

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division**

BLACKCAT EVENTS LLC, on behalf of
itself and all others similarly situated,

Plaintiff,

v.

ATLANTIC UNION BANK, as successor in
interest to ACCESS NATIONAL BANK,

Defendant.

Civil Action No. 3:23-cv-154

CLASS ACTION COMPLAINT

Plaintiff Blackcat Events LLC (“Plaintiff”), by counsel, brings this Class Action Complaint against Defendant Atlantic Union Bank as successor in interest to Access National Bank (“Defendant”), and alleges as follows:

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution, and injunctive and declaratory relief from Defendant, arising from its improper assessment and collection of multiple \$39 and \$21 fees on an item.

2. This practice breaches contract promises made in Defendant’s adhesion contracts, including its duty of good faith and fair dealing. The Contract and Fee Schedule are attached hereto as **Ex. A** and **Ex. B**, respectively (collectively, the “Contract”).

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

JURISDICTION

4. 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 classes exceeds \$5 million, exclusive of interest and costs, because Plaintiff brings this action on behalf of a proposed class that is comprised of over one hundred members, and because at least one of the members of the proposed class is a citizen of a different state than Atlantic Union.

PARTIES

5. Plaintiff is a limited liability company organized under the laws of the Commonwealth of Virginia with its principal place of business in this District. Sole member Michael Dickinson is a Richmond, Virginia resident. At all times relevant hereto, Plaintiff had a checking account with Access National Bank, which was acquired by Atlantic Union Bank in 2019.

6. Atlantic Union Bank is a bank with approximately \$17 billion in assets. It is one of the largest banks based in Virginia. It is headquartered in Richmond, VA and maintains branch locations across the Virginia, Maryland and North Carolina. Access National Bank merged into Atlantic Union Bank on or about May 20, 2019. In connection the merger, Atlantic Union Bank acquired the assets and liabilities of Access National Bank.

7. At least one of the members of the proposed classes is a citizen of a state other than the Commonwealth of Virginia.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

I. Defendant Improperly Charges Two Or More Fees on an Item

8. Overdraft fees (“OD 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 \$26.5 billion from overdraft fees. *Overdraft Revenue Inches Up in 2018*, <https://bit.ly/3cbHNKV>.

9. 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>.

10. Because of this, industry leaders like Capital One and Alliant made plans to end the assessment of OD Fees entirely. Hugh Son, *Capital One to Drop Overdraft Fees for All Retail Banking Customers*, NBC News (Dec. 1, 2021), <https://nbcnews.to/3DKSu2R>.

11. Similarly, Wells Fargo and Bank of America have recently decided to stop assessing fees on returned items completely. *Wells Fargo ends bounced check fees*, Paul R. La Monica, CNN Business, <https://bit.ly/3GH7XTW>.

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

13. Defendant 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.

14. Unbeknownst to consumers, when Defendant reprocesses an electronic payment item, ACH item, or check for payment after it was initially rejected for insufficient funds, Defendant chooses to treat it as a new and unique item that is subject to yet another fee. But Defendant's contract never states that this counterintuitive and deceptive result could be possible and, in fact, says nothing at all about how overdraft fees or NSF fees are assessed.

15. 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.

16. The FDIC also recently recommended that the multiple fee practice be halted entirely. *See* Barbarino, Al. "FDIC Warns Banks About Risks of Bounced Check Fees." Law360, Aug. 19, 2022, available at <https://www.law360.com/articles/1522501/fdic-warns-banks-about-risks-tied-to-bounced-check-fees>.

17. And, in its latest issue of Consumer Compliance Supervisory Highlights, the FDIC again addressed the charging of multiple non-sufficient funds fees for transactions presented multiple times against insufficient funds in the customer's account. *See* FDIC Consumer Compliance Supervisory Highlights, Mar. 2022, available at <https://www.fdic.gov/news/financial-institution-letters/2022/fil22014.html>. FDIC examiners have scrutinized this issue in recent exams, with some exams remaining open pending resolution of the issue.

18. In the Supervisory Highlights, the FDIC discussed potential consumer harm from this practice in terms of both deception and unfairness under the Federal Trade Commission Act Section 5's prohibition on unfair or deceptive acts or practices. The FDIC stated that the "failure

to disclose material information to customers about re-presentation practices and fees” may be deceptive. *Id.* at 8.

19. During 2021, the FDIC identified consumer harm when financial institutions charged multiple NSF fees for the re-presentation of unpaid transactions. Terms were not clearly defined and disclosure forms did not explain that the same transaction might result in multiple NSF fees if re-presented. While case-specific facts would determine whether a practice is in violation of a law or regulation, the failure to disclose material information to customers about re-presentation practices and fees may be deceptive. This practice may also be unfair if there is the likelihood of substantial injury for customers, if the injury is not reasonably avoidable, and if there is no countervailing benefit to customers or competition. For example, there is risk of unfairness if multiple fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for consumers to bring their account to a positive balance. *Id.*

20. In its staff analysis of the issue, the American Bankers Association recommended that banks review their deposit account agreement to ensure it states clearly that a separate NSF fee will be assessed whenever the same item is resubmitted against insufficient funds. ABA also encouraged banks, if scrutinized by a regulator, to explain the significant logistical challenges with identifying items that have been resubmitted by the merchant for payment against insufficient funds. ABA is updating its staff analysis of this issue to reflect the Supervisory Highlights. *See ABA Banking Journal, FDIC provides guidance on multiple NSF fees for re-presented items*, April 1, 2022, available at <https://bankingjournal.aba.com/2022/04/fdic-provides-guidance-on-multiple-nsf-fees-for-re-presented-items/>.

21. Further, this abusive multiple fee practice is not universal in the financial services industry. Indeed, major banks like Chase—the largest consumer bank in the country—do not

undertake the practice of charging more than one fee on the same item when it is reprocessed. Instead, Chase charges one fee even if an item is reprocessed for payment multiple times.

22. Defendant, however, engages in this abusive and deceptive practice in violation of its own contract and against the reasonable expectations of its customers.

23. The Contract allows Defendant to take certain steps when paying a check, electronic payment item, or ACH item when the accountholder does not have sufficient funds to cover it. Specifically, Defendant may (a) pay the item and charge a fee; or (b) reject the item and charge a fee.

24. In contrast to the Contract, however, Defendant regularly assesses two or more fees on an item.

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

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

26. Upon information and belief, the contractual promises of Access National Bank are substantially similar to those of Atlantic Union Bank.

27. The Contract states that:

If an item is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item (resulting in a NSF). Overdraft, NSF, and other fees are disclosed in the Personal Deposit and Business Deposit Fee Schedules.

Ex. A at 7.

28. The Fee Schedule promises that fees will be assessed "per item:"

Non-Sufficient Funds² (Per Item)\$38.00¹
Overdraft² (Per Item).....\$38.00

...
² Atlantic Union Bank limits the total number of combined Overdraft and Non-Sufficient Funds fees to 6 per business day

29. These promises reasonably mean that an item will be assessed, at most, a single “per item” overdraft fee if it is paid into overdraft or a single “per item” NSF Fee if the item is returned unpaid.

30. In breach of this promise, Defendant assesses multiple \$39 and \$21 fees on an item, meaning that customers can be assessed more than \$100 in fees on a single item.

31. 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.

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

33. Even if Defendant reprocessed 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.

34. Defendant and its customers never agreed that the bank could 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.

35. In sum, Defendant 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, Defendant breached the Contract when it charged more than one fee per item.

¹ The per item fee amounts have changed over time.

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

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

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

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

40. 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).

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

B. Plaintiff's Experience

42. 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, Defendant: (a) reprocessed a previously declined item; and (b) charged a fee upon reprocessing.

43. On or around April 2, 2018, Plaintiff attempted a payment to Discover for \$1,063.

44. Defendant rejected payment of that item and charged a \$39 fee for doing so.

45. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess the item, on April 5, 2018, Defendant processed the item again but this time paid the item into purported overdraft and charged Plaintiff a second fee, this time in the amount of \$21, for doing so.

46. *In sum, Defendant charged Plaintiff \$60 in fees on an item.*

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

48. Defendant also understood the payment to be single item too as evidenced by the fact that the additional submissions of the same item by the merchant is shown as "RETRY PYMT" of the original item in Defendant's back office data and not a new item subject to a new fee.

49. The improper fees charged by Defendant were not errors, but rather intentional charges made by Defendant as part of its standard processing of items.

50. Plaintiff therefore had no duty to report the fees as errors.

51. Moreover, any such reporting would have been futile as Defendant 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 Defendant's Duty of Good Faith and Fair Dealing

52. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are invested with a discretionary power over the other party. This creates an implied promise to act in accordance with the parties' reasonable expectations and means that Defendant is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Defendant has a duty to honor payment requests in a way that is fair to Plaintiff and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties on the depositor. Here—in the adhesion agreements Defendant foisted on Plaintiff and its other customers—Defendant has provided itself numerous discretionary powers affecting customers' accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, Defendant abuses that discretion to take money out of consumers' accounts without their permission and contrary to their reasonable expectations that they will not be charged multiple fees on an item.

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

54. In addition, Defendant 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, Defendant abuses the power it has over customers and their bank accounts and acts contrary to their reasonable expectations under the Contract. This is a breach of Defendant's duty to engage in fair dealing and to act in good faith.

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

56. Defendant 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

57. Plaintiff brings this action individually and on behalf of the following class of persons (the "Class"):

All persons who held an Access National Bank checking account who, within the applicable statute of limitations preceding the filing of this lawsuit, were charged multiple fees on an item by Access National Bank (the "Class").

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

59. Plaintiff notes that Atlantic Union Bank has entered into a class action settlement regarding the same fee practice at issue here that remains subject to court approval. *See Mawyer v. Atlantic Union Bank*, No. 3:21-cv-00726 (E.D. Va.). That settlement does not release claims against banks that Atlantic Union acquired.

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

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

- 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 Defendant, 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 Defendant'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 Defendant'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 Defendant have contracted for bank account deposit, checking, ATM, and debit card services. *See* Exs. A-B.

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

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

75. Virginia 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.

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

78. Defendant 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 Defendant's breach of the Contract and breach of the covenant of good faith and fair dealing.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, demands a jury trial on all claims so triable and judgment as follows:

- A. Certification for this matter to proceed as a class action on behalf of both proposed Class under Fed. R. Civ. P. 23(b)(2) and 23(b)(3);
- B. Declaring Defendant's OD Fee and NSF Fees policies and practices to be wrongful, unfair and unconscionable in light of its contractual promises;
- C. Restitution of all OD Fees and NSF Fees paid to Defendant by Plaintiff and the members of the Class, as a result of the wrongs alleged herein in an amount to be determined at trial;
- D. Actual damages in an amount according to proof;

- E. Injunctive or declaratory relief;
- 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. For attorneys' fees under the common fund doctrine, and all other applicable law; and
- I. Such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of itself and the Class, hereby demands a trial by jury pursuant to Federal Rule of Civil Procedure 38(b) on all claims so triable.

Dated: March 1, 2023

Respectfully submitted,

/s/ Devon J. Munro

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