



overdraft and insufficient funds transactions, and design their accountholder application and onboarding process to allow the banks to capitalize on this confusion. This confusion allows banks to maximize the number of overdraft fees they can charge leading directly to increased revenue for the bank. See Ashlee Kieler, *CFPB Says TCF Bank Made Millions From Misleading Overdraft Practices*, Consumerist.com (Jan. 19, 2017), <https://consumerist.com/2017/01/19/cfpb-says-tcf-bank-made-millions-from-misleading-overdraft-practices/>; *Consumer Financial Protection Bureau Orders Santander Bank to Pay \$10 Million Fine for Illegal Overdraft Practices* (July 14, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-orders-santander-bank-pay-10-million-fine-illegal-overdraft-practices/>.

3. This increased revenue source, however creates a disproportionate impact on consumers living in the lower socio-economic levels of the country. For example, the Center for Responsible Lending reported that, “[o]verdraft fees often impose a great burden on those already living paycheck to paycheck, struggling to make ends meet.” *Center for Responsible Lending, Unfair Market: The State of High-Cost Overdraft Practices in 2017* (August 2018), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-unfair-market-overdraft-1-aug2018.pdf>.

4. Historically, overdraft fees represent a substantial revenue generator for financial institutions. In 2013 alone, a survey by Moebs Services, Inc. found that certain financial institutions generated \$31.9 billion in overdraft revenue.<sup>1</sup> As banks continued their abusive practices of pushing overdraft products, “the Federal Reserve Board enacted certain regulatory changes in 2009, including requiring that bank customers must “opt in” to bank overdraft products

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<sup>1</sup> See *How Banks Sell Overdraft 1* (July 2014) (available at [http://calreinvest.org/wp-content/uploads/2018/09/Report\\_How\\_Banks\\_Sell\\_Overdraft\\_Results\\_of\\_Overdraft\\_Mystery\\_Shopping\\_in\\_Four\\_Key\\_States.pdf](http://calreinvest.org/wp-content/uploads/2018/09/Report_How_Banks_Sell_Overdraft_Results_of_Overdraft_Mystery_Shopping_in_Four_Key_States.pdf)).

that may be triggered by ATM withdrawals or debit card purchases.”<sup>2</sup> These regulations were specifically designed to protect consumers from abusive and confusing banking practices.

5. Undeterred by these new regulations, banks found new ways to keep the overdraft machine churning: charge multiple overdraft fees for a single item without a customer’s consent—all while promising in their account agreements that a single item would only be subject to a single overdraft fee.

6. In this case, Defendant contracted with Plaintiff to charge one NSF Fee for a single item that was returned one or more times for insufficient funds. *See* Account Contract, attached hereto as Exhibits A and B (collectively, the “Account Contract”).

7. Notwithstanding these contractual provisions, which limit the number of NSF Fees Defendant may charge, Defendant routinely charged Plaintiff and the Class multiple NSF Fees for a single item. In doing so, Defendant breached its contractual promises.

8. Such breaches cause Defendant’s customers—Plaintiff and members of the Class—to pay to Defendant more NSF Fees than they agreed to pay under the Account Contract.

9. Plaintiff, and the Class, have been injured by Defendant’s practices. As such, Plaintiff seeks to recover any and all damages, restitution and injunctive relief for Defendant’s breach of contract.

10. Upon information and belief, Defendant has thousands of accountholders. Defendant’s scheme must be enjoined to prevent further damages and hardships.

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<sup>2</sup> *Id.*

**PARTIES**

11. Plaintiff Bradley Kerrigan is a resident of Grayson County, Texas. Plaintiff holds a checking account with Defendant. At the time Plaintiff opened his checking account, he agreed to the terms of Defendant's Account Contract.

12. Defendant is engaged in the business of providing banking services to consumers, including Plaintiff and the Class. Defendant is headquartered in Durant, Oklahoma and has over \$12 billion in assets. Defendant operates over 80 offices in Oklahoma and Texas.

**JURISDICTION & VENUE**

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the parties are citizens of different states and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

14. This Court also has subject matter jurisdiction under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d) *et seq.*, this Court has original jurisdiction because the aggregate claims of the members of the putative Class exceeds \$5 million, exclusive of costs, and at least one of the Class members is a citizen of a different state than Defendant.

15. This Court has personal jurisdiction over Defendant because Defendant is domiciled in the state of Oklahoma and Defendant's actions and omissions committed as pleaded in the Complaint occurred within the state of Oklahoma and Defendant regularly and systematically conducts and/or solicits business and provides retail banking in, and/or derives substantial revenue from, products and/or services to customers in this District, including to members of the putative Class. As such, it is subject to the jurisdiction of this Court.

16. Venue is proper in this in this District pursuant to 28 U.S.C. § 1391 because Defendant is subject to personal jurisdiction in this District and regularly conduct business in this District.

**GENERAL ALLEGATIONS**

**I. DEFENDANT CHARGES ITS CUSTOMERS FEES IN EXCESS OF THOSE PROVIDED FOR IN THE ACCOUNT CONTRACT.**

**A. Defendant’s Account Contract.**

17. Defendant requires its customers, including Plaintiff and the Class, to agree to its Account Contract at or around the time an account is opened. *See* Exhibits A and B.

18. Defendant’s Account Contract allows it to assess a single Returned Item Fee per item.

19. Defendant’s Account Contract provides:

|  |          |
|--|----------|
| NSF Charge ( <i>per item</i> ).....            | \$30.00  |
| Overdraft Item Charge ( <i>per item</i> )..... | \$30.00  |
| Return Item Fee ( <i>per item</i> ) .....      | \$30. 00 |

*See* Exhibit A at 19 (emphasis supplied); *see also* Exhibit B.

20. Defendant’s Account Contract specifically and ubiquitously sets forth the term “item” in the singular and states a fee (singular) may be assessed “per item.” Nothing in the Account Contract entitles Defendant to charge multiple Returned Item Fees on a single item. Thus, Defendant’s Account Contract means it may only charge its customers one Returned Item Fee per item.

21. Notwithstanding the Account Contract’s plain language, Defendant routinely charged multiple Returned Item Fees *for the same item*.

22. Specifically, Defendant charges a Returned Item Fee when an ACH payment or check is returned for insufficient funds, and then one or more additional Returned Item Fees when *the same item* is reprocessed or “retried” without any additional action by the accountholder. However, because these “retry” payments are the same item, they should not have been subject to an additional Overdraft or Returned Item Fee.

23. Defendant breached its contract when it charged Returned Item Fees for “retried” items—thus charging more than one Returned Item Fee for a single item.

***B. Plaintiff’s Agreement with Defendant.***

24. At the time Plaintiff opened an account with Defendant, and all times relevant hereto, Plaintiff and Defendant were subject to the terms set forth in the Account Contract. *See* Exhibits A and B.

25. Defendant’s Account Contract provided that Defendant could only collect one Returned Item Fee “per item.” *See* Exhibit A at 19; *see also* Exhibit B. As such, nothing in the Account Contract allows Defendant to charge Plaintiff multiple Returned Item Fees for the same item.

26. Upon information and belief, Defendant entered into the same or substantially similar contract with hundreds, if not thousands, of its other banking customers.

***C. Plaintiff’s Payment Attempt, Subsequent Retries of that Payment, and Defendant’s Unauthorized Fees.***

27. In support of the claims alleged herein, Plaintiff offers an example of a fee that should not have been assessed against their checking account. As alleged below, Defendant: (a) reprocessed a previously declined item; and (b) charged an additional fee upon reprocessing, for a total assessment of *\$56.00 in fees on one item*. The pattern exhibited in the following example occurred numerous times on Plaintiff’s account.

28. On October 9, 2019, Plaintiff initiated a single payment in the amount of \$131.57. *See* Exhibit C at 4.

29. Defendant rejected payment of that item due to insufficient funds in Plaintiff's account and charged a \$28.00 fee for doing so. *Id.* Plaintiff does not dispute this initial fee, as it is allowed by Defendant's Account Contract.

30. Unbeknownst to Plaintiff, and without a request by Plaintiff to Defendant to reprocess the item, 7 days later, on October 16, 2019, Defendant processed the same item a second time. *Id.* at 3. Again, Defendant returned the item unpaid and charged Plaintiff *another* \$28.00 fee for doing so. *Id.*

31. In sum, Defendant assessed Plaintiff \$56.00 in fees in its effort to process a single payment.

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

***D. The Imposition of Multiple Returned Item Fees for a Single Item Violates Defendant's Account Contract.***

33. Defendant's Account Contract does not indicate that it intends to charge multiple Returned Item Fees for a single item.

34. The plain language of Defendant's Account Contract provides that a single item is capable—at most—of incurring a *single* Returned Item Fee, even if that item is repeatedly reprocessed.

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

36. The following are some examples from other banks and credit unions that make clear what Defendant was contractually required to do, if it was going to engage in charging multiple Returned Item Fees for the same item.

37. For example, Central Pacific Bank, a leading bank in Hawaii, states in its Fee Schedule under the “MULTIPLE NSF FEES” subsection:

Items and transactions (such as, for example, checks and electronic transactions/payments) returned unpaid due to insufficient/non-sufficient (“NSF”) funds in your account, may be resubmitted one or more times for payment, and a \$32 fee will be imposed on you each time an item and transaction resubmitted for payment is returned due to insufficient/nonsufficient funds.

*Miscellaneous Fee Schedule*, Central Pacific Bank at 1 (Jan. 4, 2021), <https://www.cpb.bank/media/2742/misc-fee.pdf> (last accessed January 24, 2023).

38. BP Credit Union likewise states: “We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.” *Membership and Account Agreement*, BP Credit Union at 4, <https://www.bpcfuc.org/images/docs/membership-agreement.pdf> (last accessed January 24, 2023).

39. Regions Bank likewise states:

If any item is presented again after having previously been returned unpaid by us, you agree to pay this charge for each time the item is presented for payment and the balance of available funds in your account is insufficient to pay the item.

*Deposit Agreement*, Regions Bank at 18, ¶ 19 (July 2020), <https://www.regions.com/-/media/pdfs/terms/Deposit-Agreement.pdf?revision=89ba3f19-6503-434b-8c33-e6ca0cb7f717> (last accessed January 24, 2023).

40. First Financial Bank states: “Be aware that such an item or payment may be presented multiple times and that we do not monitor or control the number of times a transaction



is presented for payment. You agree that we may charge you an NSF fee each time a payment is presented if the amount of money available in your account is not sufficient to cover the payment, regardless of the number of times the payment is presented.” Consumer Accounts Terms and Conditions, First Financial Bank at 7 (May 4, 2021), <https://www.first-online.bank/wp-content/uploads/2021/05/FFB-Consumer-Disclosure-Booklet-IN-IL-Updated-05.04.21.pdf> (last accessed January 24, 2023).

41. Consumers Credit Union states:

If your account does not have sufficient available funds when a transaction or item is presented to us for payment and, as a result, returned unpaid, the merchant or payee of your transaction or item may choose to resubmit the same transaction. In the event a transaction or item is resubmitted for payment at a time when your account lacks sufficient available funds to pay it and we decline it, we will charge a related NSF Fee.

*Membership and Account Agreement*, Consumers Credit Union at 13 (Feb. 2021), <https://www.consumerscu.org/wp-content/uploads/2019/04/Member-Handbook.pdf> (last accessed January 24, 2023).

42. Partners 1<sup>st</sup> Federal Credit Union states:

Consequently, because we may charge a fee for an NSF item each time it is presented, we may charge you more than one fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission 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.

*Consumer Membership & Account Agreement*, Partners 1<sup>st</sup> Federal Credit Union 119) (Revised September 15, 2019) [https://s3.us-east-1.amazonaws.com/assets.partners1stcu.org/uploads/PDFs/Consumer\\_Account\\_Agreement.pdf](https://s3.us-east-1.amazonaws.com/assets.partners1stcu.org/uploads/PDFs/Consumer_Account_Agreement.pdf) (last accessed January 24, 2023).

43. Community Bank, N.A. states:

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 Disclosures, Community Bank, N./A. 5 (Nov. 2019) <https://cbna.com/u/header/2019-Overdraft-and-Unavailable-Funds-Practices-Disclosure.pdf> (last accessed January 24, 2023).

44. RBC Bank states:

We may also charge against the Account an NSF fee for each item returned or rejected, including for multiple returns or rejections of the same item.

*Service Agreement for Personal Account*, RBC Bank 13 (Sep. 2014) <https://www.rbcbank.com/siteassets/Uploads/pdfs/Service-Agreement-for-Personal-Accounts.pdf> (last accessed January 24, 2023).

45. Diamond Lakes Credit Union states:

Your account may be subject to a fee for each item regardless of whether we pay or return the item. We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.

*Membership and Account Agreement*, ¶ 14 <https://www.diamondlakesfcu.org/termsconditions.html> (last accessed January 24, 2023).

46. Parkside Credit Union states:

If the Credit Union returns the item, you will be assessed an NSF Fee. Note that the Credit Union has no control over how many times an intended payee may resubmit the same check or other item to us for payment. In the event the same check or other item is presented for payment on more than one occasion, your account will be subject to an additional charge on each occasion that the item is presented for payment. There is no limit to the total fees the Credit Union may charge you for overdrawing your account.

*Membership and Account Agreement*, Parkside Credit Union 21

[https://www.parksidecu.org/\\_/kcms-doc/1043/44277/Membership-and-Account-Agreement.pdf](https://www.parksidecu.org/_/kcms-doc/1043/44277/Membership-and-Account-Agreement.pdf)

(last accessed January 24, 2023).

47. In fact, courts throughout the country routinely conclude that banks using contracts nearly identical to the one utilized by Defendant here *breach their contracts* when they charge multiple Returned Item Fees on the same item. *See, e.g., Roberts v. Capital One, N.A.*, 719 Fed. Appx. 33 (2d Cir. 2017); *Morris v. Bank of America, N.A.*, No. 3:18-cv-00157, 2009 WL 1421166 (W.D.N.C. Mar. 29, 2019); *Tisdale v. Wilson Bank and Trust*, No. 19-400-BC (Davidson Co. Tenn. Chancery Court Oct. 17, 2019); *Tannehill v. Simmons Bank*, No. 3:19-cv-140-DPM (E.D. Ark. Oct. 21, 2019); *Perks, et al. v. TD Bank, N.A.*, No. 18-CV-11176 (S.D.N.Y. Mar. 17, 2020); *Ingram v. Teachers Credit Union*, No. 49D01-1908-PL-035431 (Ind. Comm. Ct. Feb. 18, 2020); *Noe v. City Nat'l Bank of W. Va.*, No. 3:19-cv-0690 (S.D. W. Va. Feb. 19, 2020); *Almon, et al. v. Independence Bank*, No. 19-CI-00817 (McCracken Co. Ky. Cir. Ct. Mar. 18, 2020).

48. At no time did Defendant provide any disclosure to Plaintiff and the Class or amend the contract to reflect that it intended to charge multiple Returned Item Fees on the same item. In agreeing to charge Plaintiff and the Class one set of fees, and instead charging Plaintiff and the Class multiple fees for a single item, Defendant breached its contract with Plaintiff and the Class.

***E. The Abusive Practices Alleged Herein Breach Defendant's Duty of Good Faith and Fair Dealing.***

49. A party to a contract, who possesses unilateral discretion over the implementation of a term in a contract is required to act in good faith when it acts to implement that term. In such circumstances, the party with the discretionary power is required to exercise that power and discretion in good faith and may not do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract. As a result, Defendant was

prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Defendant had, and has, a duty to honor transaction requests in a way that is fair to its accountholders and is prohibited from exercising its discretion to gouge them with fees never disclosed or contemplated by its Account Contract.

50. Here, Defendant provided itself numerous discretionary powers directly affecting its accountholders; namely, the power to define an undefined term—“item”—in a manner that unfairly benefits it. Defendant—in its *sole discretion*, and in violation of its contract with Plaintiff and the Class—decided it would charge Plaintiff and the Class a second (or more) Returned Item Fee on the same item. At all times relevant hereto, Defendant did not exercise its discretion in good faith, opting instead to use the multiple retry attempts in its own favor thereby prejudicing Plaintiff and the Class. Specifically, Defendant charged more than one Returned Item Fee for the same item *solely for Defendant’s benefit*. In short, Defendant abused the power it has over its customers and their bank accounts by charging multiple Returned Item Fees for the same item. In doing so, Defendant breached the implied covenant of good faith and fair dealing inherent in each and every contract that required it to act with good faith towards Plaintiff and the Class.

51. Utilizing this power, Defendant exercised its discretion in its own favor—and to the prejudice of Plaintiff and the Class—by charging Plaintiff and the Class multiple Returned Item Fees every time the same item was resubmitted to the bank for payment against a negative balance. Defendant’s decision to unilaterally enforce this policy and practice directly lead to Plaintiff and the Class being charged multiple Returned Item Fees on the same item. As a direct and proximate result, Defendant breached the implied covenant of good faith and fair dealing.

#### **CLASS ACTION ALLEGATIONS**

52. Plaintiff brings this action as a class action pursuant to Fed. R. Civ. P. 23(a) on behalf of the following Class:

*All persons who, within the applicable statute of limitations period, were charged by First United Bank for multiple Returned Item Fees on a single item.*

Plaintiff reserves the right to modify or amend the class definition as necessary.

53. Plaintiff reserves the right to modify or amend the definition of the proposed Class and/or to add subclasses, if necessary, before this Court determines whether class certification is appropriate.

54. Excluded from the Class are: (1) any entity in which Defendant has a controlling interest; (2) officers or directors of Defendant; (3) this Court and any of its employees assigned to work on the case; and (4) all employees of the law firms representing Plaintiff and the Class.

55. This action is brought and may be properly maintained on behalf of each Class member.

56. *Numerosity of the Class:* The members of the Class are so numerous that a joinder of all members would be impracticable. While the exact number of Class members is presently unknown to Plaintiff, and can only be determined through appropriate discovery, Plaintiff believes the Class is likely to include thousands of members based on the fact Defendant has over \$12 billion in assets.

57. Defendant maintains a database, or other documentation, of its customers' transactions and account enrollment documents. These databases or documents can be analyzed by an expert to ascertain which of Defendant's customers have been harmed by its practices and thus qualify as Class members. Further, the Class definition identifies unnamed Plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify themselves as having a right to recover damages from Defendant. Other than by direct notice by mail or email, alternatively proper and sufficient notice of this action may be provided to the Class through notice published in newspapers or other publications.

58. *Commonality*: This action involves common questions of law and fact. The questions of law and fact common to both Plaintiff and the Class include, but are not limited to, the following:

- a. Whether Defendant violated its contractual relationship with Plaintiff and the Class by charging multiple Returned Item Fees for a single item;
- b. Whether Defendant breached its covenant of good faith and fair dealing with Plaintiff and the Class by charging multiple Returned Item Fees for a single item;
- c. Whether the Account Contract's plain language limited the number of times Defendant could charge Plaintiff and the Class Returned Item Fees on the same item.
- d. If the Account Contract's terms and conditions were not plain, whether they were so ambiguous that Plaintiff's and the Class' reasonable interpretation of the Account Contract should be interpreted to limit the number of times it could charge Plaintiff and the Class Returned Item Fees; and
- e. The proper method or methods to determine and measure Plaintiff's and the Class' damages.

59. *Typicality*: Plaintiff's claims are typical of all members of the Class. The evidence and the legal theories regarding Defendant's alleged wrongful conduct committed against Plaintiff and the Class are substantially the same because all of the relevant agreements between Defendant and its accountholders were identical as to all relevant terms, and also because the challenged practices of charging customers multiple Returned Item Fees for a single item are uniform for Plaintiff and the Class. Accordingly, in pursuing his own self-interest in litigating his claims, Plaintiff will also serve the interests of the Class.

60. *Adequacy*: Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff retained competent counsel experienced in class action litigation to ensure such protection. There are no material conflicts between the claims of the representative Plaintiff and the Class that would make class certification inappropriate. Additionally, Plaintiff's Counsel are

competent to advance the interests of the Class having been designated as Lead Counsel in dozens, if not hundreds, of Class cases. Plaintiff and his Counsel intend to prosecute this action vigorously.

61. *Predominance and Superiority*: The matter is properly maintained as a class action under Fed. R. Civ. P. 23(b)(3) because the common questions of law and fact identified herein, and to be identified through discovery, predominate over questions that may affect only individual Class members. Further, a class action is superior to all other available methods for the fair and efficient adjudication of this matter because the injuries suffered by the individual Class members are relatively small. As such, the expense and burden of individual litigation would make it virtually impossible for Plaintiff and the Class to individually seek redress for Defendant's wrongful conduct. Even if any individual person or group(s) of the Class could afford individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. The class action device is preferable to individual litigation because it provides the benefits of unitary adjudication, economies of scale, and comprehensive adjudication by a single court. In contrast, the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for the party (or parties) opposing the Class and would lead to repetitious trials of the numerous common questions of law and fact. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action. As a result, a class action is superior to other available methods for the fair and efficient adjudication of this action. Absent a class action, Plaintiff and the Class will continue to suffer losses, thereby allowing Defendant's violations of law to proceed without remedy.

62. Plaintiff anticipates the issuance of notice setting forth the subject and nature of the instant action to the proposed Class. Upon information and belief, Defendant's own business records or electronic media can be utilized for the notice process. To the extent any further notices may be required, Plaintiff anticipates the use of additional media or mailings.

**COUNT I**

**BREACH OF CONTRACT**

63. Plaintiff re-alleges and incorporates all previous paragraphs herein.

64. Plaintiff and Defendant contracted for checking account services, as embodied in the Account Contract. *See generally* Exhibits A and B.

65. Plaintiff and each of the Class Members entered into a Terms and Conditions agreement with Defendant covering the subject of overdraft transactions. This contract was drafted by and is binding upon Defendant.

66. Nowhere did the Account Contract state that Defendant was authorized to assess multiple Returned Item Fees for the same item. The operative contracts governed which fees could be charged and under which circumstances, and Defendant breached these contracts by charging fees under circumstances not permitted by the contracts.

67. This good faith requirement extends to the manner in which a party employs discretion conferred by a contract.

68. 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. This is particularly true where one party (here, Defendant) maintains sole discretion over



the decision to implement a particular term or condition of the contract—in this case the decision to charge multiple Returned Item Fees for a single item.

69. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes the 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. Other 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.

70. Defendant breached the covenant of good faith and fair dealing through its policies and practices as explained herein; namely, its unilateral decision to charge Plaintiff and Class members multiple Returned Item Fees on the same item.

71. Each of Defendant's actions were done in bad faith and were arbitrary and capricious.

72. Defendant breached its contract with Plaintiff and Class members through its policies and practices as alleged herein

73. Plaintiff and the Class Members have performed all conditions, covenants, and promises required by each of them on their part to be performed in accordance with the terms and conditions of the Terms and Conditions agreement, except for those they were prevented from performing or which were waived or excused by Defendant's misconduct.

74. As a proximate result of Defendant's breaches, Plaintiff and the Class Members have been damaged in an amount to be proven at trial and seek relief as set forth in the Prayer below.

**PRAYER FOR RELIEF**

75. WHEREFORE, Plaintiff, individually and on behalf of the Class, respectfully requests the Court enter an Order:

- a. Certifying the proposed Class;
- b. Declaring Defendant's practice of charging multiple OD or NSF Fees on a single item as wrongful, unfair, and unconscionable;
- c. Granting restitution of all Overdraft and Insufficient Funds Fees paid to Defendant by Plaintiff and the Class, as a result of the wrongs alleged herein in an amount to be determined at trial;
- d. Compelling disgorgement of the ill-gotten gains derived by Defendant from its misconduct;
- e. Awarding actual and/or compensatory damages in an amount according to proof;
- f. Awarding pre-judgment interest at the maximum rate permitted by applicable law;
- g. Reimbursing all costs, expenses, and disbursements accrued by Plaintiff and the proposed Class in connection with this action, including reasonable attorneys' fees, costs, and expenses, pursuant to applicable law and any other basis; and
- h. Awarding such other relief as this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff, individually and on behalf of the Class, hereby demands a trial by jury on all issues in this Class Action Complaint that are so triable.

Respectfully submitted,

/s/ Mark A. Waller

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*\*Pro hac vice anticipated*