

ELECTRONICALLY FILED
Pulaski County Circuit Court
Terri Hollingsworth, Circuit/County Clerk
2024-Jan-11 15:35:57
60CV-24-354
C06D16 : 52 Pages

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
_____ DIVISION

JOSEPH SELF and MALINDA SELF, on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

CADENCE BANK,

Defendant.

JURY DEMAND

Case No. _____

CLASS ACTION COMPLAINT

Plaintiffs, Joseph and Malinda Self, individually and on behalf of the class of persons preliminarily defined below (the “Class”), makes the following allegations based upon information and belief, except as to allegations specifically pertaining to Plaintiffs, which are based on personal knowledge.

NATURE OF THE ACTION

1. This is a civil action seeking monetary damages, restitution, and injunctive and declaratory relief from Cadence Bank (“Defendant”), arising from its improper assessment and collection of \$36 overdraft fees (“OD Fees”) on debit card transactions that were authorized on sufficient funds.

2. Besides being deceptive, this practice breaches the plain language of Defendant’s adhesion contract, attached hereto as Exhibit A.

3. Plaintiffs and other Defendant customers have been injured by Defendant’s practice. Plaintiffs, individually and on behalf of the class of individuals preliminarily defined below, bring claims for breach of contract, including the duty of good faith and fair dealing, unjust

enrichment, and violations of the Arkansas Deceptive Trade Practices Act (“ADTPA”), Arkansas Code Annotated (“ACA”) § 4-88-101, *et seq.*

PARTIES

4. Plaintiffs Joseph and Malinda Self are natural persons and citizens of Arkansas. Plaintiffs reside in Monroe County and have had a checking account with Defendant at all times material hereto.

5. Defendant is a bank with more than \$4.5 billion in assets with and maintains several branches in Arkansas, including in this County. Its principal place of business is in Tupelo, Mississippi.

JURISDICTION AND VENUE

6. Defendant regularly and systematically conducts business and provides retail banking services in this state and provides retail banking services to customers in this state, including Plaintiffs and members of the putative Class. As such, it is subject to the jurisdiction of this Court.

7. Venue is likewise proper in this county pursuant to A.C.A. § 16-58-125 because Defendant maintains multiple branch offices in this county.

BACKGROUND FACTS

8. OD Fees and insufficient funds fees (“NSF fees”) are among the primary fee generators for banks. In 2021, the largest financial institutions in America charged customers almost \$11 billion in overdraft fees, 84 percent of which were paid by customers who carried an average balance of less than \$250. *Why Poverty Persists in America*, N.Y. Times (Mar. 9, 2023), <https://www.nytimes.com/2023/03/09/magazine/poverty-by-america-matthew-desmond.html>.

9. Because of this, industry leaders like Bank of America, Capital One, Wells Fargo, Alliant, and Ally have made plans to end the assessment of OD or NSF fees entirely. *See* Hugh Son, *Capital One to Drop Overdraft Fees for All Retail Banking Customers*, NBC News (Dec. 1, 2021), <https://nbcnews.to/3DKSu2R>; Paul R. La Monica, *Another Bank Ends Bounced Check Fees*, CNN (Jan. 12, 2022), <https://bit.ly/3iTAN9k>.

10. 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).

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

I. DEFENDANT ASSESSES OD FEES ON DEBIT CARD TRANSACTIONS THAT WERE AUTHORIZED ON SUFFICIENT FUNDS.

12. Plaintiffs bring this action challenging Defendant's practice of charging OD Fees on what are referred to in this complaint as "Authorize Positive, Settle Negative Transactions," or "APSN Transactions."

13. Defendant's practice is as follows: the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Defendant 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 Defendant held the required funds.

14. However, Defendant still assesses crippling OD Fees on many of these transactions and misrepresents its practices in the Contract.

15. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, Defendant later assesses OD Fees on those same transactions when they settle days later into a negative balance. These types of transactions are APSN Transactions.

16. Defendant 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, Defendant 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 OD 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, Defendant improperly charges OD 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 Defendant’s OD Fee revenue. APSN Transactions only exist because intervening transactions supposedly

reduce an account balance. But Defendant is free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year.

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

23. Besides being deceptive, this practice breaches contract promises made in Defendant’s adhesion contracts, which fundamentally misconstrues and misleads consumers about the true nature of Defendant’s processes and practices. Defendant also exploits its contractual discretion by implementing these practices to gouge its customers.

24. Federal regulators have repeatedly condemned OD Fees on APSN Transactions where, like here, the financial institution’s contract does not expressly and unambiguously permit them.

25. For example, the Consumer Financial Protection Bureau (“CFPB”) ordered Regions Bank to pay \$141 million to reimburse consumers for OD Fees on debit card transactions authorized on sufficient funds, noting such fees result from “counter-intuitive, complex processes” and finding them to be “unfair” and “abusive” in violation of federal law. Consent Order, In the Matter of: Regions Bank, No. 2022-CFPB-0008 ¶¶ 4, 32, 34, 38 (Sept. 28, 2022) (Dkt. 1), <https://bit.ly/3vGDdyx>.

26. In October 2022, the CFPB again declared that the assessment of OD Fees on debit card transactions authorized on sufficient funds may constitute an “unfair act or practice” because consumers cannot reasonably avoid these “unanticipated” OD Fees. *See Circular 2022-06, Unanticipated Overdraft Fee Practices*, Cons. Fin. Protection Bureau (Oct. 26, 2022), <https://bit.ly/3VJm3uB>.

27. In December 2022, the CFPB ordered Wells Fargo Bank, N.A. to refund \$205 million in such “Authorized-Positive Overdraft Fees” and again declared such practice to be “unfair, deceptive, or abusive” in violation of federal law. Consent Order, *In the Matter of: Wells Fargo Bank, N.A.*, No. 2022-CFPB-0011 ¶¶ 47, 60 (Dec. 20, 2022) (Dkt. 1), <https://bit.ly/3ZdnwMM>. The CFPB reasoned that “[c]onsumers may be taken by surprise when they incur Authorized-Positive Overdraft Fees because they believed that if they had enough money to cover the relevant transaction when it was authorized they would not incur an Overdraft fee. These Authorized-Positive Overdraft Fees were not reasonable avoidable because they were contrary to consumers’ reasonable expectations.” *Id.* at ¶ 44.

28. And in its Winter 2023 Supervisory Highlights, the CFPB again stated this APSN practice is “unfair,” as “[c]onsumers could not reasonably avoid the substantial injury, irrespective of account-opening disclosures.” *Supervisory Highlights Junk Fees Special Edition*, CONS. FIN. PROTECTION BUREAU 4 (Winter 2023), <https://tinyurl.com/3ste5dfr>. The CFPB explained that “[w]hile work is ongoing, at this early stage Supervision has already identified at least tens of millions of dollars of consumer injury and in response to these examination findings, institutions are providing redress to over 170,000 consumers” and indicated the CFPB intends to continue pursuing such “legal violations surrounding APSN overdraft fees both generally and in the context of specific public enforcement actions[, which] will result in hundreds of millions of dollars of redress to consumers.” *Id.*

29. The Federal Reserve has likewise found that OD Fees on debit card transactions authorized on sufficient funds is an “unfair or deceptive” in violation of federal law and advised financial institutions to “[r]efrain from assessing unfair overdraft fees on POS transactions when they post to consumers’ accounts with insufficient available funds after having authorized those

transactions based on sufficient available funds.” *Consumer Compliance Supervision Bulletin: Highlights of Current Issues in Federal Reserve Board Consumer Compliance Supervision*, Fed. Reserve Bd. 12, 13 (July 2018), <https://tinyurl.com/44dvnd65>.

30. On April 26, 2023, the Office of the Comptroller of the Currency (“OCC”) joined the chorus of regulators, issuing a bulletin to banks addressing the risks associated with overdraft protection programs. The OCC addressed APSN practices as follows:

Some banks assess overdraft fees on debit card transactions that authorize when a customer’s available balance is positive but that later post to the account when the available balance is negative.

In this scenario, a customer’s account has a sufficient available balance to cover a debit card transaction when the transaction is authorized but, due to one or more intervening transactions, has an insufficient available balance to cover the transaction at the time it settles. This is commonly referred to as an APSN transaction. In addition to assessing an overdraft fee on the APSN transaction, some banks also assess an overdraft fee on intervening transactions that exceed the customer’s available balance. In this scenario, for example, the bank reduces a customer’s available balance by an amount that is more than, equal to, or less than the initial authorized debit card transaction, and subsequently, an intervening transaction further reduces the customer’s available balance so that the account no longer has a sufficient available balance. The bank charges an overdraft fee on both the intervening transaction and the initial APSN transaction when posted to the customer’s account.

The OCC has reviewed a number of overdraft protection programs that assess overdraft fees on APSN transactions. In some instances, the OCC has found account materials to be deceptive, for purposes of Section 5, with respect to the banks’ overdraft fee practices. In these instances, misleading disclosures contributed to findings that the APSN practice was also unfair for purposes of Section 5. In addition, and based on subsequent analysis, even when disclosures described the circumstances under which consumers may incur overdraft fees, the OCC has found that overdraft fees charged for APSN transactions are unfair for purposes of Section 5 because consumers were still unlikely to be able to reasonably avoid injury and the facts met the other factors for establishing unfairness.

OCC Bulletin 2023-12: Overdraft Protection Programs: Risk Management Practices, OFFICE OF COMPTROLLER OF THE CURRENCY (Apr. 26, 2023), <https://tinyurl.com/mt63pfnb> (footnotes omitted).

A. Mechanics of a Debit Card Transaction

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

32. At this step, if the transaction is approved, Defendant 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.

33. Sometime thereafter, the funds are actually transferred from the customer’s account to the merchant’s account in a process called “settlement.”

34. Defendant (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 Defendant 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).

35. There is no change—no impact whatsoever—to the available funds in an account when settlement occurs.

B. Defendant’s Contract

36. The Contract's most basic definition of an "overdraft" states: "[a]n 'overdraft' occurs when a check, ACH, ATM, debit card, bank fee (including any overdraft-related fee), or any other item or other debit (collectively, a 'Transaction') is presented for payment against an Account and the available balance of the Account is insufficient to pay the Transaction." Ex. A at 18.

37. The Contract further encourages consumers to avoid overdrafts by "not initiat[ing] or conduct[ing] transactions that will overdraw your Account." *Id.*

38. The Contract further provides that overdrafts are paid or honored when Defendant exercises its discretion to either pay or return a transaction:

If a Transaction is presented to the Bank and the Bank refuses to honor the Transaction because there are insufficient funds to pay the Transaction, your Account will be assessed a fee as set forth in the current fee schedule . . .

...

When an overdraft occurs, . . . the Bank may, at its sole and absolute discretion, refuse the Transaction, or alternatively, the Bank may choose to pay the Transaction, in which case a negative Account balance will result.

...

We may return any transaction being presented at any time if your available balance is insufficient to pay such transaction being presented, even if we previously have permitted overdrafts.

Id.

The Bank may, however, at its option honor an NSF item or amount or dishonor such NSF item or amount and avoid creation of an overdraft.

Id. at 11.

39. Authorization is the only point at which Defendant has discretion to decline payment or "return" a debit card transaction. Once a debit card transaction is authorized, Defendant is required to transfer the funds to the merchant at settlement. The above language linking

overdrafts to Defendant's discretion to pay or return the transaction thus means overdrafts occur at authorization.

40. The Contract also explains that overdrafts are determined based on the account's available balance:

Any Account owner or authorized signer may withdraw all or part of the available balance in the Account regardless of who deposited the funds into the Account

Id. at 10.

An "overdraft" occurs when a check, ACH, ATM, debit card, bank fee (including any overdraft-related fee), or any other item or other debit (collectively, a "Transaction") is presented for payment against an Account and the **available balance** of the Account is insufficient to pay the Transaction.

...

You agree that if your **available balance** is insufficient to pay any item presented against your Account you will promptly pay both our service charge for handling and processing that item and the amount of any overdraft without further notice or demand.

...

We may return any transaction being presented at any time if your **available balance** is insufficient to pay such transaction being presented, even if we previously have permitted overdrafts.

Id. at 18 (emphasis added).

41. The Contract also promises that Defendant will place authorization holds that reduce the account's available balance and render the held funds unavailable for other transactions:

Temporary Debit Authorization Hold. On debit card purchases, merchants may request a temporary hold on your Account for a specified sum of money . . . , during which time the amount of funds in your Account available for other transactions may be reduced by the amount of the temporary hold.

Id. at 10 (emphasis original).

42. 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 Defendant assesses OD Fees on them anyway.

43. The above contractual provisions 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.

44. In fact, Defendant 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.

45. All of the above representations and contractual promises are untrue. Defendant 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 Defendant may impose fees on any APSN Transactions.

46. The Contract also misconstrues Defendant's true debit card processing and overdraft practices.

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

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

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

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

51. Defendant'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.

52. At the time of settlement, however, an available balance does not change at all for these transactions previously authorized into positive funds. As such, Defendant cannot then charge an OD Fee on that transaction because the available balance has not been rendered insufficient due to the pseudo-event of settlement.

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

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

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

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

57. 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 OD Fees on APSN Transactions.

58. Defendant and its accountholders make no such agreement. Instead, the Contract misleads and deceives accountholders regarding the manner in which Defendant will assess OD Fees.

C. Reasonable Consumers Understand Debit Card Transactions Are Debited Immediately

59. Defendant's assessment of OD Fees on transactions that have not overdrawn an account is inconsistent with 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.

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

61. Defendant 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.

62. 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>.

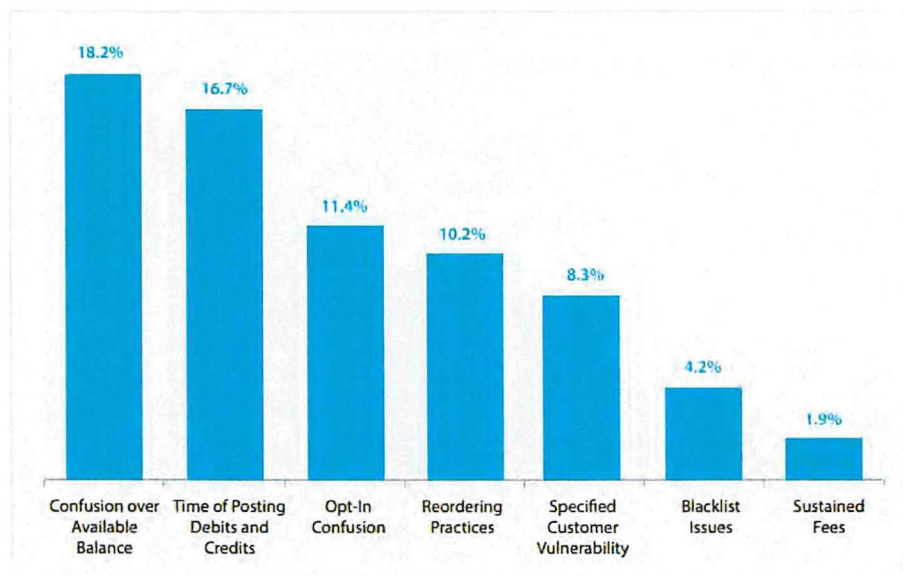
63. This understanding is a large part of the reason that debit cards have risen in popularity. The number of terminals that accept debit cards in the United States has increased by approximately 1.4 million in the last five years, and with that increasing ubiquity, consumers have viewed debit cards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

64. 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.

65. 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>.

66. 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.

67. 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.

68. Ultimately, unclear and misleading fee representations like those in Defendant's account documents mean that consumers like Plaintiffs "who are carefully trying to avoid overdraft, and often believe they will avoid it . . . end up being hit by fees nonetheless." *Id.*

69. 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>.

70. Despite this recommendation, Defendant continues to assess OD Fees on transactions that are authorized on sufficient funds.

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

72. Defendant was also aware of consumers’ confusion regarding OD Fees but nevertheless failed to make its customers agree to its practices.

D. Plaintiffs Were Assessed an OD Fee on Debit Card Transactions Previously Authorized on Sufficient Funds

73. Plaintiffs were charged OD Fees on APSN Transactions on numerous occasions.

74. For example, on August 16, 2023, Plaintiffs were assessed a \$36 OD Fee on a debit card transaction that was previously authorized on sufficient funds.

75. Because Defendant previously placed a hold on the funds required to cover this transaction, Plaintiffs’ account always had sufficient funds to pay the transaction and should not have been assessed a fee.

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

77. Plaintiffs 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 Defendant standard practices.

78. Moreover, any such reporting would have been futile as Defendant's own contract admits that Defendant made a decision to charge the fees.

CLASS ALLEGATIONS

79. Plaintiffs bring this action individually and as a class action on behalf of the following proposed Class:

All consumers who, during the applicable statute of limitations, were Defendant checking account holders and were assessed an overdraft fee on a debit card transaction that was authorized on sufficient funds and settled in the same amount for which the debit card transaction was authorized.

80. Plaintiffs reserve the right to modify or amend the definition of the Class as this litigation proceeds.

81. 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.

82. The time period for the Class is the number of years immediately preceding the date on which this Complaint was filed as allowed by the applicable statute of limitations, going forward into the future until such time as Defendant remedies the conduct complained of herein.

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

84. The claims of the representative Plaintiffs are typical of the claims of the Class in that the representative Plaintiffs, like all members of the Class, were charged improper fees as set forth herein. And Plaintiffs, like all members of the Class, have been damaged by Defendant's misconduct. Furthermore, the factual basis of Defendant's misconduct is common to all members

of the Class and represents a common thread of unlawful and unauthorized conduct resulting in injury to all members of the Class. Plaintiffs have suffered the harm alleged and have no interests antagonistic to the interests of any other members of the Class.

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

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

- a. Whether Defendant charged OD Fees on APSN Transactions;
- b. Whether this fee practice breached the Contract and Defendant's duty of good faith and fair dealing;
- c. Whether Defendant was unjustly enriched by this practice;
- d. Whether Defendant violated the ADTPA;
- e. The proper method or methods by which to measure damages; and
- f. The declaratory and injunctive relief to which the Class are entitled.

87. Plaintiffs are committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions, particularly on behalf of consumers and against financial institutions. Accordingly, Plaintiffs are adequate representatives and will fairly and adequately protect the interests of the Class.

88. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual class member's claim is small relative to the complexity of the litigation, no class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members of the Class will continue to suffer losses and Defendant's misconduct will proceed without remedy.

89. Even if class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows for the consideration of claims which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

90. Plaintiffs suffer a substantial risk of repeated injury in the future. Plaintiffs, like all Class members, are at risk of additional improper fees. Plaintiffs and the Class members are entitled to injunctive and declaratory relief as a result of the conduct complained of herein. Money damages alone could not afford adequate and complete relief, and injunctive relief is necessary to restrain Defendant from continuing to violate its Contract and commit its illegal actions.

91. Plaintiffs' class claims are appropriate to proceed under the ADTPA. Act 986 of 2017—which purports to prohibit most private class actions under the ADTPA—is an unconstitutional intrusion into the Arkansas Supreme Court's exclusive authority to "prescribe the rules of pleading, practice and procedure for all courts." Ark. Const. Amend. 80, § 3; *see also Johnson v. Rockwell Automation*, 2009 Ark. 241, 308 S. W.3d 135; *Broussard v. St. Edward Mercy Health Sys.*, 2012 Ark. 14, 386 S.W.3d 385; *Edwards v. Thomas*, 2021 Ark. 140, 2021 Ark. LEXIS 144 (2021); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Mounce v. CHSPSC, LLC*, No. 5:15-CV-05197, 2017 U.S. Dist. LEXIS 160673, at *2 (W.D. Ark. Sep. 29, 2017). Therefore, Plaintiffs additionally seek declaratory relief finding the ADTPA's class action ban unconstitutional.

92. All conditions precedent to bringing this action have been satisfied and/or waived.

FIRST CLAIM FOR RELIEF
Breach of Contract, Including Breach of the Duty of Good Faith and Fair Dealing
(On Behalf of Plaintiffs and the Class)

93. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

94. Plaintiffs and Defendant have contracted for banking services, as embodied in Defendant's account documents. *See* Ex. A.

95. All contracts entered by Plaintiffs and the Class are identical or substantively identical because Defendant's form contracts were used uniformly.

96. Defendant has breached the express terms of its own agreements as described herein.

97. Arkansas 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.

98. Defendant abuses its discretion in its own favor—and to the prejudice of Plaintiffs and other customers—by charging OD Fees on APSN Transactions. This is an abuse of the power that Defendant has over Plaintiffs and their bank account, is contrary to Plaintiffs' reasonable expectations under the Contract, and breaches Defendant's implied covenant to engage in fair dealing and to act in good faith.

99. 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.

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

101. Defendant harms Plaintiffs and members of the Class by abusing its contractual discretion that no reasonable customer would anticipate.

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

103. Plaintiffs and members of the Class have sustained damages because of Defendant's breach of the Contract.

104. Plaintiffs and members of the Class have sustained damages because of Defendant's breach of the covenant of good faith and fair dealing.

SECOND CLAIM FOR RELIEF
Unjust Enrichment
(On Behalf of Plaintiffs and the Class)

105. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

106. Plaintiffs and members of the Class conferred a benefit on Defendant at the expense of Plaintiffs and members of the Class when they paid improper OD Fees.

107. There was an appreciation of this benefit by Defendant in the form of the substantial revenue that Defendant generates from the imposition of such fees.

108. Defendant has inequitably accepted such improper fees without payment to Plaintiffs and members of the Class for their value.

109. Defendant should not be allowed to profit or enrich itself inequitably at the expense of Plaintiffs and the Class and should be required to make restitution to Plaintiffs and the Class.

THIRD CLAIM FOR RELIEF

**Violation of the Arkansas Consumer Protection Act (A.C.A. § 4-88-107(a)(10))
(On Behalf of Plaintiffs and the Class)**

110. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

111. The ADTPA is designed to protect consumers from deceptive, unfair, and unconscionable trade practices. The ADTPA is a remedial statute which is to be construed liberally in favor of consumers.

112. Defendant's wrongful actions as described throughout this Complaint violate the ADTPA, specifically A.C.A. § 4-88-107(a)(10).

113. As detailed herein, Defendant has violated (and continues to violate) A.C.A. § 4-88-107(a)(10) by deceptively assessing and collecting OD Fees on debit card transactions that did not cause an overdraft in violation of Defendant's fee disclosures.

114. Plaintiffs and the Class relied on Defendant's misleading and deceptive fee representations.

115. As a result, Plaintiffs and members of the Class have suffered actual financial loss proximately caused by Defendant's unlawful conduct. Plaintiffs and other members of the Class suffered actual financial loss proximately caused by their reliance on Defendant's unlawful conduct.

116. Accordingly, Plaintiffs and Class are entitled to recover their damages, attorneys' fee, and costs pursuant to A.C.A. § 4-88-113.

117. Plaintiffs and members of the Class are also entitled to punitive damages. Defendant knew or should have known that its conduct would result in injury to Plaintiffs and members of the Class, yet it continues such conduct in reckless disregard for the consequences.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs 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;
- b. Declaratory relief finding the ADTPA's class action ban unconstitutional;
- c. Declaratory and injunctive relief to the extent Defendant's fee practice breaches the Contract;
- d. Designation of Plaintiffs as the Class Representative and designation of the undersigned as Class Counsel;
- e. Restitution of all improper fees paid to Defendant by Plaintiffs and the Class because of the wrongs alleged herein in an amount to be determined at trial;
- f. Actual damages in amount according to proof;
- g. Pre- and post-judgment interest at the maximum rate permitted by applicable law;
- h. Costs and disbursements assessed by Plaintiffs in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- i. Such other relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs, by counsel, demand trial by jury.

Dated: January 11, 2024

By: /s/ Randall K. Pulliam

Randall K. Pulliam (AR Bar #98105)

CARNEY BATES & PULLIAM, PLLC

519 W. 7th St.

Little Rock, Arkansas 72201

Telephone: (501) 312-8500

rpulliam@cbplaw.com

Attorneys for Plaintiffs and the Putative Class