

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Kathrine Reaves, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

Crescom Corporation,

Defendant.

CASE NO. 2:20-cv-00254-DCN

JURY TRIAL DEMANDED

CLASS ACTION PETITION

COMES NOW Plaintiff, Katherine Reaves, by counsel, and for her Class Action Complaint against the Defendant, she alleges as follows:

NATURE OF THE ACTION

1. Plaintiff brings this action on behalf of herself and class of all similarly situated consumers against Crescom Bank (“Crescom” or “Defendant”), arising from its routine practice of assessing more than one fee, whether an overdraft fee (“OD Fee”) or insufficient funds fee (“NSF Fee”) on the same item (“Multiple Fees”), which is barred by the contract and is deceptive.

2. This is a civil action seeking monetary damages, restitution, and declaratory and injunctive relief.

3. As described herein, Defendant’s practices violate South Carolina consumer protection law, as well as the Defendant’s own form contracts.

4. Defendant’s improper scheme to extract funds from accountholders already struggling to make ends meet has victimized Plaintiff and thousands of others. Unless enjoined,

Defendant will continue to engage in this scheme and cause substantial injury to its checking account holders.

JURISDICTION

5. This Court has original jurisdiction over this putative class action lawsuit pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2) & (6), because the aggregate sum of the claims of the members of each of the putative class exceeds \$5 million, exclusive of interest and costs, because Plaintiff bring this action on behalf of proposed class that are each comprised of over one hundred members, and because at least one of the members of each of the proposed class is a citizen of a different state than Defendant.

6. Venue is appropriate under 28 U.S.C. § 1391(b) because Defendant resides in this District and is the only Defendant in this action.

PARTIES

7. Plaintiff Katherine Reaves is a citizen of North Carolina and resident of Tabor City, North Carolina.

8. Defendant Crescom Bank is one of the largest banks in the Carolinas. It has nearly \$4 billion in assets and maintains its headquarters in Charleston, South Carolina.

BACKGROUND FACTS **CRESCOM CHARGES MULTIPLE FEES ON THE SAME ITEM**

9. As alleged more fully herein, Crescom’s “Deposit Agreement” (Ex. A.) and “Fee Schedule” (Ex. B) (collectively, “Account Documents”) allow it to charge a single NSF or OD Fee when an item, including an electronic payment item, is returned for insufficient funds.

10. In contrast to its Account Documents, however, Crescom regularly assesses Multiple Fees on the *same* item.

11. 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 NSF Fee even if a transaction is resubmitted for payment multiple times.

12. Crescom’s Account Documents never disclose this practice. To the contrary, the Account Documents indicate that it will only charge a single fee on an item.

A. Plaintiff’s Experience

13. In support of her claims, Plaintiff offers an example of an NSF Fee that should not have been assessed against his checking account. As alleged below, Crescom: (a) reprocessed a previously declined transaction; and (b) charged an additional fee upon reprocessing.

14. On September 18, 2018, Plaintiff attempted to make a \$34.93 payment to Citi.

15. Crescom rejected payment of that item due to insufficient funds in Plaintiff’s account and charged her a \$36 NSF Fee the next day for doing so. Plaintiff does not dispute the initial fee, as it is allowed by Crescom’s Deposit Agreement and Fee Schedule.

16. Unbeknownst to Plaintiff and without her request to Crescom to retry the item, however, three days later, on September 21, 2018, Crescom processed the same item yet again, with Crescom labeling the transaction a RETRY PYMT on her statements. Again, Crescom rejected the item due to insufficient funds and charged Plaintiff *another* \$36 NSF Fee.

17. Crescom reprocessed the same item for a third time on September 26, 2019. Again, Crescom rejected the item due to insufficient funds and charged Plaintiff *a third* \$36 NSF Fee

18. *In sum, CRESCOM charged Plaintiff \$108 in fees to attempt to process a single \$35 payment.*

19. Plaintiff understood her payment to be a single item as is laid out in Crescom's contract, capable at most of receiving a single NSF Fee (if Crescom returned it) or a single OD Fee (if Crescom paid it).

B. The Imposition of Multiple Fees on a Single Transaction Violates Crescom's Express Promises and Representations

20. Crescom's Deposit Agreement, attached hereto as Exhibit A, states that a singular NSF Fee can be assessed on checks, ACH debits, and electronic payments.

21. Crescom's Deposit Agreement states that it will charge one insufficient funds fee for an "item" that is returned due to insufficient funds.

We may determine the amount of available funds in your account for the purpose of deciding whether to return an Item for Insufficient funds at any time between the time we receive the item and when we return the Item or send a notice in lieu of return. We need only make one determination. but if we choose to make a subsequent determination, the account balance at the subsequent time will determine whether there are insufficient available funds. A temporary debit authorization hold affects your account balance - On debit card purchases, merchants may request a temporary hold on your account for a specified sum of money, which may be more than the actual amount of your purchase. When this happens, our processing system cannot determine that the amount of the hold exceeds the actual amount of your purchase. This temporary hold, and the amount charged to your account, will eventually be adjusted to the actual amount of your purchase, but it may be up to three days before the adjustment is made. Until the adjustment is made, the amount of funds in your account available for other transactions will be reduced by the amount of the temporary hold. If another transaction is presented for payment in an amount greater than the funds left after the deduction of the temporary hold amount, that transaction will be a nonsufficient funds (NSF) transaction if we do not pay it or an overdraft transaction if we do pay it. You will be charged an NSF or overdraft fee according to our NSF or overdraft fee policy.

Ex. A at 2 (emphasis added).

22. Moreover, the "Fee Schedule," attached hereto as Exhibit B, confirms that only a single fee may be charged on an item:

Overdraft/Non-Sufficient Funds \$36.00 per item

Ex. B at 1.

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

24. There is zero indication anywhere in the Deposit Agreement or Fee Schedule that the same “item” is eligible to incur Multiple Fees.

25. The word “item” is nowhere defined in the Deposit Agreement.

26. Even if Crescom reprocesses an instruction for payment, it is still the same “item.” Defendant’s reprocessing is simply another attempt to effectuate an accountholder’s original order or instruction.

27. The disclosures described above never discuss a circumstance where Crescom may assess multiple fees for a single check or ACH transaction that was returned for insufficient funds and later reprocessed one or more times and returned again.

28. In sum, Crescom promises that one \$36 NSF Fee will be assessed per ACH debit or check, and these terms must mean all iterations of the same instruction for payment. As such, Crescom breached the contract when it charged Multiple Fees per item.

29. Reasonable consumers understand any given authorization for payment to be one, singular “item,” as those terms are used in Crescom’s Account Documents.

30. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same transaction will be treated as the same “item,” which Crescom 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 does

Crescom disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor do Crescom customers ever agree to such fees.

31. Customers reasonably understand, based on the language of the Account Documents, that Crescom's reprocessing of checks or ACH payments are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger additional fees. In other words, it is always the same item or transaction.

32. Banks and credit unions like Crescom that employ this abusive practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that do engage in this abusive practice disclose it expressly to their accountholders—something Defendant here never did.

33. For example, First Citizens Bank, a major institution in the Carolinas, engages in the same abusive practice as Crescom, but at least expressly states:

Because we may charge a service fee for an NSF item each time it is presented, **we may charge you more than one service fee for any given item.** All fees are charged during evening posting. When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft.

(emphasis added).

34. First Hawaiian Bank engages in the same abusive practices as Defendant, but at least currently discloses it in its online banking agreement, in all capital letters, as follows:

YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT OF A RETURNED ITEM AND RESUBMISSION.

(emphasis added).

35. Klein Bank similarly states in its online banking agreement:

[W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment (electronic or check) is submitted to us for payment from your Bill Payment Account when, at the time

of posting, your Bill Payment Account is overdrawn, would be overdrawn if we paid the item (whether or not we in fact pay it) or does not have sufficient available funds; or (2) we return, reverse, or decline to pay an item for any other reason authorized by the terms and conditions governing your Bill Payment Account. We will charge an NSF/Overdraft Fee as provided in this section regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the bill payment.

36. Central Pacific Bank, a leading bank in Hawai'i, states in its Fee Schedule under the "MULTIPLE NSF FEES" subsection: "Items and transactions (such as, for example, checks and electronic transactions/payments) returned unpaid due to insufficient/non-sufficient ("NSF") funds in your account, may be resubmitted one or more times for payment, and a \$36 fee will be imposed on you each time an item and transaction resubmitted for payment is returned due to insufficient/nonsufficient funds." *Miscellaneous Fee Schedule*, Central Pacific Bank 1 (Feb. 15, 2019), <https://www.centralpacificbank.com/PDFs/Miscellaneous-Fee-Schedule.aspx>.

37. BP Credit Union likewise states: "We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item."

38. Crescom provides no such disclosure, and in so doing, deceives its accountholders.

C. The Imposition of Multiple Fees on a Single Transaction Breaches Crescom's Duty of Good Faith and Fair Dealing

39. 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. In such circumstances, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties' reasonable expectations and means that Crescom is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Crescom has a duty to honor transaction 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. Here—in the adhesion agreements Crescom foisted on Plaintiff and its other customers—Crescom has provided itself numerous discretionary powers affecting customers’ accounts. But instead of exercising that discretion in good faith and consistent with consumers’ reasonable expectations, Crescom abuses that discretion to take money out of consumers’ account without their permission and contrary to their reasonable expectations that he will not be charged multiple fees for the same transaction.

40. Crescom exercises its discretion in its own favor—and to the prejudice of Plaintiff and its other customers—when it defines “item” in a way that directly leads to more fees. Further, Crescom abuses the power it has over customers and their accounts and acts contrary to their reasonable expectations under the Deposit Agreement. This is a breach of Crescom’s implied covenant to engage in fair dealing and act in good faith.

41. By exercising its discretion in its own favor—and to the prejudice of Plaintiff and other customers—by charging more than one fee on a single item, Crescom breaches the reasonable expectation of Plaintiff and other customers and in doing so violates the implied covenant to act in good faith.

42. It was bad faith and totally outside Plaintiff’s reasonable expectations for Crescom to use its discretion to assess two or three fees for a single attempted payment.

43. When Crescom charges multiple fees, Crescom uses its discretion to define the meaning of “item” in an unreasonable way that violates common sense and reasonable consumer expectations. Crescom uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes Multiple Fees.

CLASS ACTION ALLEGATIONS

44. Plaintiff brings this action on behalf of herself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of Rule 23. The proposed “Class” is defined as:

All persons who, during the applicable statute of limitations, were charged Multiple Fees on the same item on a Crescom checking account.

45. Excluded from the Class are Defendant’s officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded from the Class are any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

46. The time period for each of the Class 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 Crescom remedies the conduct complained of herein.

47. Numerosity. The members of the Class are so numerous that separate joinder of each member is impracticable. Upon information and belief, and subject to class discovery, the Class consist of thousands of members or more, the identity of which are within the exclusive knowledge of and can be ascertained only by resort to Crescom’s records. Crescom has the administrative capability through its computer systems and other records to identify all members of the Class and the amount of NSF Fees and OD Fees paid by each Class member, and such specific information is not otherwise available to Plaintiff.

48. Commonality. There are numerous questions of law and fact common to the Class relating to Crescom’s business practices challenged herein, and those common questions

predominate over any questions affecting only individual Class members. The common questions include, but are not limited to:

- a. Whether Crescom improperly charged more than one NSF Fee on the same item;
- b. Whether Plaintiff and other members of the Class have sustained damages and the proper measure of damages.

49. Typicality. Plaintiff's claims are typical of the claims of the other Class members in that they arise out of the same wrongful business practice by Crescom, as described herein.

50. Adequacy of Representation. Plaintiff is an adequate representative of the Class in that she has a Crescom checking account and has suffered damages as a result of Crescom's assessment and collection of NSF and OD Fees. In addition:

- a. Plaintiff is committed to the vigorous prosecution of this action on behalf of herself and all others similarly situated and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers against financial institutions;
- b. There is no hostility of interest between Plaintiff and the unnamed Class members;
- c. Plaintiff anticipates no difficulty in the management of this litigation as a class action; and
- d. Plaintiff's legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

51. Predominance. The questions of law and fact common to the Class as set forth in the "commonality" allegation above predominate over any individual issues. As such, the "commonality" allegations are restated and incorporated herein by reference.

52. Superiority. A class action is superior to other available methods and highly desirable for the fair and efficient adjudication of this controversy. Since the amount of each individual Class member's claim is very small relative to the complexity of the litigation and since the financial resources of Crescom are enormous, no Class member could reasonably afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and Crescom's misconduct will proceed without remedy. In addition, 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 claims to be heard 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.

53. All conditions precedent to bringing this action have been satisfied and/or waived.

FIRST CLAIM FOR RELIEF

Breach of Contract, Including the Covenant of Good Faith and Fair Dealing

54. Plaintiff incorporates by reference the preceding paragraphs.

55. Plaintiff and Crescom have contracted for banking services, as embodied in Crescom's Account Documents and related documentation.

56. All contracts entered by Plaintiff and the Class are identical or substantively identical because Crescom's form contracts were used uniformly.

57. Crescom has breached the express terms of its own agreements as described herein when it assessed multiple fees on the same item.

58. Under the law of the state of South Carolina, good faith is an element of every contract. All contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, 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.

59. 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, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

60. Crescom abused the discretion it granted to itself when it assessed multiple fees on the same item.

61. In these and other ways Defendant violated good faith and fair dealing.

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

63. Plaintiff and members of the Class have performed all, or substantially all, of the obligations imposed on them under the contracts.

64. Plaintiff and members of the Class have sustained damages as a result of Defendant's breaches of the parties' contracts and breaches of contract through violations of the covenant of good faith and fair dealing.

65. Plaintiff and members of the Class have no adequate remedy at law.

SECOND CLAIM FOR RELIEF
South Carolina Unfair Trade Practices Act

66. Paragraphs 1 through 65 of the Complaint are hereby repeated and re-alleged as if fully set forth herein.

67. Defendant's unconscionable and unfair actions regarding the assessment of NSF and OD account fees constitute unfair trade practices as defined by the laws of the United States and the State of South Carolina, including but not limited to S.C. Code Ann. § 39-5-20 *et. seq.*

68. The assessments are unfair as they violate industry standards, offend public policy and deceived customers who do not expect the charges.

69. The assessments affect commerce in South Carolina, as many of the Defendant's customers were charged these unfair fees.

70. The Defendant's conduct has substantial potential for repetition that necessarily affects the public interest of the citizens of South Carolina, as the actions are ongoing and consumers continue to be assessed these unfair fees.

71. Defendant's conduct of charging unfair NSF and OD fees has been repeated many times.

72. Plaintiffs suffered ascertainable actual losses of money due to the unfair, deceptive, willful, and unlawful actions of the Defendant, and are entitled to damages for such losses.

73. As a direct result of charging the unfair assessments, Defendant obtained income, profit, and other benefits that it would not otherwise have obtained.

74. The Defendants' deceit was substantial and the acts and practices regarding South Carolina consumers were undertaken in bad faith.

75. At all times, the Defendant knew or should have known that its conduct violated the South Carolina Unfair Trade Practices Act, and therefore is willful for purposes of S.C. Code Ann. § 39-5-110, which justifies civil penalties.

76. The Defendant's conduct constitutes trade and commerce under S.C. Code Ann. § 39-5-10, as the Defendant has offered its banking services to the citizens of South Carolina.

77. Every act of unfair competition by the Defendant constitutes a separate and distinct violation of S.C. Code Ann. § 39-5-20.

THIRD CLAIM FOR RELIEF
Unjust Enrichment

78. Paragraphs 1 through 77 of the Complaint are hereby repeated and re-alleged as if fully set forth herein.

79. Unjust enrichment prevents the wrongful retention of a benefit in violation of good conscience and principals of justice and equity. The doctrine permits recovery of the amount the Defendant has been unjustly enriched as the expense of the Plaintiffs.

80. Defendant's acts and practices as alleged herein substantially impacted the Plaintiffs and caused significant harm.

81. Defendant's acts and practices as alleged herein were motivated by a desire to increase its profits and were undertaken in bad faith.

82. Plaintiffs have suffered injuries as a result of these deceptive fees by the Defendant, and are entitled to restitution or disgorgement.

83. Defendant has been unjustly enriched in the form of increased revenue and profit as a result of its deceptive and unfair actions in violation of the laws of South Carolina. Under equitable principals and due to its unjust enrichment, Defendant should be required to disgorge any profits, plus interest, that were obtained as a result of its misrepresentations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff on her own behalf and on behalf of the Class respectfully request that the Court:

- (a) Certify this case as a class action, appointing Plaintiff as class representative and appointing counsel for Plaintiff as lead counsel for the Class;
- (b) Award Plaintiff and the Class actual, incidental, statutory, consequential, and treble damages in an amount to be proven at trial, including any and all compensatory damages, punitive damages, restitution, any applicable penalties and interest, authorized attorneys' fees, interest, and costs, and any further relief as the Court deems just equitable, and proper;
- (c) Declare Crescom's practices outlined herein to be unlawful;
- (d) Enjoin Crescom from engaging in the practices outlined herein; and
- (e) Grant Plaintiff and the Class a trial by jury.

DEMAND FOR TRIAL BY JURY

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

Dated: January 24, 2020

Respectfully submitted,

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