

IN THE CIRCUIT COURT OF BOONE COUNTY  
STATE OF MISSOURI

**SUSANNE PACE**

on behalf of herself and all others similarly  
situated,

Plaintiff,

v.

**LANDMARK BANK**

Defendant.

JURY DEMAND

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**

Plaintiff Susanne Pace (“Plaintiff”), by counsel, brings this Class Action Complaint against Defendant Landmark Bank (“Landmark” or “Defendant”), and alleges as follows:

**INTRODUCTION**

1. This is a civil action seeking monetary damages, restitution, and injunctive and declaratory relief from Landmark, arising from its improper assessment and collection of multiple \$29 fees on an item.

2. Besides being deceptive, this practice breaches contract promises made in Landmark’s adhesion contracts, including its duty of good faith and fair dealing.

3. Plaintiff and other Landmark customers have been injured by Landmark’s practices.

**PARTIES**

4. Plaintiff is a resident of Fulton, Missouri, and has had a checking account with Landmark at all times material hereto.

5. Defendant Landmark Bank is a nationally chartered bank with its headquarters in Columbia, Missouri. It has over \$3.1 billion in assets and maintains several branches throughout Missouri, Oklahoma, and Texas.

### **JURISDICTION AND VENUE**

6. This Court has original jurisdiction over this matter because Landmark is at home in this State.

7. Landmark regularly and systematically conducts business and provides retail banking services in this State and provides retail banking services to customers in this State, including Plaintiff and members of the putative Class. As such, it is subject to the jurisdiction of this Court.

8. Venue is likewise proper in this district pursuant to Mo. Ann. Stat. § 508.010 because Landmark maintains its principal office in this County, conducts business in this County, and a substantial part of the acts and omissions giving rise to this lawsuit occurred in this County.

### **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

#### **I. Landmark Improperly Charges Two Or More Fees on an Item**

9. 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 \$29.5 billion from overdraft fees. *Overdraft Revenue Inches Up in 2018*, <https://bit.ly/3cbHNKV>.

10. 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>.

11. Landmark unlawfully maximizes its already profitable fees through its deceptive and contractually-prohibited practice of charging multiple NSF fees, or an NSF fee followed by an overdraft fee, on an item.

12. Unbeknownst to consumers, each time Landmark reprocesses an electronic payment item, ACH item, or check for payment after it was initially rejected for insufficient funds, Landmark chooses to treat it as a new and unique item that is subject to yet another fee. But Landmark's contract never states that this counterintuitive and deceptive result could be possible and, in fact, promises the opposite.

13. 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.

14. Plaintiff has a Landmark checking account, which was governed by Landmark's standardized Account Agreement, attached as Ex. A hereto (the "Agreement"), and the Schedule of Fees, attached as Ex. B hereto (the "Fee Schedule" and, together with the Agreement, the "Contract").

15. The Contract allows Landmark 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, Landmark may (a) pay the item and charge a \$29 fee; or (b) reject the item and charge a \$29 fee.

16. In contrast to the Contract, however, Landmark regularly assesses two or more \$29 fees on an item.

**A. The Imposition of Multiple Fees on an Item Violates Landmark's Express Promises and Representations**

17. The Contract provides the general terms of Plaintiff's relationship with Landmark, and therein Landmark makes explicit promises and representations regarding how an item will be processed, and how fees may be assessed.

18. The Agreement promises that "a fee" (singular) will be charged on an item for when the "account lacks sufficient funds available to pay" the item:

If your account lacks sufficient funds available to pay a check, preauthorized transfer or other debit activity presented for payment as determined by the available balance in your account, we may (1) return the item, *or* (2) pay the item at our discretion....If we return the item without paying it, we may charge you *a non-sufficient funds fee*. If we do pay the item on your behalf, you will be responsible to pay the overdrawn balance and *an overdraft fee*.

Ex. A at 3-4 (emphasis added).

19. In other words, Landmark promises to assess "a non-sufficient funds fee" (singular) or "an overdraft fee" (singular) on an item when the "account lacks sufficient funds available." *Id.*

20. In breach of this promise, Landmark assesses multiple non-sufficient funds fees on an item or a nonsufficient funds fee and an overdraft fee on an item.

21. The Fee Schedule reinforces this promise to assess the "fee" "per item":

**Overdraft and Insufficient Funds \$29.00 *per item*. *Fee*** may be imposed for covering overdrafts created by check, in person withdrawal, ATM withdrawal, or electronic means.

Ex. B (bold italic emphasis added).

22. Taken together, the Contract thus promises a fee will be assessed on an item, when in fact Landmark regularly charges two or more fees on an item.

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 it.

24. There is zero indication anywhere in the Contract that the same “item” is eligible to incur multiple fees.

25. Even if Landmark 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.

26. Landmark and its members never agreed that Landmark 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.

27. In sum, Landmark promised that one fee would be assessed on an item, and this term must mean all iterations of the same instruction for payment. As such, Landmark breached the Contract when it charged more than one fee per item.

28. Reasonable consumers understand any given authorization for payment to be one, singular “item,” as that term is used in the Contract.

29. 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 Landmark 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 Landmark and its customers agree that Landmark will treat each reprocessing of a check, electronic payment item, or ACH item as a separate item, subject to additional fees.

30. Customers reasonably understand, based on the language of the Contract, that Landmark'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.

31. Banks and credit unions like Landmark that employ this abusive practice require their accountholders to expressly agree to it.

32. First Citizens Bank, a major institution in the Carolinas, engages in the same practice as Landmark, but 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.

*Deposit Account Agreement*, First Citizen's Bank (Oct. 2020), <https://bit.ly/2GJjSqq> (emphasis added).

33. Community Bank, NA, discloses its fee practice in its online banking agreement, in all capital letters, 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).

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

[W]e will charge you an NSF/Overdraft Fee each time: (1) an item is submitted to us for payment from your Account when, at the time of posting, your Account is overdrawn or would be overdrawn if we paid the item (whether or not we in fact pay it); or (2) we return, reverse, or decline to pay an item for any other reason authorized by the Terms and Conditions of your account. For these purposes, an item includes a check, an ATM or debit card transaction, an ACH transaction, or

other withdrawal, transfer or debit. Your account is overdrawn if your Available Balance is less than zero. **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 item.**

*Online Access Agreement*, Klein Bank 17 (Jan. 2013), <https://bit.ly/2Fevj8W> (emphasis added).

35. The Contract provides no such authorization, and actually promises the opposite—Landmark may charge, at most, a fee on an item.

### **B. Plaintiff's Experience**

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

37. On or around July 24, 2019, Plaintiff attempted a payment by check for \$780.00.

38. Landmark rejected payment of that check due to insufficient funds in Plaintiff's account and charged a \$29 fee for doing so.

39. Unbeknownst to Plaintiff and without Plaintiff's request to Landmark to reprocess the item, on or around July 29, 2019, Landmark rejected the same check again and charged Plaintiff a *second* \$29 fee for doing so.

40. *In sum, Landmark charged Plaintiff \$58 in fees on an item.*

41. On or around September 16, 2019, Plaintiff attempted a single payment via ACH for \$56.00.

42. Landmark rejected payment of that item due to insufficient funds in Plaintiff's account and charged a \$29 fee for doing so.

43. Unbeknownst to Plaintiff and without Plaintiff's request to Landmark to reprocess the item, on or around September 19, 2019, Landmark rejected the item again and charged Plaintiff a *second* \$29 fee for doing so.

44. *In sum, Landmark charged Plaintiff \$58 in fees on an item.*

45. On or around October 16, 2019, Plaintiff attempted a single payment via ACH for \$56.00.

46. Landmark rejected payment of that item due to insufficient funds in Plaintiff's account and charged a \$29 fee for doing so.

47. Unbeknownst to Plaintiff and without Plaintiff's request to Landmark to reprocess the item, on or around October 21, 2019, Landmark paid the item into overdraft and charged Plaintiff a *second* \$29 fee for doing so.

48. *In sum, Landmark charged Plaintiff \$58 in fees on an item.*

49. 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 Landmark returned it, or a single fee if Landmark paid it.

50. The improper fees charged by Landmark were not errors or "discrepancies," but rather intentional charges made by Landmark as part of its standard processing of items.

51. Plaintiff therefore had no duty to report the fees as errors or "discrepancies."

52. Moreover, any such reporting would have been futile as Landmark had made a decision to charge the fees in this specific manner to maximize profits at the expense of customers.

**C. The Imposition of Multiple Fees on an Item Breaches Landmark's Duty of Good Faith and Fair Dealing**

53. 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 Landmark is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Landmark 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. Here—in the adhesion agreements Landmark foisted on Plaintiff and its other customers—Landmark has provided itself numerous discretionary powers affecting customers' accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, Landmark 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 multiple fees on an item.

54. When Landmark charges multiple fees on an item, it uses its discretion to define the meaning of "item" in a way that violates common sense and reasonable consumer expectations. Landmark uses its contractual discretion to define that term to choose a meaning that directly causes more fees.

55. In addition, Landmark exercises its discretion in its own favor and to the prejudice of Plaintiff and its other customers when it reprocesses an item when it knows a customer's account lacks funds and then charges additional fees on an item. Further, Landmark 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 Landmark's duty to engage in fair dealing and to act in good faith.

56. It was bad faith and totally outside of Plaintiff's reasonable expectations for Landmark to use its discretion to assess two or more fees on an item.

57. Landmark abuses its discretion and acts in bad faith by defining contract terms in an unreasonable way that violates common sense and by charging multiple fees on an item.

## CLASS ALLEGATIONS

58. Plaintiff brings this action individually and on behalf of the following class of persons (the “Class”):

All Landmark Bank checking account holders who, during the applicable statute of limitations, were charged multiple fees on an item by Landmark Bank.

59. Plaintiff reserves the right to modify or amend the definition of the Class as this litigation proceeds.

60. Excluded from the Class are Landmark, its parents, subsidiaries, affiliates, officers and directors, any entity in which Landmark 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.

61. The Class consists of thousands of members, such that joinder of all Class members is impracticable.

62. There are questions of law and fact that are common to all members of the Class that relate to Landmark’s practice of charging fees on multiple fees on an item.

63. The claims of Plaintiff are typical of the claims of the proposed Class because they are based on the same legal theories, and Plaintiff has no interests that are antagonistic to the interests of the members of the Class.

64. Plaintiff is an adequate representative of the Class and has retained competent legal counsel experienced in class actions and complex litigation that will fairly and adequately protect the interests of the Class.

65. The class action is an appropriate method for the fair and efficient adjudication of the controversy.

66. The questions of law and fact common to the Class predominate over any questions affecting only individual members of the Class, particularly because the focus of the litigation will be on Landmark's conduct. The predominant questions of law and fact in this litigation include, but are not limited to, whether Landmark:

- Imposed more than one fee on an item;
- Breached its contract with Plaintiff and members of the Class by assessing more than one fee on an item; and
- Breached the covenant of good faith and fair dealing imposed on it.

67. Other questions of law and fact common to the Class include the proper method or methods by which to measure damages.

68. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, as the pursuit of hundreds of individual lawsuits would not be economically feasible for individual Class members, and certification as a class action will preserve judicial resources by allowing the common issues of the Class members to be adjudicated in a single forum, avoiding the need for duplicative hearings and discovery in individual actions that are based on an identical set of facts. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of Landmark, no Class member could 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 Landmark's misconduct will proceed without remedy. In addition, without a class action, it is likely that many members of the Class will remain unaware of Landmark's conduct and the claims they may possess.

69. It appears that other persons who fall within the definitions of the Class set forth above are not pursuing similar litigation, such that individual Class members do not wish to control the prosecution of separate actions.

70. This proposed class action does not present any unique management difficulties.

**FIRST CLAIM FOR RELIEF**  
**(Breach of Contract including Breach of the Covenant of Good Faith and Fair Dealing)**  
**(On Behalf of Plaintiff and the Class)**

71. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

72. Plaintiff and Landmark have contracted for bank account deposit, checking, ATM, and debit card services. *See Exs. A & B.*

73. Landmark mischaracterized in the Contract its true fee practices and breached the express terms of the Contract.

74. No contract provision authorizes Landmark to charge more than one fee on an item.

75. Under Missouri law, good faith is an element of every contract. Good faith is also mandated by the Uniform Commercial Code (“UCC”), which covers banking transactions. Whether by common law or statute, 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.

76. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing are 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.

77. Landmark has breached the covenant of good faith and fair dealing through its fee policies and practices as alleged herein.

78. Landmark harms consumers by abusing its contractual discretion in a number of ways that no reasonable customer would anticipate.

79. Plaintiff and members of the Class have performed all, or substantially all, of the obligations imposed on them by the Contract.

80. Plaintiff and members of the Class have sustained damages as a result of Landmark's breach of the Contract and breach of the covenant of good faith and fair dealing.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff and the Class demand a jury trial on all claims so triable and judgment including the following:

- a. Certification for this matter to proceed as a class action;
- b. Designation of Plaintiff as Class Representative, and designation of the undersigned as Class Counsel;
- c. Restitution of all improper fees paid to Landmark by Plaintiff and the Class, because of the wrongs alleged herein in an amount to be determined at trial;
- d. Actual damages in an amount according to proof;
- e. Pre- and post- judgment interest at the maximum rate permitted by applicable law;

- f. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law;
- g. Attorneys' fees under the common fund doctrine and all other applicable law;
- h. Injunctive and declaratory relief prohibiting Landmark from engaging in the practices outlined herein and declaring such practices unlawful; and
- i. Such other relief as this Court deems just and proper.

**JURY DEMAND**

Plaintiff, by counsel, demands trial by jury.

Dated: May 13, 2021

Respectfully submitted,

/s/ John F. Garvey

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\* To Seek Admission *Pro Hac Vice*

**Certificate of Filing**

The undersigned hereby certifies that the foregoing Class Action Complaint has been filed by using the Court's electronic case filing system on this 13<sup>th</sup> day of May, 2021.

*/s/John F. Garvey*