

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

WENDY GARRANT and TANYA  
HOOVER, on behalf of herself and all others  
similarly situated,

Plaintiff,

v.

FIVE STAR BANK,

Defendant.

Civil Action No. 24-6155

**CLASS ACTION COMPLAINT**

**Jury Trial Demanded**

COMES NOW Plaintiffs Wendy Garrant and Tanya Hoover (“Plaintiffs”), on behalf of the putative Class, by his undersigned counsel, and for his Class Action Complaint against Defendant Five Star Bank (“FSB”), alleges upon knowledge as to themselves and upon information and belief as to all other matters as follows:

**PRELIMINARY STATEMENT**

1. Plaintiffs bring this action on behalf of themselves and on behalf of a Class of similarly situated consumers against Defendant Five Star Bank (“Five Star Bank” or “Defendant”) arising from Defendant’s routine policy and practices of (a) charging its customers Overdraft Fees (“OD Fees”) on transactions that did not overdraw an account; and (b) multiple fees on an item.

2. The plain language of FSB’s adhesion contracts specifically promises that FSB will only charge OD Fees on items when such items cause the account to have a negative balance, and will only charge a single fee per item.

3. Overdraft fees represent one of the biggest profit centers for banks, stemming from practices susceptible to high levels of abuse which pose the largest burden on consumers. For

example, investigations undertaken by the Consumer Financial Protection Bureau (“CFPB”) revealed that some banks intentionally create confusion for their accountholders regarding the terms of their overdraft policies, intentionally obscure how fees are charged for 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/>.

4. This increased revenue source, however, creates a disproportionate impact on consumers living in the lower socio-economic levels of the United States. 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>.

5. 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 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.

6. Recently, one of the nation’s largest banks, Ally Financial, announced that it was eliminating overdraft fees on all accounts. Ally’s CEO stated in the company’s announcement that “[n]ationwide, more than 80% of overdraft fees are paid by consumers living paycheck to paycheck or with consistently low balances – precisely the people who need help stabilizing their finances...[e]liminating these fees helps keep people from falling further behind and feeling penalized as they catch up.” Jessica Dickler, *Ally Bank is Eliminating Overdraft Fees Once and For All*, CNBC (June 2, 2021), <https://www.cnbc.com/2021/06/02/ally-bank-eliminates-overdraft-fees-for-all-customers.html>.

7. Plaintiffs and other FSB customers have been injured by FSB’s practices. On behalf of themselves and the putative class, Plaintiff seeks damages and restitution for FSB’s breach of contract.

### **PARTIES**

8. Plaintiff Wendy Garrant is a resident and a citizen of Piffard, New York.

9. Plaintiff Tanya Hoover is a resident and citizen of Clifton Springs, New York.

10. Defendant FSB is a bank with over \$6 billion dollars in assets. It is headquartered

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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\\_S hopping\\_in\\_Four\\_Key\\_States.pdf](http://calreinvest.org/wp-content/uploads/2018/09/Report_How_Banks_Sell_Overdraft_Results_of_Overdraft_Mystery_S hopping_in_Four_Key_States.pdf)).

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

in Warsaw, New York.

### **JURISDICTION AND VENUE**

11. This Court has original jurisdiction of this action under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. § 1332(d), this Court has original jurisdiction because:

- a. the proposed Class is comprised of at least 100 members; § 1332(d)(5)(B)
- b. at least one member of the proposed class is a citizen of a State other than New York (the State of which FSB is a citizen), § 1332(d)(2)(A); and
- c. the aggregate claims of the putative class members exceed \$5 million, exclusive of interest and costs. § 1332(d)(2), (6).

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because FSB is subject to personal jurisdiction here and regularly conducts business in this District, and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this district.

### **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

#### **I. DEFENDANT CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT**

13. Plaintiff brings this cause of action challenging Defendant's practice of charging OD Fees on what are referred to in this Complaint as Authorize Positive, Purportedly Settle Negative Transactions, or "APPSN Transactions."

14. Here's how it works: at 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 a checking account to cover that transaction, and as a result, the consumer's displayed "available balance" reflects that subtracted amount. As a result, customers' accounts will always have sufficient available funds

available to cover these transactions because Defendant has already sequestered these funds for payment.

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

16. 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 purportedly settle days later into a negative balance. These types of transactions are APPSN transactions.

17. Defendant maintains a running account balance in real time, 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 sequesters 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 accountholder, and such funds are specifically associated with a given debit card transaction.

18. 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, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

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 5498-01 (Jan. 29, 2009).

19. 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 any earlier debit card transactions. This means that many subsequent transactions incur OD Fees due to the unavailability of the funds sequestered for those debit card transactions.

20. Still, despite keeping those held funds off-limits for other transactions, Defendant improperly charges OD Fees on those APPSN Transactions, although the APPSN transactions always have sufficient available funds to be “covered.”

21. Indeed, the Consumer Financial Protection Bureau (“CFPB”) has expressed concern with this very issue, flatly calling the practice “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 fees under these circumstances was found to be unfair.

Consumer Financial Protection Bureau, Winter 2015 Supervisory Highlights, 8–9 (available at [https://files.consumerfinance.gov/f/201503\\_cfpb\\_supervisory-highlights-winter-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf)).

22. The CFPB recently released additional critique of this exact practice:

Unanticipated overdraft fees can occur on “authorize positive, settle negative” or APSN transactions, when financial institutions assess an overdraft fee for a debit card transaction where the consumer had sufficient available balance in their account to cover the transaction at the time the consumer initiated the transaction and the financial institution authorized it, but due to intervening authorizations, settlement of other transactions (including the ordering in which transactions are settled), or other complex processes, the financial institution determined that the consumer’s balance was insufficient at the time of settlement. These unanticipated overdraft fees are assessed on consumers who are opted in to overdraft coverage for one-time debit card and ATM transactions, but they likely did not expect overdraft fees for these transactions.

...

Certain financial institution practices can exacerbate the injury from unanticipated overdraft fees from APSN transactions by assessing overdraft fees in excess of the number of transactions for which the account lacked sufficient funds. In these APSN situations, financial institutions assess overdraft fees at the time of settlement based on the consumer’s available balance reduced by debit holds, rather than the consumer’s ledger balance, leading to consumers being assessed multiple overdraft fees when they may reasonably have expected only one.

Consumer Financial Protection Bureau, Circular 2022-06, October 26, 2022, [https://files.consumerfinance.gov/f/documents/cfpb\\_unanticipated-overdraft-fee-assessment-practices\\_circular\\_2022-10.pdf](https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf), pp. 8-9, 10 (last accessed November 2, 2022).

23. There is no justification for these practices, other than to maximize Defendant’s overdraft fee revenue. APPSN Transactions only exist because intervening checking account 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. But Defendant was

not content with these millions in OD Fees. Instead it sought millions *more* in OD Fees on these APPSN Transactions.

24. This abusive practice is not universal in the banking industry. Indeed, major banks like Wells Fargo—one of the largest consumer banks in the country—do not charge OD Fees on APPSN transactions.

25. These practices breach contractual promises made in Defendant’s Account Contract—a contract which fundamentally misconstrues and misleads consumers about the true nature of Defendant’s processes and practices. These practices also exploit contractual discretion to gouge consumers.

26. In plain, clear, and simple language, Defendant’s Account Contract promises that Defendant will only charge OD Fees on transactions that have insufficient funds to “cover” that transaction.

27. Defendant is therefore not authorized by the Account Contract to charge OD Fees on transactions that have not overdrawn an account, but Defendant has done so and continues to do so in violation of the Account Contract.

**A. MECHANICS OF A DEBIT CARD TRANSACTION**

28. A debit card transaction occurs in two parts. First, authorization for the purchase amount is instantaneously obtained by the merchant from Defendant. When a merchant physically or virtually “swipes” a customer’s 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.



29. At this step, if the transaction is approved, Defendant immediately decreases the funds in a consumer's account and sequesters funds in the amount of the transaction but does not yet transfer the funds to the merchant.

30. 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, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

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 5498-01 (Jan. 29, 2009).

31. Sometime thereafter, the funds are actually transferred from the customer's account to the merchant's account. This is referred to in the banking industry as "posting" or "settling"—something which may occur several days after the transaction was initially initiated.

32. There is no change—no impact whatsoever—to the available funds in an account when posting or payment of a transaction that settles in the same amount for which it authorized occurs. That is because available funds amounts do not change for debit card transactions that settle in the same amount for which they were authorized.

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

**i. Defendant's Account Contract**

33. Defendant's Account Contract promises that Defendant immediately places holds on debit card transactions at the moment of authorization and that those held funds are off-limits for other, later transactions:

An Account Overdraft could occur if you do not have sufficient funds available in your Account. We are not obligated to pay any Item presented for payment if your Account does not contain sufficient funds. Fees can be avoided for Overdrafts and returned Items by verifying your Accounts contain a sufficient Available Balance to cover your transactions. We may pay Overdrafts at our discretion, but you are responsible for any overdrawn balances and any associated fees. If there is an Overdraft paid by us on an Account with more than one Owner, each Owner, shall be jointly and severally liable for such Overdraft, plus any applicable fees. You will be notified by mail of any Overdraft Items, paid or returned that you may have; however, we have no obligation to notify you before we pay or return any Item.

Ex. A, p. 18.

34. Defendant's Overdraft Disclosure promises the same:

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have standard overdraft practices that come with your account.
2. We also offer overdraft protection plans, such as an overdraft line of credit, or a link to a savings account which may be less expensive than our standard overdraft practices. To learn more, ask us about these plans.

This notice explains our standard overdraft practices.

What are the standard overdraft practices that come with my account?

We do authorize and pay overdrafts for the following types of transactions:

- Checks and other transactions made using your checking account number
- Automatic bill payments

We do not authorize and pay overdrafts for the following types of transactions unless you ask us to (see below):

- ATM transactions
- Everyday debit card transactions

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction. If we do not authorize and pay an overdraft, your transaction will be declined.

What fees will I be charged if Five Star Bank pays my overdraft? Under our standard overdraft practices:

- We will charge you a fee of up to \$40 each time we pay an overdraft.
- There is a limit of 6 overdraft fees, per day, that we will charge you for overdrawing your account.

Ex. B (emphasis omitted).

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

36. These promises mean that transactions are only overdraft transactions when they are authorized into a negative account balance. Of course, that is not true for APPSN Transactions.

37. In fact, Defendant actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to “pay” those same transactions when they settle. Instead, it uses a secret posting process described below.

38. All these representations and contractual promises are untrue. In fact, Defendant charges OD Fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. No express language in the Account Contract states that Defendant may impose OD Fees on any APPSN Transactions.

39. On information and belief, the Account Contract misrepresents Defendant’s true debit card processing and overdraft practices.

40. First, and most fundamentally, Defendant charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions. That is despite affirmative contractual representations that Defendant will only charge OD Fees on transactions with insufficient available funds to cover a given transaction.

41. Defendant assesses OD Fees on APPSN Transactions that do have sufficient funds available to cover them throughout their lifecycle.

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

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

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

45. In reality, Defendant's actual practice is to inspect the same debit card transaction twice to determine if the transaction overdraws an account—both at the time a transaction is authorized and later at the time of settlement.

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

47. This discrepancy between Defendant's actual practices and the Account Contract causes consumers to incur more OD Fees than they should.

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

**ii. Defendant Abuses Contractual Discretion**

49. Defendant's treatment of debit card transactions to charge OD Fees is not simply a breach of the express terms of the numerous account documents. In addition, Defendant exploits contractual discretion to the detriment of accountholders when it uses these policies.

50. The term "to cover" a transaction is undefined. Defendant uses its discretion to define "temporary debit authorization hold" in a manner contrary to any reasonable, common sense understanding of that term. In Defendant's implied definition, a transaction is not covered even if Defendant sequesters sufficient available funds for that transaction.

51. Moreover, Defendant uses its contractual discretion to cause APPSN Transactions to incur OD Fees by knowingly authorizing later transactions that it allows to consume available funds previously sequestered for APPSN Transactions.

52. Defendant uses all of these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable consumer would believe could cause OD Fees.

### **iii. Plaintiff Hoover's Experience**

53. On November 5, 2021, Plaintiff Hoover was assessed OD Fees for debit card transactions that settled on that day even though positive funds were deducted and held immediately for the transaction on which she was assessed an OD Fee.

## **II. DEFENDANT ASSESSES TWO OR MORE FEES ON THE SAME ITEM RETURNED FOR INSUFFICIENT FUNDS**

54. Defendant unlawfully maximizes its already profitable fees through the deceptive and, upon information and belief, the contractually-prohibited practice of charging multiple NSF fees, or an NSF fee followed by an overdraft fee, on an item.

55. 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, promises the opposite.

56. 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.

57. This abusive 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.

58. Upon information and belief, 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 \$40 fee; or (b) reject the item and charge a \$40 fee.

59. In contrast to the Contract, however, Defendant regularly assesses two or more \$40 fees on an item.

**A. The Imposition of Multiple Fees on a Single Item Violates Defendant’s Express Promises and Representations**

60. The fee schedule promises that a single fee will be assessed on an item:

Returned Item Fee***	\$40	Per Item
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Ex. C, p. 1.

61. The same item on an account cannot conceivably become a new one when it is rejected for payment then reprocessed, especially when—as here—Plaintiff took no action to resubmit it.

62. There is zero indication anywhere in the contract that the same item is eligible to incur multiple fees.

63. Even if Defendant reprocesses 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.

64. The contract never discusses a circumstance where Defendant may 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.

65. In sum, Defendant promises that one fee will 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.

66. Reasonable consumers understand any given authorization for payment to be one, singular “item.”

67. 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. Upon information and belief, 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.

68. Customers reasonably understand 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.

69. Banks and credit unions like Defendant that employ this abusive practice require their accountholders to expressly agree to it—something, upon information and belief, Defendant here did not do.

70. 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).

71. Upon information and belief, Defendant's contract provides no such authorization, and actually promises the opposite— Defendant may charge, at most, a fee, per item.

#### **B. Plaintiff Garrant's Experience**

72. In support of Plaintiff Garrant's claim, Plaintiff Garrant offers an example 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.

73. On or around September 5, 2018, Plaintiff Garrant was assessed multiple fees on an item.



74. Plaintiff Garrant understood the payment to be a single item as is laid out in the contract, upon information and belief, capable of receiving, at most, a single fee if Defendant returned it, or a single fee if Defendant paid it.

75. Defendant knew that these transactions were mere retries of a single item and not a new item because its own statements state that these payments were “RETRY PYMT”.

### **III. NONE OF THESE FEES WERE ERRORS.**

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

77. Plaintiff therefore had no duty to report the fees as errors because they were not; instead, they were part of the systematic and intentional assessment of fees according to Defendant’s 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.

### **IV. THE IMPOSITION OF THESE IMPROPER FEES BREACHES DEFENDANT’S DUTY OF GOOD FAITH AND FAIR DEALING**

79. Parties to a contract are required not only to adhere to the express conditions of the contract but also to act in good faith when they are invested with a discretionary power over the other party. This creates an implied duty to act in accordance with account holders’ reasonable expectations and means that the bank or credit union is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the bank or credit union has a duty to honor transaction requests in a way that is fair to its customers and is prohibited from exercising its discretion to pile on even greater penalties on its account holders.

80. Here—in the adhesion agreements Defendant foisted on Plaintiff and its other customers—upon information and belief, 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 improper fees.

81. Defendant abuses its discretion in its own favor—and to the prejudice of Plaintiff and its other customers—when it assesses fees in this manner. By *always* assessing these fees to the prejudice of Plaintiff and other customers, Defendant breaches their reasonable expectations and, in doing so, violates its duty to act in good faith. This is a breach of Defendant’s implied covenant to engage in fair dealing and to act in good faith.

82. It was bad faith and totally outside Plaintiff’s reasonable expectations for Defendant to use its discretion in this way.

83. When Defendant charges improper fees in this way, upon information and belief, Defendant uses its discretion to interpret the meaning of key terms in an unreasonable way that violates common sense and reasonable consumers’ expectations. Defendant uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more fees.

### **CLASS ALLEGATIONS**

84. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements.

All FSB checking account holders who, during the applicable statute of limitations, were charged OD Fees on transactions that were authorized into a positive available balance. (Proposed Class Representative: Plaintiff Hoover)

All FSB checking account holders who, during the applicable statute of limitations, were charged multiple fees on the same item. (Proposed Class Representative: Plaintiff Gurrant)

85. Plaintiffs also brings an alternative state subclass on behalf of New York residents.

86. The Nationwide Classes and alternative state subclass defined above are collectively referred to herein as the “Classes.” Plaintiff reserves the right to modify or amend the definitions of the proposed Classes before the Court determines whether certification is appropriate.

87. Excluded from the Classes are FSB, its parents, subsidiaries, affiliates, officers and directors, any entity in which FSB has a controlling interest, all personal accountholders 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.

88. The members of the Classes are so numerous that joinder is impractical. The Classes consist of at least thousands of members, the identity of whom is within the knowledge of, and can be ascertained only by resort to, FSB’s records.

89. The claims of the representative Plaintiff are typical of the claims of the Classes he seeks to represent in that the representative Plaintiff, like all members of the Classes, were charged improper and deceptive fees as alleged herein. The representative Plaintiff, like all members of the Classes, were damaged by FSB’s misconduct in that they were assessed OD Fees on APPSN transactions and multiple fees on the same item. Furthermore, the factual basis of FSB’s misconduct is common to all members of the Classes and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Classes. And FSB has no unique defenses that would apply to Plaintiff and not the Classes.

90. There are numerous questions of law and fact common to the Classes and those

common questions predominate over any questions affecting only individual members of the Classes.

91. The questions of law and fact common to the Classes include, but are not limited to, the following:

- a. Whether FSB's assessment of OD Fees on APPSN transactions and multiple fees on the same item was in breach of its contract;
- b. Whether FSB's assessment of OD Fees on APPSN transactions and multiple fees on the same item was unfair, deceptive, or misleading;
- c. The proper method or methods by which to measure damages and/or restitution and/or disgorgement; and
- d. Whether Plaintiff and the Classes are entitled to declaratory and injunctive relief and the nature of that relief.

92. Plaintiff's claims are typical of the claims of other members of the Classes, in that they arise out of the same wrongful OD Fee and NSF Fee policies and practices. Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other member of the Classes.

93. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions and, in particular, consumer class actions against financial institutions. Accordingly, Plaintiff is an adequate representatives and will fairly and adequately protect the interests of the Classes.

94. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual member of the Classes' claim is small relative to the complexity of the litigation, and due to the financial resources of FSB,

no member of the Classes could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members of the Classes will continue to suffer losses and FSB's misconduct will proceed without remedy.

95. Even if members of the Classes 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 claims to be heard 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.

96. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its treatment as a class action.

97. FSB has acted or refused to act on grounds generally applicable to each of the Classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each Classes as a whole.

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

### **CAUSES OF ACTION**

#### **FIRST CAUSE OF ACTION**

#### **Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing On Behalf of Plaintiffs and the Class**

99. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

100. Plaintiffs and FSB have contracted for bank account deposit, checking, ATM, and

debit card services. That contract does not permit FSB to charge OD Fees on transactions that do not actually overdraw an account, nor does it permit FSB to charge multiple fees on the same item.

101. Nowhere in the Account Agreement did FSB state that would charge OD Fees based on an account balance different from the funds actually in an account and different from the account balance disclosed to accountholders on bank statements, or that it would charge multiple fees on the same item.

102. Good faith is an element of every contract. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. 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.

103. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A failure to act in 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 include evasion of the spirit of the bargain, 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.

104. FSB has breached the covenant of good faith and fair dealing in its account agreement with customers by charging OD Fees on transactions that do not actually overdraw the account i.e. when there were sufficient actual funds in the account to cover the transaction and by charging multiple fees on the same item.

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

106. Plaintiffs and members of the Class have sustained damages as a result of FSB's breach of the contract.

**SECOND CLAIM FOR RELIEF**  
**Deceptive Acts or Practices – N.Y. Gen. Bus. Law § 349**  
**(On Behalf of Plaintiff and the New York Subclass)**

107. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

108. This cause of action is asserted on behalf of the New York Subclass, whose members enjoy the protections of Article 22-A of the New York General Business Law, the Consumer Protection from Deceptive Acts and Practices Law, N.Y. GEN. BUS. LAW § 349 *et seq.*, which prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service.” N.Y. GEN. BUS. LAW § 349(a).

109. FSB's policies and practices complained of herein were and are consumer-oriented, in that they affect all consumers who maintain checking accounts with FSB.

110. The complained-of policies and practices were and are misleading in a material respect, because FSB promised it would not charge OD Fees on APPSN transactions or charge multiple fees on the same item.

111. Had Plaintiff and the members of the New York Subclasses known they could be charged OD Fees on APPSN transactions and/or multiple fees on the same item, they would have made different payment decisions so as to avoid incurring such fees and/or would have banked elsewhere.

112. Plaintiff and members of the New York Subclasses were injured as a result of FSB's

policies and practices, in that their accounts were debited by FSB in violation of their agreements with the bank.

113. FSB's actions were willful and knowing.

114. As redress for FSB's repeated and ongoing violations of these consumer protection statutes, Plaintiff and members of the New York Subclass each seek actual damages, treble damages, statutory damages, injunctive relief, and attorney's fees and costs.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs and the members of the Class seek an Order:

115. Certifying the proposed Class pursuant to Rule 23;

116. Declaring that FSB is financially responsible for notifying the Class members of the pendency of this suit;

117. Declaring the FSB has committed the violations of law alleged herein;

118. Providing for any and all injunctive relief the Court deems appropriate;

119. Awarding statutory damages in the maximum amount for which the law provides;

120. Awarding monetary damages, including but not limited to any compensatory, incidental, or consequential damages in an amount that the Court or jury will determine, in accordance with applicable law;

121. Providing for any and all equitable monetary relief the Court deems appropriate;

122. Awarding punitive or exemplary damages in accordance with proof and in an amount consistent with applicable precedent;

123. Awarding Plaintiffs their reasonable costs and expenses of suit, including attorneys' fees;

124. Awarding pre- and post-judgment interest to the extent the law allows; and



125. Providing such further relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs respectfully demand a trial by jury on all issues so triable.

Dated: March 13, 2024

Respectfully submitted,

*/s/ James Bilsborrow*

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