hereto, upon information and belief, Plaintiff had a checking account governed by the Contract.

46. Upon information and belief, the Contract is a standardized form of contracts for deposit accounts, the material terms of which are drafted by Defendant, amended by Defendant from time to time at its convenience and complete discretion, and imposed by Defendant on all deposit account customers.

B. Overview of the Claim

47. Plaintiff brings this action challenging Defendant's practice of charging OD Fees on what is referred to in this Complaint as "Authorize Positive, Settle Negative Transactions," or "APSN Transactions."

48. Here is how the practice works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Defendant immediately reduces consumers' checking accounts for the amount of the purchase, sets aside funds in the checking account to cover that transaction, and adjusts the consumer's displayed "available balance" to reflect that subtracted amount. As a result, customers' accounts will always have sufficient funds available to cover these transactions because Defendant has already held the funds for payment.

49. However, Defendant still assesses crippling \$36 OD Fees on many of these transactions and misrepresents its practices in the Contract.

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

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

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

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

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

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

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

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

[A] financial institution authorized an electronic transaction, which reduced a customer's available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer's available balance and pushed the account into overdraft status; and when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged. Because such fees caused harm to consumers, one or more supervised entities were found to have acted unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which

was not appropriately disclosed. They, therefore, could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive.

At one or more institutions, examiners found deceptive practices relating to disclosing overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer's available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that the disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer's decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing the fees under these circumstances was found to be unfair.

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

56. The CFPB has also stated:

Consumers are likely to reasonably expect that a transaction that is authorized at point of sale with sufficient funds will not later incur overdraft fees. Consumers may understand their account balance based on keeping track of their expenditures, or increasingly through the use of mobile and online banking, where debit card transactions are immediately reflected in mobile and online banking balances. Consumers may reasonably assume that when they have sufficient available balance in their account at the time they entered into the transaction, they will not incur overdraft fees for that transaction. But consumers generally cannot reasonably be expected to understand and thereby conduct their transactions to account for the delay between authorization and settlement—a delay that is generally not of the consumers' own making but is the product of payment systems. Nor can consumers control the methods by which the financial institution will settle other transactions—both

transactions that precede and that follow the current one—in terms of the balance calculation and ordering processes that the financial institution uses, or the methods by which prior deposits will be taken into account for overdraft fee purposes.

Consumer Financial Protection Bureau, “*Circular 2022-06*” (June 2022).

57. The CFPB has even called out APSN transactions specifically as “unanticipated:”

Unanticipated overdraft fees can occur on “authorize positive, settle negative” or APSN transactions, when financial institutions assess an overdraft fee for a debit card transaction where the consumer had sufficient available balance in their account to cover the transaction at the time the consumer initiated the transaction and the financial institution authorized it, but due to intervening authorizations, settlement of other transactions (including the ordering in which transactions are settled), or other complex processes, the financial institution determined that the consumer’s balance was insufficient at the time of settlement. These unanticipated overdraft fees are assessed on consumers who are opted in to overdraft coverage for one-time debit card and ATM transactions, but they likely did not expect overdraft fees for these transactions.

Id.

58. There is no justification for these practices, other than to maximize Defendant’s OD Fee revenue. APSN Transactions only exist because intervening transactions supposedly reduce an account balance. However, Defendant is free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year.

59. Nevertheless, Defendant was not content with these millions in OD Fees. Instead, it sought millions more in OD Fees on APSN Transactions.

60. Besides being deceptive, upon information and belief, these practices breach contract promises made in Defendant’s adhesion contracts, which fundamentally misconstrue and mislead consumers about the true nature of Defendant’s processes and practices. Defendant also exploits its contractual discretion by implementing these practices to gouge its customers.

C. Mechanics of a Debit Card Transaction

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

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

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

64. Defendant (like all banks and credit unions) decides whether to “pay” debit card transactions at authorization. For debit card transactions, that moment of decision can only occur at the point of sale, when the transaction is authorized or declined. It is at that point—and only that point—that Defendant may choose to either pay the transaction or decline it. When the time comes to actually transfer funds for the transaction to the merchant, it is too late for the bank to deny payment—the bank has no discretion and must pay the charge. This “must pay” rule applies industry-wide and requires that, once a financial institution authorizes a debit card transaction, it “must pay” it when the merchant later makes a demand, regardless of other account activity. See Electronic Fund Transfers, 74 Fed. Reg. 59033-01, 59046 (Nov. 17, 2009).

65. There is no change—no impact whatsoever—to the available funds in an account when the transfer step occurs.

66. Upon information and belief, the Contract indicates that transactions are only overdraft transactions when there is not enough money to cover the transaction at the time the customer swipes his or her debit card to pay for an item. But, of course, that is not true for APSN Transactions.

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

68. Defendant charges fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. Upon information and belief, no express language in any document states that Defendant may impose fees on any APSN Transactions.

69. First and most fundamentally, Defendant charges OD Fees on debit card transactions for which sufficient funds are available to cover throughout their lifecycle.

70. Defendant's practice of charging OD Fees even when sufficient available funds exist to cover a transaction violates its contractual promise not to do so. This discrepancy between Defendant's actual practice and the Contract causes consumers like Plaintiff to incur more OD Fees than they should.

71. Next, sufficient funds for APSN Transactions are immediately debited from the account, consistent with standard industry practice.

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

73. Defendant's actual practice is to assay the same debit card transaction twice to determine if it overdraws an account—both at the time of a transaction of authorization and later at the time of settlement.

74. At the time of settlement, however, an available balance does not change at all for these transactions previously authorized into positive funds. As such, Defendant cannot then charge an OD Fee on that transaction because the available balance has not been rendered insufficient due to the pseudo-event of settlement.

75. Upon information and belief, something more is going on: at the moment a debit card transaction is getting ready to settle, Defendant releases the hold placed on funds for the transaction for a split second, putting money back into the account, then re-debits the same transaction a second time.

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

77. In sum, there is a huge gap between Defendant's practices as described in the Contract and Defendant's actual practices.

78. Banks and credit unions like Defendant that employ this abusive practice require their accountholders to expressly agree to it—something Defendant here never did.

79. Indeed, recognizing the complexity of the settlement process for APSN Transactions and the fact that a fee in such circumstances is counterintuitive to accountholders, other banks and credit unions require their accountholders to agree to be assessed OD Fees on APSN Transactions.

80. For example, Canvas Credit Union states:

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

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

Member Service Agreement, Part 2, Canvas Credit Union 30 (Nov. 5, 2019), <https://bit.ly/3kX0iXo> (emphasis in original).

81. Upon information and belief, Defendant and its accountholders make no such agreement.

a. Reasonable Consumers Understand Debit Card Transactions Are Debited Immediately

82. Defendant's assessment of OD Fees on transactions that have not overdrawn an account is inconsistent with immediate withdrawal of funds for debit card transactions. This is because if funds are immediately debited, they cannot be depleted by intervening, subsequent transactions. If funds are immediately debited, they are necessarily applied to the debit card transactions for which they are debited.

83. Defendant was and is aware that this is precisely how its accountholders reasonably understand debit card transactions work.

84. Defendant knows that consumers prefer debit cards for these very reasons. Consumer research shows that consumers prefer debit cards as budgeting devices because they do not allow debt like credit cards as the money comes directly out of the checking account.

85. Consumer Action, a national nonprofit consumer education, and advocacy organization, advises consumers in determining whether they should use a debit card that “[t]here is no grace period on debit card purchases the way there is on credit card purchases; the money is immediately deducted from your checking account. Also, when you use a debit card, you lose the one or two days of ‘float’ time that a check usually takes to clear.” *What Do I Need To Know About Using A Debit Card?*, ConsumerAction (Jan. 14, 2019), <https://bit.ly/3v5YL62>.

86. This understanding is a large part of the reason that debit cards have risen in popularity. The number of terminals that accept debit cards in the United States has increased by approximately 1.4 million in the last five years. With that increasing ubiquity, consumers have viewed debit cards (along with credit cards) “as a more convenient option than refilling their wallets with cash from an ATM.” Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*, MarketWatch (Mar. 23, 2016), <https://on.mktw.net/3kV2zCH>.

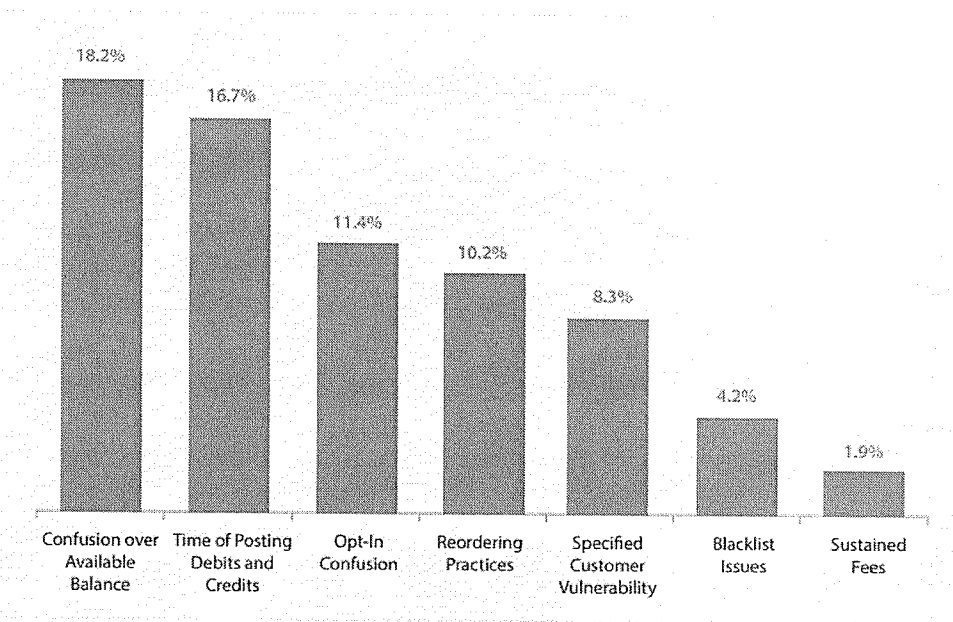
87. Not only have consumers increasingly substituted debit cards for cash, but they believe that a debit card purchase is the functional equivalent to a cash purchase, with the swipe of a card equating to handing over cash permanently and irreversibly.

88. Accordingly, “[o]ne of the most salient themes [in complaints to the CFPB] . . . is the difficulty avoiding overdrafts even when consumers believed they would. Often, this was related to bank practices that make it difficult for consumers to know balance availability, transaction timing, or whether or not overdraft transactions would be paid or declined.” Rebecca

Borne et al., *Broken Banking: How OD Fees Harm Consumers and Discourage Responsible Bank Products*, Center for Responsible Lending 8 (May 2016), <https://bit.ly/3v7SvL1>.

89. In fact, consumers' leading complaints involved extensive confusion over the available balance and the time of posting debits and credits:

Figure 3: Top Overdraft Consumer Complaint Issues, by Percentage of Total Complaints



Id.

90. Consumers are particularly confused by financial institutions' fee practices when "based on their actual review of their available balance, often including any 'pending' transactions, [customers] believed funds were available for transactions they made, but they later learned the transactions had triggered overdraft fees." *Id.* at 9.

91. Ultimately, unclear and misleading fee representations like those in Defendant's account documents mean that consumers like Plaintiff "who are carefully trying to avoid overdraft, and often believe they will avoid it . . . end up being hit by fees nonetheless." *Id.*

92. The Federal Deposit Insurance Corporation ("FDIC") has specifically noted that financial institutions may effectively mitigate this widespread confusion regarding overdraft

practices by “ensuring that any transaction authorized against a positive available balance does not incur an overdraft fee, even if the transaction later settles against a negative available balance.”

Consumer Compliance Supervisory Highlights, FDIC 3 (June 2019), <https://bit.ly/3t2ybsY>.

93. Despite this recommendation, Defendant continues to assess OD Fees on transactions that are authorized on sufficient funds.

94. Defendant was aware of the consumer perception that debit card transactions reduce an account balance at a specified time—namely, the time and order the transactions are actually initiated—and the Contract only supports this perception.

95. Defendant was also aware of consumers’ confusion regarding OD Fees but nevertheless failed to make its members agree to these practices.

b. Plaintiff Was Assessed OD Fees on Debit Card Transactions Previously Authorized on Sufficient Funds

96. For example, on or around December 29, 2021, Plaintiff was assessed an OD Fee, even though the transactions that purportedly caused these fees had been previously authorized on sufficient funds.

97. As another example, on or around January 24, 2022, Plaintiff was assessed an OD Fee, even though the transactions that purportedly caused these fees had been previously authorized on sufficient funds.

98. As a further example, on or around August 17, 2022, Plaintiff was assessed an OD Fee, even though the transactions that purportedly caused these fees had been previously authorized on sufficient funds.

99. Because Defendant had previously held the funds to cover this transaction, Plaintiff’s account always had sufficient funds to cover these transactions and should not have been assessed these fees.

III. DEFENDANT ASSESSES FOREIGN TRANSACTION FEES ON TRANSACTIONS THAT ARE MADE IN THE UNITED STATES

100. FT Fees are often charged by debit card-issuing retail banks and credit card companies when accountholders use their debit card or credit card while traveling abroad.

101. While consumers might expect to be charged these FT Fees while traveling abroad, they do not expect to be charged these fees when they never leave the United States. Indeed, a 2019 survey by personal finance website Wallethub found that 80% of consumers did not realize they could be charged FT Fees on transactions made with merchants in foreign countries while they were located in the United States.

102. This abusive practice is not universal in the financial services industry. Many credit cards, such as USAA, Discover, and Barclay's, do not charge any FT Fees. Similarly, many banks do not charge FT Fees on their debit cards. Banks like Capital One and Boeing Employees' Credit Union do not charge FT Fees on any debit card transaction.

103. And, as discussed below, many of the other banks that do charge FT Fees clearly disclose when they are assessed.

104. Unlike each of those banks and credit unions, upon information and belief, Defendant represents it will only charge FT Fees on transactions made while the accountholder is outside of the United States. To the contrary, upon information and belief the Contract only allows Defendant to charge FT Fees on transactions made outside of the United States.

A. Plaintiff's Experience

105. As an example of Defendant's actions, Plaintiff was assessed the following FT Fee by Defendant during the applicable time period.

106. For example, on August 1, 2022, Plaintiff made a purchase from a vendor identified as "WEIKEGUO" for \$55.94, and Defendant assessed a \$1.01 FT Fee on her transaction.

107. Plaintiff understood the above transactions to be made in the United States because Plaintiff herself was located in the United States when she made each of the foregoing transactions.

108. At the time Plaintiff engaged in the above transactions, the purchase price of the products were offered in U.S. Dollars as was the total price of her products at checkout. Upon information and belief, Plaintiff received no warning whatsoever that any of the above purchases involved the exchange of U.S. dollars for foreign currency or that she would otherwise be charged any sort of FT Fee for her purchase.

109. Upon information and belief, Plaintiff had no warning that she would be charged a FT Fee on a purchase made while she was in the United States. To the contrary, Plaintiff reasonably understood from the Contract that she would only be charged an FT Fee on transactions made while she was traveling abroad.

B. The Imposition of FT Fees on Transactions Made in the United States Violates Defendant's Express Promises and Representations

110. The Contract provides the general terms of Plaintiff's relationship with Defendant, and therein, upon information and belief, Defendant makes explicit promises and representations that FT Fees will only be charged when the accountholders use their debit cards to make a transaction while outside of the United States.

111. Upon information and belief, there is zero indication anywhere in the Contract that Defendant will charge a FT Fee on an online purchase made while the accountholder is in the United States; in fact, upon information and belief, the Contract explicitly state otherwise

112. Reasonable consumers understand that they will only be charged FT Fees while they are actually abroad, as such fees are called *foreign* transaction fees for a reason.

113. Upon information and belief, nowhere does Defendant disclose that Defendant will consider a foreign transaction to be “made” where the merchant is located as opposed to where the accountholder is located.

114. This counterintuitive interpretation defies common sense. Indeed, an accountholder often has no idea where an online merchant is located nor should she be expected to know.

115. An accountholder only has control over her location. To a reasonable accountholder, a transaction is “made” where she swipes his card or enters his card number. The language in the Account Documents, quoted above reinforce this understanding.

116. Banks and credit unions that employ this abusive practice know how to disclose it plainly and clearly. Indeed, other banks and credit unions that do engage in this abusive practice disclose it expressly to their account holders—something, upon information and belief, Defendant never did here.

117. For example, Bank of America provides the following disclosure for its FT Fee:

Fee applies if you use your card to purchase goods or services in a foreign currency or in U.S. Dollars with a foreign merchant (a “Foreign Transaction”). *Foreign Transactions include internet transactions made in the U.S. but with a merchant who processes the transaction in a foreign country.*

See <https://www.bankofamerica.com/salesservices/deposits/resources/personal-schedule-fees/>.

118. Similarly, TD Bank expressly discloses that it will charge an FT Fee regardless of where the accountholder is physically located:

Whenever you use your TD Bank Debit Card or TD ATM Card outside of the United States to get cash at any non-TD ATM, or to purchase goods or services, or for cash advances, we will charge an International transaction fee equal to 3% of the transaction amount. **This fee will apply whether the TD Bank Debit Card holder or TD ATM Card holder is physically located inside or outside the**

United States and the merchant is located outside the United States or makes a purchase in a foreign currency or in US currency.

See https://www.feeds.td.com/en/document/oao/pdf/1_fees.pdf.

119. Ally Bank also makes clear that the merchant's location is dispositive for determining when it will assess an FT Fee:

Cross Border and/or Currency Conversion Transaction Fee. A "Cross Border" and/or "Currency Conversion" fee applies to any point-of-sale debit and/or ATM transaction originated by any Merchants or ATM Operator located outside the United States.

See <https://www.ally.com/resources/pdf/bank/ally-bank-deposit-agreement-upcoming.pdf>.

120. Likewise, American Airlines Federal Credit Union engages in the same practice, but also expressly discloses it to accountholders:

Foreign Transactions: Debit Card purchases and cash withdrawals and ATM transactions made in foreign countries and foreign currencies will be debited from your Account in U.S. dollars. For Debit Card transactions, the rate of exchange between the transaction currency and the billing currency used for processing international transactions will be (i) a rate selected by Visa from the range of rates available in wholesale currency markets for the applicable central processing date, which rate may vary from the rate Visa itself receives, or (ii) the government mandated rate in effect for the applicable central processing date. The exchange rate used on the processing date may differ from the rate that would have been used on the purchase date or statement posting date. A Foreign/International Transaction Fee as set forth in our Fee Schedule will be assessed on all Debit Card international purchase, credit voucher and cash disbursement transactions. ***A foreign transaction is any transaction that you complete or a merchant completes on your card outside of the United States, with the exception of U.S. military bases, U.S. embassies or U.S. consulates.***

121. South State Bank is yet another bank that clearly tethers its disclosure to the location of the merchant rather than the accountholder:

VISA USA charges us a 0.8% International Service Assessment on all international transactions, regardless of whether there is a currency conversion. If there is a currency conversion, the International Service Assessment is 1% of the transaction. In either case, we pass this international transaction fee on to you. *An international transaction is a transaction where the country of the merchant is outside of the USA.*

122. Upon information and belief, Defendant provides no such disclosure, and instead, states otherwise, and in so doing deceives accountholders.

IV. NONE OF THESE FEES WERE ERRORS.

123. The improper fees charged by Defendant to Plaintiff's account were not errors by Defendant, but rather were intentional charges made by Defendant as part of its standard processing of transactions.

124. Plaintiff therefore had no duty to report the fees as errors because they were not; instead, they were part of the systematic and intentional assessment of fees according to Defendant's standard practices.

125. Moreover, any such reporting would have been futile as Defendant's own contract admits that Defendant made a decision to charge the fees.

V. THE IMPOSITION OF THESE FEES BREACHES DEFENDANT'S DUTY OF GOOD FAITH AND FAIR DEALING

126. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are invested with a discretionary power over the other party. This creates an implied promise to act in accordance with the parties' reasonable expectations and means that Defendant is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Defendant has a duty to honor payment requests in a way that is

fair to Plaintiff and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties on the depositor.

127. Here—upon information and belief, in the adhesion agreements Defendant foisted on Plaintiff and its other customers—Defendant has provided itself numerous discretionary powers affecting customers’ accounts. But instead of exercising that discretion in good faith and consistent with consumers’ reasonable expectations, Defendant abuses that discretion to take money out of consumers’ accounts without their permission and contrary to their reasonable expectations that they will not be charged improper fees.

128. When Defendant charges these fees, it uses its discretion in a way that violates common sense and reasonable consumer expectations and directly causes more fees.

129. In addition, Defendant exercises its discretion in its own favor and to the prejudice of Plaintiff and its other customers. Further, Defendant abuses the power it has over customers and their bank accounts and acts contrary to their reasonable expectations under the Contract. This is a breach of Defendant’s duty to engage in fair dealing and to act in good faith.

130. It was bad faith and totally outside of Plaintiff’s reasonable expectations for Defendant to use its discretion to assess improper fees.

131. Defendant abuses its discretion and acts in bad faith by defining terms in an unreasonable way that violates common sense.

CLASS ALLEGATIONS

132. Plaintiff brings this action individually and as a class action on behalf of the following proposed Classes:

The Multiple Fee Class: All citizens of Pennsylvania who, during the applicable statute of limitations period through the present, were assessed multiple fees on an item on a Defendant checking account.

The Overdraft Fee Class: All citizens of Pennsylvania who, during the applicable statute of limitations, were checking accountholders of Defendant and were assessed an overdraft fee on an APSN Transaction.

The Foreign Transaction Fee Class: All citizens of Pennsylvania who, during the applicable statute of limitations period through the present, were checking accountholders of Defendant and incurred an FT Fee on a transaction made in the United States.

133. Plaintiff reserves the right to modify or amend the definition of the Classes as this litigation proceeds.

134. Excluded from the Classes are Defendant, its parents, subsidiaries, affiliates, officers and directors, any entity in which Defendant has a controlling interest, all customers who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

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

136. The members of the Classes are so numerous that joinder is impractical. The Classes consist of thousands of members, the identities of whom are within the exclusive knowledge of Defendant and can be readily ascertained only by resort to Defendant's records.

137. The claims of the representative Plaintiff are typical of the claims of the Classes in that the representative Plaintiff, like all members of the Classes, has been damaged by Defendant's misconduct in that he has been assessed unlawful overdraft fees. Furthermore, the factual basis of Defendant's misconduct is common to all members of the Classes and represents a common thread of unlawful and unauthorized conduct resulting in injury to all members of the Classes. Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other members of the Class.

138. There are numerous questions of law and fact common to the Classes and those common questions predominate over any questions affecting only individual members of the Class.

139. Among the questions of law and fact common to the Classes include:

- a. Whether Defendant assesses multiple fees on an item;
- b. Whether Defendant violated its Contract by charging fees OD Fees on APSN Transactions;
- c. Whether Defendant improperly charges FT Fees on transactions made in the United States;
- d. Whether these practices breach the Contract;
- e. Whether Defendant breached its covenant of good faith and fair dealing through its fee policies and practices as described herein;
- f. Whether Defendant was unjustly enriched as a result of these fee assessment practices;
- g. Whether Defendant violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law;
- h. The proper method or methods by which to measure damages; and
- i. The declaratory and injunctive relief to which the Classes are entitled.

140. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions, particularly on behalf of consumers and against financial institutions. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Classes.

141. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual class member's claim is small relative to the complexity of the litigation, no class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members of the Classes will continue to suffer losses and Defendant's misconduct will proceed without remedy.

142. Even if class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows for the consideration of claims which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

143. Plaintiff suffers a substantial risk of repeated injury in the future. Plaintiff, like all Class members, is at risk of additional improper fees. Plaintiff and the Class members are entitled to injunctive and declaratory relief as a result of the conduct complained of herein. Money damages alone could not afford adequate and complete relief, and injunctive relief is necessary to restrain Defendant from continuing to commit its unfair and illegal actions.

CAUSE OF ACTION ONE
Breach of Contract, Including Breach
of the Covenant of Good Faith and Fair Dealing
(On Behalf of Plaintiff and the Multiple Fee Class)

144. Plaintiff realleges and incorporates by reference all the foregoing allegations as if they were fully set forth herein.

145. Plaintiff and Defendant have contracted for bank account services, as embodied in the written Contract.

146. Pursuant to 231 Pa. Code § 1019(i), the current or applicable written Contract is not assessible or available to the Plaintiff despite efforts to obtain it. The facts as plead represent the substance of the written Contract as it relates to the Complaint.

147. All contracts entered by Plaintiff and the Multiple Fee Class are identical or substantively identical because Defendant's form contracts were used uniformly.

148. Defendant has breached the express terms of its own agreements as described herein.

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

150. Good faith and fair dealing means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

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

152. Defendant abused the discretion it granted to itself when it charged multiple fees on an item.

153. Defendant also abused the discretion it granted to itself by defining key terms in a manner that is contrary to reasonable account holders' expectations.

154. In these and other ways, Defendant violated its duty of good faith and fair dealing.

155. Defendant willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing fee revenue from Plaintiff and other members of the Multiple Fee Class.

156. Plaintiff and members of the Multiple Fee Class have performed all, or substantially all, of the obligations imposed on them under the agreements.

157. Plaintiff and members of the Multiple Fee Class have sustained damages as a result of Defendant's breaches of contract, including breaches of contract through violations of the covenant of good faith and fair dealing.

158. Plaintiff and the members of the Multiple Fee Class are entitled to injunctive relief to prevent Defendant from continuing to engage in the foregoing conduct.

CAUSE OF ACTION TWO
Breach of Contract, Including Breach
of the Covenant of Good Faith and Fair Dealing
(On Behalf of Plaintiff and the Overdraft Fee Class)

159. Plaintiff realleges and incorporates by reference all the foregoing allegations as if they were fully set forth herein.

160. Plaintiff and Defendant have contracted for bank account services, as embodied in the written Contract.

161. Pursuant to 231 Pa. Code § 1019(i), the current or applicable written Contract is not assessible or available to the Plaintiff despite efforts to obtain it. The facts as plead represent the substance of the written Contract as it relates to the Complaint.

162. All contracts entered by Plaintiff and the Overdraft Fee Class are identical or substantively identical because Defendant's form contracts were used uniformly.

163. Defendant has breached the express terms of its own agreements as described herein.

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

165. Good faith and fair dealing means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

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

167. Defendant abused the discretion it granted to itself when it charged fees on APSN transactions.

168. Defendant also abused the discretion it granted to itself by defining key terms in a manner that is contrary to reasonable account holders' expectations.

169. In these and other ways, Defendant violated its duty of good faith and fair dealing.

170. Defendant willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing fee revenue from Plaintiff and other members of the Overdraft Fee Class.

171. Plaintiff and members of the Overdraft Fee Class have performed all, or substantially all, of the obligations imposed on them under the agreements.

172. Plaintiff and members of the Overdraft Fee Class have sustained damages as a result of Defendant's breaches of contract, including breaches of contract through violations of the covenant of good faith and fair dealing.

173. Plaintiff and the members of the Overdraft Fee Class are entitled to injunctive relief to prevent Defendant from continuing to engage in the foregoing conduct.

CAUSE OF ACTION THREE
Breach of Contract, Including Breach
of the Covenant of Good Faith and Fair Dealing
(On Behalf of Plaintiff and the Foreign Transaction Fee Class)

174. Plaintiff realleges and incorporates by reference all the foregoing allegations as if they were fully set forth herein.

175. Plaintiff and Defendant have contracted for bank account services, as embodied in the written Contract.

176. Pursuant to 231 Pa. Code § 1019(i), the current or applicable written Contract is not assessible or available to the Plaintiff despite efforts to obtain it. The facts as plead represent the substance of the written Contract as it relates to the Complaint.

177. All contracts entered by Plaintiff and the Foreign Transaction Fee Class are identical or substantively identical because Defendant's form contracts were used uniformly.

178. Defendant has breached the express terms of its own agreements as described herein.

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

180. Good faith and fair dealing means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

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

182. Defendant abused the discretion it granted to itself when it charged FT fees on transactions made in the United States.

183. Defendant also abused the discretion it granted to itself by defining key terms in a manner that is contrary to reasonable account holders' expectations.

184. In these and other ways, Defendant violated its duty of good faith and fair dealing.

185. Defendant willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing fee revenue from Plaintiff and other members of the Foreign Transaction Fee Class.

186. Plaintiff and members of the Foreign Transaction Fee Class have performed all, or substantially all, of the obligations imposed on them under the agreements.

187. Plaintiff and members of the Foreign Transaction Fee Class have sustained damages as a result of Defendant's breaches of contract, including breaches of contract through violations of the covenant of good faith and fair dealing.

188. Plaintiff and the members of the Foreign Transaction Fee Class are entitled to injunctive relief to prevent Defendant from continuing to engage in the foregoing conduct.

CAUSE OF ACTION FOUR
Unjust Enrichment
(On behalf of Plaintiff and the Classes)

189. Plaintiff incorporates the preceding paragraphs of this Complaint as if fully set forth below.

190. Plaintiff, individually and on behalf of the Classes, asserts a common law claim for unjust enrichment. This claim is brought solely in the alternative to Plaintiff's breach of contract claims and applies only if the parties' contracts are deemed unconscionable or otherwise unenforceable for any reason. In such circumstances, unjust enrichment will dictate that Defendant disgorge all improperly assessed fees.

191. Plaintiff and members of the Classes conferred a benefit on Defendant at the expense of Plaintiff and members of the Classes when they paid improper fees.

192. Defendant appreciated this benefit in the form of the substantial revenue that Defendant generates from the imposition of such fees.

193. Defendant has accepted and retained such fees under inequitable and unjust circumstances.

194. Defendant should not be allowed to profit or enrich itself inequitably and unjustly at the expense of Plaintiff and the members of the Class and should be required to make restitution to Plaintiff and members of the Class.

CAUSE OF ACTION FIVE
Violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law,
73 PA. Stat. Ann. §§ 201-1 *et. seq.*
(On Behalf of Plaintiff and the Classes)

195. Plaintiff realleges and incorporates by reference all the foregoing allegations as if they were fully set forth herein.

196. Defendant engaged in unfair and/or deceptive acts or practices relating to the

imposition of OD Fees on consumers, in violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. §§ 20-1 *et seq.* (the “Act”).

197. The Act prohibits “[u]nfair methods of competitions” and “unfair or deceptive acts or practices in the conduct of any trade or commerce.” 73 Pa. Stat. § 201-3.

198. 73 Pa. Stat. § 201-2(4)(xxi) defines “unfair methods of competition” and “unfair or deceptive acts or practices” as “engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding.”

199. Plaintiff and members of the Classes purchased services, in the form of banking services, from Defendant that were used primarily for personal, family, or household purposes.

200. Defendant engaged in unlawful conduct, made affirmative misrepresentations, purposefully and intentionally failed to provide or omitted material information, or otherwise violated the Act by, *inter alia*, knowingly and intentionally employing a deceptive policy and practice of charging multiple fees on an item, assessing overdraft fees on transactions that were authorized into a sufficient available balance, assessing FT fees on transactions made in the United States, and misrepresenting and/or omitting its fee assessment policy and practice in the Contract and related documents.

201. Defendant also engaged in unlawful conduct, made affirmative misrepresentations and material omissions, or otherwise violated the Act by, *inter alia*, abusing its discretion to interpret undefined terms in a manner harmful to consumers and beneficial to Defendant.

202. Defendant intended that Plaintiff and members of the Classes rely on its misrepresentations so that Plaintiff and the members of the Classes would continue to incur improper fees.

203. Plaintiff and members of the Classes relied upon Defendant’s affirmative

misrepresentations and material omissions to their detriment.

204. Defendant's conduct caused Plaintiff and members of the Classes to suffer ascertainable losses in the form of excessive fees that, but for Defendant's deceptive fee assessment policies as alleged herein, would not otherwise have been imposed.

205. A causal relationship exists between Defendant's unlawful conduct and the ascertainable losses suffered by Plaintiff and members of the Class.

206. Had Defendant charged overdraft fees on transactions only if they were authorized into an insufficient balance, assessed a single fee on an item, and did not assess FT fees on transactions made in the United States, Plaintiff and members of the Classes would not have incurred excessive fees in violation of the Act.

207. As redress for Defendant's repeated and ongoing violations of the Act, Plaintiff and the Classes are entitled to, *inter alia*, treble damages, injunctive and declaratory relief, and attorney fees.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff and members of the Classes demand a jury trial on all claims so triable and judgment as follows:

- a. Certification for this matter to proceed as a class action;
- b. Designation of Plaintiff as the Class Representative and designation of the undersigned as Class Counsel;
- c. Restitution of all improper fees paid to Defendant by Plaintiff and the Classes because of the wrongs alleged herein in an amount to be determined at trial;
- d. Declaring Defendant's fee policies and practices alleged in this Complaint to be wrongful to the extent they are inconsistent with the Contract;

- e. Enjoining Defendant from engaging in the practices outlined herein so long as they remain inconsistent with the Contract;
- f. Awarding actual damages and statutory damages in an amount according to proof;
- g. Pre- and post-judgment interest at the maximum rate permitted by applicable law;
- h. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- i. Such other relief as the Court deems just and proper.

JURY DEMAND

Plaintiff, by counsel, demands trial by jury.

Date: January 30, 2023

GOLOMB SPIRT GRUNFELD, P.C.

Respectfully submitted,

/s/ 

KENNETH J. GRUNFELD, ESQUIRE

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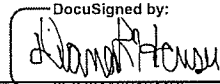
tyler@yourattorney.com

* *Pro Hac Vice* applications to be submitted

Counsel for Plaintiff and the Proposed Class

VERIFICATION

DIANA L. HEUSER hereby states that she is the Plaintiff in this action and verifies that the statements made in the **CLASS ACTION COMPLAINT** filed on the below date are true and correct to the best of her knowledge, information and belief. The undersigned understands that the statements therein are made subject to penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.

DocuSigned by:


8E8704A0B1643B5
DIANA L. HEUSER

Date: 1/26/2023

CERTIFICATE OF COMPLIANCE

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

A handwritten signature in black ink, appearing to read 'Ken Grunfeld', written over a horizontal line.

Kenneth J. Grunfeld