

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

JILL ABERCROMBIE, on behalf of
herself, and all others similarly situated,

Plaintiff,

CASE NO.: *CAC 21-11047*
CLASS REPRESENTATION *Div 04*

JURY TRIAL DEMANDED

v.

TD BANK, N.A.,

Defendant.

CLASS ACTION COMPLAINT

Plaintiff Jill Abercrombie (“Ms. Abercrombie”), on behalf of herself and all others similarly situated, by and through her counsel, brings this Class Action Complaint (“Complaint”) against Defendant TD Bank, N.A. (“TD Bank” or the “Bank”), and based upon personal knowledge with respect to herself, and on information and belief and the investigation of counsel as to all other matters, in support thereof alleges as follows:

INTRODUCTION

1. Ms. Abercrombie brings this action on behalf of herself, and all similarly situated consumers against TD Bank, arising from a specific fee generation practice that violates the Bank’s contracts.

2. When an item is paid on an account balance that has insufficient funds, TD Bank charges a \$35 Overdraft Fee (“OD Fee”). When TD Bank returns an item unpaid because an account balance has insufficient funds, TD Bank charges a \$35 “Overdraft – Return” fee (“NSF Fee”). This case concerns TD Bank’s business practice of imposing both an OD Fee and an NSF Fee *on the same item*.

3. The relevant Account Documents (defined below) permit TD Bank to charge a

single \$35 NSF Fee or a single \$35 OD Fee on an item.

4. Therefore, Ms. Abercrombie does not dispute the Bank's right to either (a) reject a transaction and charge a *single* NSF Fee or (b) pay a transaction and charge a *single* OD Fee, but TD Bank unlawfully maximizes its already profitable account fees with deceptive practices that violate the express terms of its contract when it charges *both* fees on the same item.

5. Ms. Abercrombie and other TD Bank customers have been injured by this practice. On behalf of herself and the Class, Ms. Abercrombie seeks damages, and restitution for TD Bank's breach of contract and of the covenant of good faith and fair dealing.

PARTIES

6. Ms. Abercrombie is a citizen of Florida, residing in Palm Coast, Flagler County, Florida. Ms. Abercrombie has maintained a checking account at TD Bank at all times material hereto.

7. Defendant TD Bank is a national bank with its headquarters and principal place of business located in Cherry Hill, New Jersey. Among other things, TD Bank is engaged in the business of providing retail banking services to consumers, including Ms. Abercrombie and members of the putative Class. TD Bank operates banking centers, and thus conducts business, throughout the State of Florida, including within this County.

JURISDICTION AND VENUE

8. This Court has personal jurisdiction over TD Bank because Defendant operates, conducts, engages in, and carries on its business in this State, and breached a contract in this state by failed to perform acts required by the contract to be performed in this state. Also, Defendant regularly conducts and/or solicits business in, engages in other persistent courses of conduct in, and/or derives substantial revenue from products and/or services provided to persons in this

County and in Florida.

9. The damages in this case exceed \$30,000.00, exclusive of interest, costs, and attorneys' fees.

10. Venue for this action is proper in this Court because Defendant is authorized to transact business in Florida, Defendant has an agent or representative in this County, and the wrongdoing alleged herein occurred in this County.

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

SUBSTANTIVE ALLEGATIONS

12. As alleged more fully herein, TD Bank's Account Documents allow it to take certain steps when a TD Bank accountholder attempts a transaction but does not have sufficient funds to cover it. Specifically, the Bank may charge a *single* \$35 OD Fee or charge a *single* \$35 NSF Fee.

13. In contrast to its Account Documents (as defined below), however, TD Bank regularly charges NSF Fees and an OD Fee on the *same* item.

14. Oftentimes, TD Bank does this multiple times—repeatedly rejecting, re-processing, and charging one or more NSF Fees on the transaction before finally authorizing it and then charging an *additional* OD Fee on that item.

15. Until very recently, TD Bank's Account Documents never disclosed that the Bank undertakes these practices. To the contrary, the Bank's Account Documents indicated that TD Bank would charge only a single fee on an item.

A. Ms. Abercrombie's Experience

16. In support of her claims, Ms. Abercrombie offers an example of an OD Fee

assessed on an item after the same item had already been subject to an NSF Fee. In this example, TD Bank: (a) reprocessed an item it had previously declined at least once and charged an NSF Fee on at least once; and (b) upon reprocessing, paid the same item into overdraft and charged an OD Fee.

17. For example, on February 4, 2021, Ms. Abercrombie attempted to make a one-time transfer to Capital One in the amount of \$100.00 via an ACH transaction.

18. TD Bank rejected payment of that item due to insufficient funds in Ms. Abercrombie's account and charged her a \$35 NSF Fee. Ms. Abercrombie does not dispute this initial fee, as it is allowed by the Bank's Account Documents.

19. Unbeknownst to Ms. Abercrombie, however, four days later, on February 8, 2021, TD Bank processed the same item yet again, and this time TD Bank paid the item into overdraft and charged her another \$35 Fee.

20. In sum, TD Bank charged Ms. Abercrombie \$70 in fees to process a single \$100.00 payment to Capital One—a payment it could have simply authorized into overdraft and charged one fee at the outset.

21. Ms. Abercrombie understood her Capital One payment to be a single item as is laid out in TD Bank's contract, capable at most of receiving a single NSF Fee (if TD Bank returned it) or a single OD Fee (if TD Bank paid it).

B. The Imposition of Both NSF and OD Fees on a Single Transaction Violates TD Bank's Express Promises and Representations

22. The Account Documents—together, the Personal Deposit Account Agreement, attached as *Exhibit A*, and the corresponding Personal Fee Schedule, attached as *Exhibit B*—provide the general terms of Ms. Abercrombie's relationship with the Bank. Therein TD Bank makes explicit promises and representations regarding how transactions will be processed, as

well as when NSF Fees and OD Fees may be assessed.

23. The Account Documents explicitly promise that a single OD or NSF Fee will be assessed per “item”—defined as a customer request for payment or transfer—when in fact TD Bank regularly charges two or more fee per item.

24. TD Bank’s operative Personal Fee Schedule stated:

Overdraft – return (NSF)/overdraft – paid (**per item**)⁸ \$ 35.00

⁸ The fee applies to a maximum of five (5) items per day per account.

Ex. B.

25. The plain language of the fee schedule groups “Overdraft – return (NSF)” and “overdraft - paid” together and promises that only one of such fees will be assessed “per item.” In other words, the contract promises that whatever fee is assessed, there can only be one “per item.”

26. According to the operative Deposit Agreement:

An “item” includes a *check*, substitute check, purported substitute check, remotely created check or draft, electronic transaction, draft, demand draft, image replacement document, indemnified copy, ATM withdrawal or transfer, debit card point-of-sale transaction, pre-authorized debit card payment, automatic transfer, telephone-initiated transfer, *ACH transaction*, online banking transfer to or from Accounts at TD Bank or external transfers to other institutions, online bill payment instruction, payment to or from other people (Send Money with Zelle® transaction), withdrawal or deposit slip, in-person transfer or withdrawal, cash ticket, deposit adjustment, wire transfer, and any other instruction or order for the payment, transfer, deposit or withdrawal of funds.

Ex. A at 7 (emphasis added).

27. An “item” like a check or ACH transaction, in other words, is a request for payment by an accountholder. It does not become a new “item” when it is later reprocessed by TD Bank.

28. Because, in the example above, Ms. Abercrombie only made one request for

payment for her ACH transaction—she only wanted to pay funds to Capital One once—there is no new “item” when that transaction is rejected then reprocessed for payment by TD Bank.

29. In other words, an “item” does not become a new “item” when it is reprocessed.

30. In sum, the same instruction for payment cannot conceivably become a new “item” each time it is rejected for payment and then reprocessed by TD Bank. The Bank’s reprocessing is simply another attempt to effectuate Ms. Abercrombie’s original order or instruction.

31. The disclosures described above never address a circumstance where TD Bank may assess one or more NSF Fees *and* an OD Fee on a single check or ACH transaction that was returned for insufficient funds and later reprocessed one or more times and then paid into overdraft.

32. Reasonable consumers understand any given authorization for payment to be one, singular “item” as that term is used in TD Bank’s Fee Schedule and Deposit Agreement.

33. TD Bank knows this. That is why, in April 2021, TD added for the first time, language to its definition of “item” that authorizes TD Bank to treat resubmitted items as new, unique “items” for fee assessment purposes:

An “item” includes any instruction or order for the payment, transfer, deposit, or withdrawal of funds, including but not limited to any check, substitute check, purported substitute check, remotely created check or draft, electronic transaction, draft, demand draft, image replacement document, indemnified copy, ATM withdrawal or transfer, debit card point-of-sale transaction, pre-authorized debit card payment, automatic transfer, telephone-initiated transfer, ACH transaction, online banking transfer to or from Accounts at TD Bank Bank or external transfers to other institutions, online bill payment instruction, payment to or from other people (Send Money with Zelle® transaction), withdrawal or deposit slip, in-person transfer or withdrawal, cash ticket, deposit adjustment, or wire transfer. ***In the event that there are insufficient funds in your account to pay an item and the transaction is resubmitted, each resubmission constitutes a separate item.***

Exhibit C at 7 (emphasis added).

C. The Imposition of an NSF Fee and OD Fee on a Single Item Breaches TD Bank's Duty of Good Faith and Fair Dealing

34. 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 the Bank is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the Bank has a duty to honor payment requests in a way that is fair to Ms. Abercrombie 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 the Bank foisted on Ms. Abercrombie and its other customers—TD Bank has provided itself numerous discretionary powers affecting customers' bank accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, the Bank abuses that discretion to take fees out of consumers' account without their permission and contrary to their reasonable expectations that they will not be charged multiple fees for the same item.

35. TD Bank maintains complete discretion not to assess NSF Fees or OD Fees on transactions at all. By exercising its discretion in its own favor—and to the prejudice of Ms. Abercrombie and other customers—by charging both an NSF Fee and OD Fee on a single item—TD Bank breaches the reasonable expectations of Ms. Abercrombie and other customers and in doing so violates the implied covenant to act in good faith.

36. Moreover, TD Bank engages in a pattern of initially rejecting, then approving, the same items in order to maximize fee revenue.

37. As alleged in the example above, TD Bank exercised discretion to reject an item

on the first iteration of Ms. Abercrombie's Capital One payment because she purportedly had insufficient funds in her account. But it approved the second iteration of the same item even though Ms. Abercrombie still purportedly lacked sufficient funds and was in fundamentally the same financial position.

38. By exercising its discretion in its own favor—and to the prejudice of Ms. Abercrombie and other customers—by engaging in its “reject, then approve into overdraft” pattern, TD Bank abuses the power it has over Ms. Abercrombie and its other customers and acts contrary to their reasonable expectations under the Deposit Agreement. This is a breach of the Bank's implied covenant to engage in fair dealing and act in good faith.

CLASS ALLEGATIONS

39. Ms. Abercrombie brings this action on behalf of herself, and all others similarly situated pursuant to Florida Rule of Civil Procedure 1.220. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rule 1.220.

40. The proposed “Class” is defined as:

All TD Bank checking account holders in the United States who, during the applicable statute of limitations until April 1, 2021, were charged an NSF Fee and an OD Fee on the same item.

41. Ms. Abercrombie reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

42. Specifically excluded from the Class are any entities in which TD Bank has a controlling interest, or which have a controlling interest in TD Bank, TD Bank's legal representatives, assigns, and successors, any Judge to whom this action is assigned, and any member of such Judge's staff and immediate family.

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

44. The claims of the representative plaintiff are typical of the claims of the Class in that the representative plaintiff, like all members of the Class, was charged at least one NSF Fee and an OD Fee on a single check or ACH item. The representative plaintiff, like all members of the Class, has been damaged by TD Bank's misconduct in that he has been assessed unfair and unconscionable NSF and OD Fees. Furthermore, the factual basis of TD Bank's misconduct is common to all members of the Class and represents a common thread of unlawful conduct resulting in injury to all members of the Class. Ms. Abercrombie has suffered the harm alleged and has no interests antagonistic to the interests of any other members of the Class.

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

46. Among the questions of law and fact common to the Class include:

- a. Whether TD Bank violated its own contract provisions by charging both an NSF Fee and an OD Fee on a single item;
- b. Whether TD Bank breached its covenant of good faith and fair dealing with Ms. Abercrombie and other members of the Class by charging both an NSF Fee and an OD Fee on an item; and
- c. The proper method or methods by which to measure damages.

47. Ms. Abercrombie 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, Ms. Abercrombie is an adequate representative and will fairly and adequately protect the interests of the Class.

48. 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 Class will continue to suffer losses and TD Bank's misconduct will proceed without remedy.

49. 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.

COUNT I

Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing (On Behalf of the Class)

50. Ms. Abercrombie realleges and incorporates by reference all the foregoing allegations as if they were fully set forth herein.

51. Ms. Abercrombie and TD Bank have contracted for bank account services, as embodied in TD Bank's Account Documents.

52. TD Bank's Account Documents explicitly state that, when a customer lacks

sufficient funds to cover an item, the Bank may either: (a) charge an OD Fee or (b) charge an NSF fee. TD Bank regularly violates its contractual promises by charging both an NSF Fee and an OD Fee on a single item to Ms. Abercrombie and the Class members.

53. Under the laws of the states where TD Bank does business, 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. That means that the Bank is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the Bank has a duty to honor transaction requests in a manner that is fair to Ms. Abercrombie and members of the Class and is prohibited from exercising its discretion to pile on ever greater penalties. Here—in the form agreements the Bank foisted on Ms. Abercrombie and members of the Class—TD Bank has provided itself numerous discretionary powers affecting customers' bank accounts.

54. Instead of exercising that discretion in good faith and consistent with customers' reasonable expectations, the Bank abuses that discretion to take money out of customers' accounts without their permission and contrary to their reasonable expectations that they will not be charged an NSF Fee and an OD Fee for the same item.

55. By exercising its discretion to enrich itself by gouging its consumers, TD Bank consciously and deliberately frustrates the agreed common purposes of the contract and violates the reasonable expectations of Ms. Abercrombie and members of the Class, thereby depriving them of the benefit of their bargain.

56. Ms. Abercrombie and members of the Class have performed all, or substantially

all, of the obligations imposed on them under the Deposit Agreement.

57. Ms. Abercrombie and members of the Class have sustained damages as a result of TD Bank's breaches of the contract and breaches of the implied covenant of good faith and fair dealing.

PRAYER FOR RELIEF

WHEREFORE, Ms. Abercrombie, individually and on behalf of the members of the Class, respectfully requests the Court to enter an Order:

- a. certifying the proposed Class, appoint Ms. Abercrombie as Class Representative, and appointing the undersigned as Class Counsel;
- b. granting actual damages and restitution of all improperly assessed OD Fees paid to TD Bank by Abercrombie and the Class, as a result of the wrong alleged herein in an amount to be determined at trial;
- c. awarding pre-judgment interest at the maximum rate permitted by applicable law;
- d. awarding costs and disbursements assessed by Abercrombie in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- e. awarding such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Ms. Abercrombie and all others similarly situated hereby demand trial by jury on all issues in this Complaint that are so triable as a matter of right.

Dated: June 3, 2021

Respectfully submitted,

/s/ Jeff Ostrow
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