STATE OF INDIANA) DELAWARE COUNTY CIRCUIT/SUPERIOR COURT
)SS:
COUNTY OF DELAWARE) CAUSE NO.

JON STELTER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

FIRST MERCHANTS BANK,

Defendant.

JURY DEMAND

<u>CLASS ACTION COMPLAINT</u>

Plaintiff, Jon Stelter, brings this Class Action Complaint against Defendant First Merchants Bank ("Defendant" or "FMB"), and alleges as follows:

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution, injunctive, and declaratory relief from FMB over the improper assessment and collection of $37 Overdraft Charges ("Overdraft Fees") on transactions that did not actually overdraw the account.

2. This practice breaches FMB's standardized adhesion "Terms and Conditions of Your Account" document ("Account Agreement"), attached as <u>Exhibit A</u>, and its overdraft notice document ("Overdraft Policy"), attached as <u>Exhibit B</u> (collectively, the "Contract"). This practice also breaches FMB's duty of good faith and fair dealing and unjustly enriches FMB to the detriment of its customers.

3. Overdraft 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*, Moebs (Mar. 27, 2019), https://bit.ly/3cbHNKV.

4. 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.

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

6. Plaintiff, like thousands of others, has fallen victim to FMB's Overdraft Fee revenue maximization scheme.

PARTIES

7. Plaintiff Jon Stelter is a citizen and resident of Oregon and has had a checking account with FMB at all times material hereto.

8. Defendant First Merchants Bank is a state bank with its headquarters and principal place of business located in Muncie, Indiana. FMB is owned by First Merchants Corporation, a one-bank holding company located in Muncie, Indiana. FMB has roughly $3.7 billion in assets and provides banking services to thousands of customers through over 100 branches in Indiana, Illinois, and Ohio. Among other things, FMB is engaged in the business of providing retail banking services to consumers, including Plaintiff and members of the putative Class.

JURISDICTION AND VENUE

9. This Court has original jurisdiction over this matter because FMB is at home in this State.

10. This Court has jurisdiction over FMB because FMB is incorporated under the laws of this State and has engaged in a continuous and systematic course of business in this State by, *inter alia*, maintaining permanent offices in Indiana and offering banking products for sale to Indiana consumers.

11. Venue is proper in Delaware County under Trial Rule 75(A) because FMB maintains its principal office in this County, FMB conducts business in this County, and a substantial part of the acts and omissions giving rise to this lawsuit occurred in this County.

BACKGROUND FACTS

I. FMB ASSESSES OVERDRAFT FEES ON DEBIT CARD TRANSACTIONS THAT WERE AUTHORIZED ON SUFFICIENT FUNDS

A. Overview of the Claim

12. Plaintiff brings this action challenging FMB's practice of charging Overdraft Fees on what are referred to in this Complaint as "Authorize Positive, Settle Negative Transactions," or "APSN Transactions."

13. Here's how the practice works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, FMB 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 FMB has already held the funds for payment.

14. However, FMB still assesses crippling $37 Overdraft Fees on many of these transactions and mispresents its practices in the Contract.

15. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, FMB later assesses Overdraft Fees on those same

transactions when they settle days later into a negative balance. These types of transactions are APSN Transactions.

16. FMB 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, FMB 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.

17. 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).

18. 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 Overdraft Fees due to the unavailability of the funds held for earlier debit card transactions.

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

20. 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 the disclosure of 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).

21. There is no justification for these practices, other than to maximize FMB's Overdraft Fee revenue. APSN Transactions only exist because intervening transactions supposedly reduce an account balance. But FMB is free to protect its interests and either reject those

intervening transactions or charge Overdraft Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year.

22. But FMB was not content with these millions in Overdraft Fees. Instead, it sought millions more in Overdraft Fees on APSN Transactions.

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

B. Mechanics of a Debit Card Transaction

24. A debit card transaction occurs in two parts. First, authorization for the purchase amount is instantaneously obtained by the merchant from FMB. When a customer physically or virtually "swipes" their debit card, the credit card terminal connects, via an intermediary, to FMB, which verifies that the customer's account is valid and that sufficient available funds exist to cover the transaction amount.

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

26. Sometime thereafter, the funds are actually transferred from the customer's account to the merchant's account.

27. FMB (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 FMB may choose to either pay the transaction or to 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).

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

C. FMB's Contract

29. FMB promises in its Account Agreement that "an overdraft occurs when there is not enough money in your account to pay for a transaction, but we pay (or cover) the transaction anyway." Ex. A at 2.

30. The Account Agreement promises to use the "'available balance' method to determine whether your account is overdrawn, that is, whether there is enough money in your account to pay for a transaction." *Id.*

31. FMB's Overdraft Policy reiterates this promise, stating: "Th[e] his available balance is used to determine if you are in an overdraft status." Ex. B at 2. The Overdraft Policy thus instructs account holders to "[c]heck your <u>available balance</u> regularly to avoid overdraft situations and/or to determine if you are in an overdraft status." *Id.* at 1 (emphasis in original).

32. According to the Contract, "the available balance takes transactions that have been authorized, but not yet settled, and subtracts them from the actual balance." Ex. A at 2.

33. In breach of these promises, FMB regularly charges Overdraft Fees on transactions when customers have "enough money in [their] account to pay for [the] transaction."

34. FMB further promises in the Contract that "debit authorization hold[s]" will be placed for authorized debit card transactions and that these holds reduce the "funds in your account available for other transactions." *Id.*

35. Importantly, the Contract explicitly promises that "[y]our preauthorized transaction will not be charged a fee if you had sufficient funds in your account equal to or less than the hold."

> **A temporary debit authorization hold affects your account balance -** On debit card purchases, merchants authorize and may request a temporary hold on your account for a specified sum of money. The merchant's request for payment from us and the amount charged to your account could occur in three calendar days, or even longer in some cases, before the adjustment is made. Until the adjustment is made, the amount of funds in your account available for other transactions may 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 non-sufficient funds (NSF) transaction if we do not pay it or an overdraft transaction if we do pay it. **Your preauthorized transaction will not be charged a fee if you had sufficient funds in your account equal to or less than the hold.** Other transactions that may post to your account could be subject to a fee according to our NSF/overdraft policy. Also, when the merchant does not know the exact amount of the purchase at the time the card is authorized, the amount of the temporary hold 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. **The amount of funds in your account available for other transactions may be reduced by the amount of the temporary hold.**

Id. (emphasis added).

36. FMB gives the following example, which includes an explicit promise not to charge Overdraft Fees on APSN transactions:

> For example, your account has an available balance of $100 and then you make a debit card purchase of $80 resulting in an available balance of $20. Then a check clears for $50 resulting in a -$30 (negative) available balance and a ledger balance of $50. When the $80 debit card transaction posts to the account, there is now an insufficient balance. **Because this transaction was approved on good funds or a positive balance at the time of the purchase, it will not be charged the NSF fee on that item.**

Id. (emphasis added).

37. The Overdraft Policy similarly promises that "[t]he amount of a debit card transaction is removed from your available balance in order to cover the transaction. . . . There can be a delay of one or more business days before the transaction is actually presented to us for settlement." Ex. B at 2.

38. The Contract thus makes clear that the funds required to pay debit card transactions are removed from the available balance at the time of authorization and that such funds remain held in the account in order to post the transaction when the merchant presents it to FMB for settlement.

39. FMB further promises that authorization and payment occur simultaneously and that overdrafts will be determined at the time FMB "cover[s] the transaction" in its Overdraft Policy:

> We <u>may</u> **authorize and pay** overdrafts for the following types of transactions:
>
> - Checks and other transactions made using your checking account number
> - Automatic bill payments
>
> We do not **authorize and pay** overdrafts for the following types of transactions unless you ask us to:
>
> - ATM transactions
> - Everyday debt card transactions
>
> . . . .
>
> We pay overdrafts at our discretion, which means we do not guarantee that we will always **authorize and pay** any type of transaction.
>
> . . . .
>
> *The amount of a debit card transaction is removed from your available balance in order to cover the transaction. This available balance is used to determine if you are in an overdraft status.
>
> What if I want First Merchants Bank to **authorize and pay** overdrafts on my ATM and everyday debit card transactions?

> If you want us to **authorize and pay** overdrafts on ATM and everyday debit card transactions, you must contact us.

Ex. B. 1-2 (bolding added).

40. FMB's links payment to authorization *five times*. FMB thus promises that transactions are paid, and therefore overdrafts are determined, at authorization.

41. In addition, the Overdraft Policy specifically states that the determination of "overdraft status" is determined when the amount of the debit card transaction is removed from the available balance. *Id.*

42. FMB's decision to "cover," "pay," or "authorize and pay" a transaction necessarily occurs at the moment of authorization. *See* Ex A. Once a transaction is authorized, FMB has no discretion and is "obligated to pay" the charge. *See* 74 Fed. Reg. at 59046.

43. Taken together, these promises mean that FMB will decide whether a transaction is an "overdraft"—and therefore whether the transaction will be charged an Overdraft Fee—at the time it authorizes the transaction and places a hold on the funds required to pay it.

44. For APSN Transactions, which are immediately deducted from a positive account balance and held aside for payment of that same transaction, there are always sufficient funds to cover those transactions—yet FMB assesses Overdraft Fees on them anyway.

45. The above promises indicate that transactions are only overdraft transactions when they are authorized and approved into a negative account balance. Of course, that is not true for APSN Transactions.

46. In fact, FMB 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.

47. All of the above representations and contractual promises are untrue. FMB charges fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. No express language in any document states that FMB may impose fees on any APSN Transactions.

48. The Contract also misconstrues FMB's true debit card processing and overdraft practices.

49. First, and most fundamentally, FMB charges Overdraft Fees on debit card transactions for which there are sufficient funds available to cover throughout their lifecycle.

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

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

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

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

54. At the time of settlement, however, an available balance does not change at all for these transactions previously authorized into positive funds. As such, FMB cannot then charge an

Overdraft Fee on that transaction because the available balance has not been rendered insufficient due to the pseudo-event of settlement.

55. Upon information and belief, something more is going on: at the moment a debit card transaction is getting ready to settle, FMB 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.

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

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

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

59. 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 Overdraft Fees on APSN Transactions.

60. For example, Bank of America's deposit agreement states:

> Debit card transactions and related authorization holds may impact your available balance. It is important to know that your available funds may change between the time you authorize a transaction and when the transaction is paid. . . . **The amount being held is not applied to the debit card transaction**. . . . **If other account activity has caused the funds available in your account to drop below zero before the debit card transaction is paid, you may no longer have sufficient funds to pay the merchant**. . . .
>
> Here is an example of how that may happen: On Monday we authorize a debit card transaction because you have enough available funds at the time. A hold is then

> placed on your funds until the merchant presents the transaction for payment. On Tuesday we process and post another transaction (such as a check you wrote) that reduces your available funds below zero. If the merchant presents the original debit card transaction for payment on Wednesday, and your available funds are now below the amount needed to pay the transaction, the debit card transaction will overdraw your account and you may incur an overdraft fee.

Deposit Agreement and Disclosure, Bank of America 19 (May 14, 2021), https://bit.ly/38iRk1G (emphasis added).

61. As another 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 restaurants 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 29 (Nov. 5, 2019), https://bit.ly/3kX0iXo (emphasis in original).

62. Capital One's deposit agreement similarly states:

> Other intervening transactions that occur while authorized debit card transactions are pending may create overdrafts on your account. Here is an example of how that could happen:
>
> You're enrolled in our optional overdraft service. Your account balance is $100.00. On Monday, you go to the store and use your debit card to make a purchase for $80.00. We authorize the transaction; however, the merchant doesn't send us the transaction for payment and posting to your account on that day. On Tuesday, you withdraw $30.00 from an ATM, reducing your account balance to $70. **On Wednesday, the merchant requests payment for the $80.00 transaction authorized on Monday, and you're charged a fee because the balance in your account is insufficient to pay the transaction at that time**.

Rules Governing Deposit Accounts, Capital One (June 24, 2020), https://capital.one/3v8MtKc (emphasis added).

63. FMB and its accountholders make no such agreement. The Contract thus misleads and deceives account holders.

D. Reasonable Consumers Understand Debit Card Transactions Are Debited Immediately

64. FMB's assessment of Overdraft Fees on transactions that have not overdrawn an account is inconsistent with the 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.

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

66. FMB knows that consumers prefer debit cards for these very reasons. Consumer research shows that consumers prefer debit cards as budgeting devices because they don't allow debt like credit cards as the money comes directly out of the checking account.

67. Consumer Action, a national nonprofit consumer education and advocacy organization, advises consumers 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.

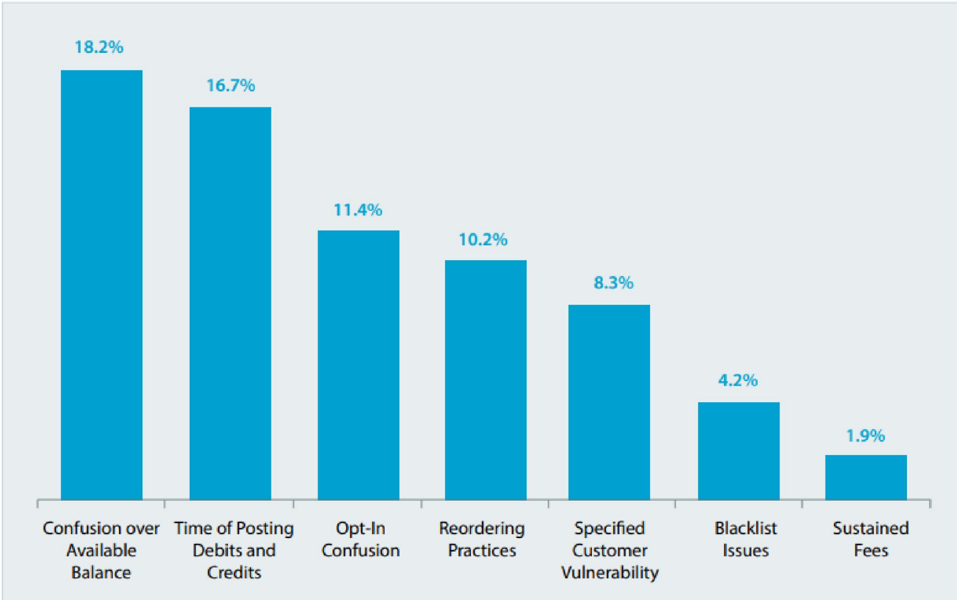
68. This understanding is a large part of the reason that debit cards have risen in popularity. The number of terminals that accept debit cards in the United States has increased by approximately 1.4 million in the last five years, and with that increasing ubiquity, consumers have viewed debit cards (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.

69. 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.

70. 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 Overdraft Fees Harm Consumers and Discourage Responsible Bank Products*, Center for Responsible Lending 8 (May 2016), https://bit.ly/3v7SvL1.

71. 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.

72. 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.

73. Ultimately, unclear and misleading fee representations like those in FMB's Contract 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.*

74. The Federal Deposit Insurance Corporation ("FDIC") has specifically noted that financial institutions may effectively mitigate this wide-spread 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.

75. Despite this recommendation, FMB continues to assess Overdraft Fees on transactions that are authorized on sufficient funds.

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

77. FMB was also aware of consumers' confusion regarding Overdraft Fees but FMB nevertheless failed to make its members agree to these fee practices.

E. Plaintiff Was Assessed Overdraft Fees on Debit Card Transactions Previously Authorized on Sufficient Funds

78. On November 1, 2019, Plaintiff was assessed a $37 Overdraft Fee on a $16.99 debit card transaction that settled that day, even though the transaction had been previously authorized and sufficient funds set aside that time.

79. On June 23, 2017, Plaintiff was assessed a $37 Overdraft Fee on a $14.88 debit card transaction that settled that day, even though the transaction had been previously authorized and sufficient funds set aside that time.

80. On May 30, 2017, Plaintiff was assessed a $37 Overdraft Fee on a $5.49 debit card transaction that settled that day, even though the transaction had been previously authorized and sufficient funds set aside that time.

81. Contrary to FMB's Contract, the Overdraft Fees were charged even though (1) Plaintiff's account had "sufficient" funds to "cover" the purchases at the time they were "authorized and paid," and (2) FMB set aside sufficient available funds to "cover" or "pay" those transactions at that time. *See* Exs. A-B.

82. The improper fees charged by FMB were not "errors" by FMB, but rather were intentional charges made by FMB as part of its standard processing of transactions.

83. Plaintiff therefore had no duty to report the fees as "errors" because they were not "errors," but were part of the systematic and intentional assessment of fees according to FMB standard practices.

84. Moreover, any such reporting would have been futile as FMB made a decision to charge the fees as part of its standard fee practices.

II. THE IMPOSITION OF OVERDRAFT FEES THAT DO NOT OVERDRAW THE ACCOUNT BREACHES FMB'S DUTY OF GOOD FAITH AND FAIR DEALING

85. Parties to a contract are required not only to adhere to the express terms of 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 duty to act in accordance with account holders' reasonable expectations and means that the bank or credit union is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the bank or credit union has a duty to honor transaction requests in a way that is fair to its customers and is prohibited from exercising its discretion to pile on even greater penalties on its account holders.

86. Here—in the adhesion agreements FMB foisted on Plaintiff and its other customers—FMB has provided itself numerous discretionary powers affecting customers' accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, FMB 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 Overdraft Fees on transactions that do not actually overdraw the account.

87. FMB exercises its discretion in its own favor—and to the prejudice of Plaintiff and its other customers—when it assesses fees in this manner. FMB also abuses the power it has over

customers and their accounts and acts contrary to their reasonable expectations under the Contract. This is a breach of FMB's implied covenant to engage in fair dealing and to act in good faith.

88. Further, FMB maintains complete discretion not to assess fees at all. Instead, FMB always charges these fees, including on transactions that do not overdraw the account and on transactions that were authorized on sufficient available funds. By always exercising its discretion in its own favor—and to the prejudice of Plaintiff and other customers, FMB breaches the reasonable expectations of Plaintiff and other customers and, in doing so, violates its duty to act in good faith.

89. It was bad faith and totally outside Plaintiff's reasonable expectations for FMB to use its discretion in this way.

90. When FMB charges improper fees in this way, FMB uses its discretion to define the meaning of key terms such as "sufficient funds," "to cover," "pay," and "authorize and pay," in an unreasonable way that violates common sense and reasonable consumers' expectations. FMB uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more Overdraft Fees.

CLASS ALLEGATIONS

91. Plaintiff brings this action individually and as a class action on behalf of himself and the following proposed Class (the "Class"):

> All persons who are checking account holders at First Merchants Bank and who were assessed overdraft fees on debit card transactions that were authorized on sufficient funds and settled on negative available funds in the same amount for which the transaction was authorized.

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

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

94. This action is properly maintainable as a class action under Indiana Rule of Trial Procedure 23.

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

96. There are questions of law and fact that are common to all members of the Class that relate to FMB's practice of charging improper Overdraft Fees.

97. 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.

98. Plaintiff is an adequate representative of the Class and has retained competent legal counsel experienced in class actions and complex litigation.

99. 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 FMB's conduct. The predominant questions of law and fact in this litigation include, but are not limited to, whether FMB:

- Imposed Overdraft Fees on transactions that did not overdraw checking accounts;
- Imposed Overdraft Fees on transactions that were authorized on sufficient funds;
- Breached its contract with Plaintiff and members of the Class;
- Breached the covenant of good faith and fair dealing imposed on it; and
- Was unjustly enriched when it collected these improper fees.

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

101. 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 members of the Class, and certification as a class action will preserve judicial resources by allowing the common issues of the members of the Class 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 FMB, 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 FMB'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 FMB's conduct and the claims they may possess.

102. 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.

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

COUNT ONE: BREACH OF CONTRACT, INCLUDING BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(*On behalf of Plaintiff and the Class*)

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

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

106. Similarly, all members of the Class have contracted with FMB for bank account deposit, checking, and debit card services. *Id.*

107. All of FMB's account holders, including Plaintiff and the members of the Class, are subject to the Contract.

108. FMB misconstrued in the Contract its true Overdraft Fee practices and breached the express terms of the Contract.

109. No contract provision authorizes FMB to charge Overdraft Fees on transactions that did not overdraw checking accounts or on debit card transactions authorized on sufficient funds.

110. FMB breached the terms of the Contract by charging Overdraft Fees on transactions that did not overdraw checking accounts and on debit card transactions authorized on sufficient funds.

111. Indiana imposes a duty of good faith and fair dealing on contracts between banks and their customers because banks are inherently in a superior position to their checking account holders because, from a superior vantage point, they offer customers contracts of adhesion, often with terms not readily discernible to a layperson.

112. FMB abuses its discretion in its own favor—and to the prejudice of Plaintiff and other customers by charging Overdraft Fees on transactions that did not overdraw checking accounts and on debit card transactions authorized on sufficient funds. This is an abuse of the power that FMB has over Plaintiff and her bank account, is contrary to Plaintiff's reasonable expectations under the Contract, and breaches FMB's implied covenant to engage in fair dealing and to act in good faith.

113. 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.

114. FMB has breached the covenant of good faith and fair dealing in the contract through its policies and practices as alleged herein.

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

116. Plaintiff and members of the Class have sustained damages because of FMB's breach of the Contract.

117. Plaintiff and members of the Class have sustained damages because of FMB's breach of the covenant of good faith and fair dealing.

COUNT TWO: UNJUST ENRICHMENT
(*On behalf of Plaintiff and the Class*)

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

119. Plaintiff, individually and on behalf of the Class, 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 FMB disgorge all improperly assessed Overdraft Fees.

120. Plaintiff and members of the Class conferred a benefit on FMB at the expense of Plaintiff and members of the Class when they paid improper Overdraft Fees.

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

122. FMB has accepted and retained such fees under inequitable and unjust circumstances.

123. FMB 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.

REQUEST FOR RELIEF

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

A. Certification for this matter to proceed as a class action under action under Trial Rule 23;

B. Designation of Plaintiff as Class Representative, and designation of the undersigned as Class Counsel;

C. Restitution of all improper Overdraft Fees paid to FMB 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. Declaring FMB's fee policies and practices alleged in this Complaint to be wrongful and unconscionable;

F. Pre- and post- judgment interest at the maximum rate permitted by applicable law;

G. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law;

H. Attorneys' fees under the common fund doctrine and all other applicable law;

I. Such other relief as this Court deems just and proper.

JURY DEMAND

Plaintiff, by counsel, demands trial by jury.

Dated: June 24, 2021

Respectfully submitted,

s/ Lynn A. Toops
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* To seek admission *pro hac vice*

Counsel for Plaintiff and the Proposed Plaintiff Class