

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

HEATHER GASIOR, on behalf of herself and
all others similarly situated,

Plaintiff,

v.

BANK RHODE ISLAND,

Defendant.

Case No.

Class Action Complaint

Jury Demand

CLASS ACTION COMPLAINT

Plaintiff Heather Gasior (“Plaintiff”) brings this Class Action Complaint against Defendant Bank Rhode Island (“Defendant”) and alleges as follows:

INTRODUCTION

1. This case concerns Defendant’s unlawful business practice of assessing (a) \$35 overdraft fees (“Overdraft Fees” or “OD Fees”) on debit card transactions authorized on sufficient funds, and (b) multiple \$35 fees on an item.

2. Upon information and belief, these practices breach promises made in Defendant's Personal Deposit Agreement and Disclosures and Defendant's Overdraft Opt-In Form¹ (respectively, Exhibits A and B hereto). Plaintiff has requested additional contract documents effective at the time the challenged fees were assessed from Defendant and, to date, Defendant has not provided them. Together with Exhibits A and B, these documents constitute the "Contract."

3. Plaintiff and other customers of Defendant have been injured by Defendant's improper fee maximization practices. Plaintiff, individually and on behalf of the classes of individuals preliminarily defined below, brings claims for Defendant's breach of contract, including the duty of good faith and fair dealing and unjust enrichment.

PARTIES

4. Plaintiff Heather Gasior is a citizen of Rhode Island and a resident of this District. She has maintained a checking account with Defendant at all times relevant hereto .

5. Defendant is a bank with over \$3 billion in total assets. It is a citizen of Rhode Island with its principal place of business in this District. Defendant is engaged in the business of providing retail banking services to consumers at its 22 locations in Rhode Island.

JURISDICTION AND VENUE

6. This Court has original jurisdiction of this action pursuant to 28 U.S.C. §§ 1332(d)(2), because the matter in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which at least one member of the proposed classes is a citizen of a

¹ Federal regulators require banks and credit unions to use an overdraft opt-in form substantially similar to the overdraft opt-in for ATM and one-time debit card transactions attached hereto as Ex. B. 12 C.F.R. § 1005.17(b)(1).

state different from the Defendant. The number of members of the proposed classes in aggregate exceeds 100 account holders. 28 U.S.C. § 1332(d)(5)(B).

7. This Court has personal jurisdiction over the Defendant because it resides in, regularly conducts and/or solicits business in, engages in other persistent courses of conduct in, and/or derives substantial revenue from products and/or services provided to persons in this District.

8. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District, where Defendant maintains its headquarters.

BACKGROUND FACTS

9. In 2021, the largest financial institutions in America charged customers almost \$11 billion in OD Fees. Customers who carried an average balance of less than \$350 paid 84 percent of these fees. *Why Poverty Persists in America* (The New York Times, Mar. 9, 2023), <https://www.nytimes.com/2023/03/09/magazine/poverty-by-america-matthew-desmond.html>.

10. 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 Fees or Insufficient Funds Fees (“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, *Wells Fargo Ends Bounced Check Fees*, CNN (Jan. 12, 2022), <https://bit.ly/3iTAN9k>.

11. Federal regulators have also taken action. For example, the Consumer Financial Protection Bureau (CFPB) recently fined Regions Bank \$191 million, finding that it “acted unfairly and abusively” in violation of the Consumer Financial Protection Act of 2010 by assessing

the same “surprise” APSN fees at issue here. CFPB, Enforcement Actions, Regions Bank (Sep. 28, 2022), available at:

https://www.consumerfinance.gov/enforcement/actions/regions-bank_2022 (last accessed Mar. 22, 2023).

12. Through the imposition of these fees, Defendant has made substantial revenue to the tune of significant profit, seeking to turn its customers’ financial struggles into revenue.

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

13. Plaintiff brings 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.”

14. 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 has already held the funds for payment.

15. However, Defendant still assesses crippling \$35 OD Fees on many of these transactions and misrepresents its practices in the 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 settle days later into a negative balance. These types of transactions are APSN Transactions.

17. Defendant maintains a running account balance, tracking funds accountholders 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 accountholder and are specifically reserved for 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:

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).

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 pending debit card transactions. Therefore, many subsequent transactions incur OD Fees due to the unavailability of the funds held for earlier debit card transactions.

20. 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.

21. 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 fees under these circumstances was found to be unfair.

Consumer Financial Protection Bureau, “Supervisory Highlights” (Winter 2015).

22. The CFPB again criticized the assessment of OD Fees on APSN Transactions in its October 2022 circular, stating:

Even if a consumer closely monitors their account balances and carefully calibrates their spending in accordance with the balances shown, they can easily incur an

overdraft fee they could not reasonably anticipate because financial institutions use processes that are unintelligible for many consumers and that consumers cannot control . . .

For example, even when the available balance on a consumer’s account—that is, the balance that, at the time the consumer initiates the transaction, would be displayed as available to the consumer—is sufficient to cover a debit card transaction at the time the consumer initiates it, the balance on the account may not be sufficient to cover it at the time the debit settles. The account balance that is not reduced by any holds from pending transactions is often referred to as the ledger balance. The available balance is generally the ledger balance plus any deposits that have not yet cleared but are made available, less any pending (i.e., authorized but not yet settled) debits. Since consumers can easily access their available balance via mobile application, online, at an ATM, or by phone, they reasonably may not expect to incur an overdraft fee on a debit card transaction when their balance showed there were sufficient available funds in the account to pay the transaction at the time they initiated it. Such transactions, which industry commonly calls “authorize positive, settle negative” or APSN transactions, thus can give rise to unanticipated overdraft fees.

. . .

Charging an unanticipated overdraft fee may generally be an unfair act or practice. Overdraft fees inflict a substantial injury on consumers. Such fees can be as high as \$36; thus consumers suffer a clear monetary injury when they are charged an unexpected overdraft fee. Depending on the circumstances of the fee, such as when intervening transactions settle against the account or how the financial institution orders the transactions at the end of the banking day, consumers could be assessed more than one such fee, further exacerbating the injury. These overdraft fees are particularly harmful for consumers, as consumers likely cannot reasonably anticipate them and thus plan for them.

Consumer Financial Protection Circular 2022-06: Unanticipated Overdraft Fee Assessment Practices, Consumer Financial Protection Bureau 5-6 (Oct. 26, 2022), <https://bit.ly/3SNPg69>.

23. 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 significant profit each year.

24. But Defendant was not content with this profit from OD Fees alone. Instead, it sought even more in OD Fees on APSN Transactions.

25. Besides being deceptive, unfair, and unconscionable, these practices breach contract promises made in Defendant's adhesion contracts, which fundamentally misconstrue and mislead 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.

A. Mechanics of a Debit Card Transaction

26. 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.

27. At this step, if the transaction is approved, Defendant immediately decrements the funds in an accountholder's account and holds funds in the amount of the transaction but does not yet transfer the funds to the merchant.

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

29. 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 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).

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

B. Defendant’s Contract

31. Plaintiff has a checking account with Defendant, which is governed by the Contract. Ex. A-B.

32. Based upon information and belief during all pertinent periods of time, Defendant’s Contract states, “An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway.” Ex. B.

33. The Contract also states that “We will not permit withdrawals from your Account unless there are sufficient available funds in the Account. The fact that we may honor withdrawal requests that overdraw the available Account balance does not obligate us to do so later” Ex. A at 5; *see also id.* at 7 (“An overdraft is created when you have insufficient funds in your Account to cover a check, withdrawal, automatic transfer, electronic transaction (e.g., ATM or point-of-sale purchase), returned deposited item, or any other electronic purchase, payment, or debit.”).

34. In breach of this promise, Defendant assesses \$35 Overdraft Fees when there is enough money in the account to pay or cover the withdrawal request. In other words, there are sufficient available funds in the account.

35. Upon information and belief, Defendant further promises that authorization and payment occur simultaneously and that overdrafts will be determined at the time Defendant “authorize[s] and pay[s]” the debit card transaction:

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 if I want you to **authorize and pay** my overdrafts on my ATM and everyday debit card transactions?

If you also want us to **authorize and pay** overdrafts on ATM and everyday debit card transactions, call ...

...

I do not want you to **authorize and pay** overdrafts on my ATM and everyday debit card transactions.

I want you to **authorize and pay** overdrafts on my ATM and everyday debit card transactions.

Ex. B (emphasis added).

36. Defendant links the terms payment to authorization **8 times**, meaning that transactions are paid, and therefore overdrafts are determined, at authorization of a debit card transaction.

37. 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 or authorize and pay those transactions—yet Defendant assesses OD Fees on them anyway.

38. 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.

39. All of the above representations and contractual promises made by Defendant 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.

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

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

42. 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 Plaintiff to incur more OD Fees than they should.

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

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

45. 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 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 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.

47. 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.

48. 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.

49. In sum, there is a difference between Defendant's practices as described in the Contract and Defendant's actual practices.

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

51. 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.

52. Defendant and its accountholders make no such agreement. The Contract thus misleads and deceives accountholders.

C. Reasonable Consumers Understand Debit Card Transactions Are Debited Immediately

53. 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.

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

55. Defendant knows that consumers prefer debit cards for these very reasons. Consumer research shows that consumers prefer debit cards as budgeting devices because they do not allow debt like credit cards as the money comes directly out of the checking account.

56. 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?*, Consumer Action (Jan. 14, 2019), <https://bit.ly/3v5YL62>.

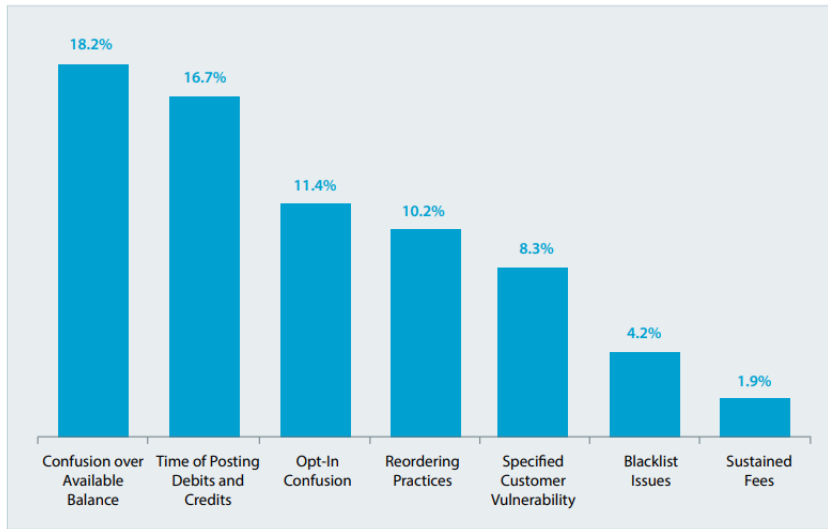
57. This understanding is a large part of the reason that debit cards have risen in popularity. The number of terminals that accept debit cards in the United States has increased by approximately 1.4 million in the last five years, and with that increasing ubiquity, consumers have viewed debit cards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

58. 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.

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

60. 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.

61. 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.

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

63. 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>.

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

65. 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.

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

D. Plaintiff Was Assessed OD Fees on Debit Card Transactions Previously Authorized on Sufficient Funds

67. On January 21, 2020, and January 27, 2020, Plaintiff was assessed a \$35 OD Fee on a debit card transaction, even though the transaction had been previously authorized on sufficient funds.

68. Because Defendant had previously held the funds to cover these transactions, Plaintiff’s account always had sufficient funds to cover the transactions and should not have been assessed these fees.

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

70. Plaintiff therefore had no duty to report the fees as errors because they were not errors, but the fees were part of the systematic and intentional assessment of fees according to Defendant’s standard practices.

71. Moreover, any such reporting would have been futile because Defendant had made a decision to charge the fees in this specific manner to maximize its profits at the expense of customers.

II. PLAINTIFF WAS ASSESSED MULTIPLE FEES ON AN ITEM IN SPITE OF THE FACT THAT SHE ONLY SUBMITTED THAT ITEM ONCE.

72. Defendant unlawfully maximizes its already profitable fees through its deceptive practice of charging multiple non-sufficient funds fees “NSF fees,” or an NSF fee followed by an Overdraft Fee, “OD fees,” on an item.

73. 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 was subject to yet another fee.

74. 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-I 1-700b, FDIC-I 1-704k, 2012 WL 7186313.

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

76. And, in its latest issue of Consumer Compliance Supervisory Highlights, the FDIC again addressed the charging of multiple non-sufficient funds fees for transactions presented multiple times against insufficient funds in the customer’s account. *See* FDIC Consumer

Compliance Supervisory Highlights, Mar. 2022, available at <https://www.fdic.gov/news/financial-institution-letters/2022/fil22014.html>. FDIC examiners have scrutinized this issue in recent exams, with some exams remaining open pending resolution of the issue.

77. In the Supervisory Highlights, the FDIC discussed potential consumer harm from this practice in terms of both deception and unfairness under the Federal Trade Commission Act Section 5's prohibition on unfair or deceptive acts or practices. The FDIC stated that the "failure to disclose material information to customers about re-presentment practices and fees" may be deceptive. *Id.* at 8.

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

79. In its staff analysis of the issue, the American Bankers Association ("ABA") recommended that banks review their deposit account agreement to ensure it states clearly that a separate NSF fee will be assessed whenever the same item is resubmitted against insufficient funds. ABA also encouraged banks, if scrutinized by a regulator, to explain the significant

logistical challenges with identifying items that have been resubmitted by the merchant for payment against insufficient funds. ABA is updating its staff analysis of this issue to reflect the Supervisory Highlights. See ABA Banking Journal, *FDIC provides guidance on multiple NSF fees for re-presented items*, April 1, 2022, available at:

<https://bankingjournal.aba.com/2022/04/fdic-provides-guidance-on-multiple-nsf-fees-for-re-presented-items/>.

80. The CFPB similarly criticized banks' Multiple Fee practices in its Winter 2023 Supervisory Highlights. Specifically, the CFPB "found that institutions engaged in unfair acts or practices by charging consumers multiple NSF fees when the same transaction was presented multiple times." *Supervisory Highlights Junk Fees Special Edition* at 6. The CFPB elaborated: "[t]he assessment of multiple NSF fees for the same transaction caused substantial monetary harm to consumers, totaling millions of dollars. These injuries were not reasonably avoidable by consumers, regardless of account opening disclosures. And the injuries were not outweighed by countervailing benefits to consumer or competition." *Id.* The CFPB encouraged financial institutions "to self-asses [their] compliance with Federal consumer financial law, self-report to the Bureau when [they identify] likely violations, remediate the harm resulting from these likely violations, and cooperate above and beyond what is required by law with these efforts." *Id.* at 7. (alternation in original, internal citation and quotation marks omitted).

81. In April 2023, the Office of the Comptroller of the Currency ("OCC") joined in this condemnation in what it referred to as Representment Fee Practices:

This practice of charging an additional fee each time a single transaction (e.g., ACH transaction or check) is presented for payment by a third party without further action by the customer contributes to customer costs in circumstances in which those customers cannot reasonably avoid the additional charges. Through ongoing

supervision, the OCC has identified concerns with a bank's assessment of an additional fee on a representation transaction, resulting in findings in some instances that the practice was unfair and deceptive. Disclosures may be deceptive, for purposes of Section 5, if they do not clearly explain that multiple or additional fees (NSF or overdraft) may result from multiple presentments of the same transaction . . . Consumers typically have no control over when we returned ACH transaction or check will be presented again and lack knowledge of whether an intervening deposit will be sufficient to cover the transaction and related fees.

OCC Bulletin 2023-12 at 6.

82. State regulators likewise have noted that such Multiple Fee practices may be deceptive where the parties do not expressly agree “that multiple fees may be charged ‘per item’ or ‘per transaction’” or where “the Institution represents that only one NSF fee will be charged ‘per item’ or ‘per transaction’ without disclosing that the same processed item may trigger Multiple NSF Fees.” *Industry Letter: Avoiding Improper Practices Related to Overdraft and Non-Sufficient Fund Fees*, N.Y. DEPT. FIN. SERVS. 3 (July 12, 2022), <https://on.ny.gov/3PNw2xH>.

83. Further, this abusive multiple fee practice is not universal in the financial services industry. Indeed, major banks like Chase—the largest consumer bank in the country—do not undertake the practice of charging more than one fee on the same item when it is reprocessed. Instead, Chase charges one fee even if an item is reprocessed for payment multiple times.

84. However, Defendant engages in this abusive and deceptive practice against the reasonable expectations of its customers.

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

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

86. The Contract provides the general terms of Plaintiff's relationship with Defendant,

and therein Defendant makes explicit promises and representations regarding how an item will be processed, and how fees may be assessed.

87. Defendant's Contract states:

When we receive a check or process an Automatic Clearing House ("ACH") payment request to debit your Account, and your account has a non-sufficient available balance to pay the check or payment request, we may charge you Paid Item Fees and/or Returned Item Fees (as such terms are defined, respectively, in the Service Fees section of the Accounts Disclosure) each time that check or payment request attempts to clear your Account. When your check or payment request is returned for non-sufficient funds, your check or payment request may be presented and re-presented to your Account for payment multiple times, and each time that your Account has a non-sufficient available balance to pay the check or payment request, we may charge you a Paid Item Fees and/or Returned Item Fees. This means you may be charged multiple Returned Item Fees (or Returned Item Fees and then a Paid Item Fee, if paid into overdraft) for the same check or ACH payment request that are re-presented for payment when your Account has a non-sufficient available balance.

Ex. A at 7.

88. In breach of this promise, Defendant assesses multiple \$35 fees when Plaintiff only presented the check or payment request once.

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

90. There is no clear and unambiguous indication anywhere in the Contract that the same "item" is eligible to incur multiple fees without any action taken by the accountholder.

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

92. Even if Defendant reprocessed an instruction for payment, it is still the same item.

Its reprocessing is simply another attempt to effectuate an accountholder's original order or instruction without any action taken by the accountholder.

93. Defendant and its customers never agreed that Defendant could assess multiple fees for a single check, electronic payment item, or ACH item that was returned for insufficient funds and later reprocessed one or more times and returned again without any action taken by the customer.

94. Reasonable consumers understand any given authorization for payment to be one, singular item, as that term is used in the Contract, unless the consumer takes further action.

B. Plaintiff's Experience

95. In support of his claim, Plaintiff offers examples of fees that should not have been assessed against Plaintiff's checking account. As alleged below, Defendant: (a) reprocessed a previously declined electronic transaction; and (b) charged an additional fee upon reprocessing.

October 18, 2022 and October 25, 2022 Multiple NSF Fees Charged on Single Item

96. On or around October 18, 2022, Plaintiff attempted a payment to elastic.com in the amount of \$220.00.

97. Defendant rejected that payment due to insufficient funds in Plaintiff's account and charged a \$35 fee for doing so.

98. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess the item, on or around October 25, 2022, Defendant processed the item for a second time, rejected the item again, and charged Plaintiff a second NSF fee, of \$35, for doing so.

99. **In sum, Defendant charged Plaintiff \$70 in fees on one item.**

100. Plaintiff understood the payment to be a single item as is laid out in the Contract,

capable of receiving, at most, a single fee if Defendant returned it, or a single fee if Defendant paid it.

March 8, 2023 and March 13, 2023 Multiple NSF Fees Charged on Single Item

101. On or around March 8, 2022, Plaintiff attempted a payment by check (check #51632) in the amount of \$110.46.

102. Defendant rejected that payment due to insufficient funds in Plaintiff's account and charged a \$35 fee for doing so.

103. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess the item, on or around March 13, 2022, Defendant processed the item for a second time, rejected the item, and charged Plaintiff an Overdraft Fee, of \$35, for doing so.

104. **In sum, Defendant charged Plaintiff \$70 in fees on one item.**

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

May 9, 2023 and May 12, 2023 Multiple NSF Fees Charged on Single Item

106. On or around May 9, 2023, Plaintiff attempted a payment by check (check #51634) in the amount of \$110.46.

107. Defendant rejected that payment due to insufficient funds in Plaintiff's account and charged a \$35 fee for doing so.

108. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess the item, on or around May 12, 2023, Defendant processed the item for a second time, rejected the item again, and charged Plaintiff a second NSF fee, of \$35, for doing so.

109. **In sum, Defendant charged Plaintiff \$70 in fees on one item.**

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

May 19, 2023 and May 25, 2023 Multiple NSF Fees Charged on Single Item

111. On or around May 19, 2023, Plaintiff attempted a payment to Rhode Island Energy in the amount of \$290.00.

112. Defendant rejected that payment due to insufficient funds in Plaintiff's account and charged a \$35 fee for doing so.

113. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess the item, on or around May 25, 2023, Defendant processed the item for a second time, rejected the item again, and charged Plaintiff a second NSF fee, of \$35, for doing so.

114. **In sum, Defendant charged Plaintiff \$70 in fees on one item.**

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

July 18, 2023 and July 24, 2023 Multiple NSF Fees Charged on Single Item

116. On or around July 18, 2023, Plaintiff attempted a payment to Rhode Island Energy in the amount of \$320.50.

117. Defendant rejected that payment due to insufficient funds in Plaintiff's account and charged a \$35 fee for doing so.

118. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess

the item, on or around July 24, 2023, Defendant processed the item for a second time, rejected the item again, and charged Plaintiff a second NSF fee, of \$35, for doing so.

119. **In sum, Defendant charged Plaintiff \$70 in fees on one item.**

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

September 7, 2023 and September 12, 2023 Multiple NSF Fees Charged on Single Item

121. On or around September 7, 2023, Plaintiff attempted a payment by check (check #51638) in the amount of \$110.46.

122. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess the item, on or around September 12, 2023, Defendant processed the item for a second time, rejected the item again, and charged Plaintiff a second NSF fee, of \$35, for doing so.

123. **In sum, Defendant charged Plaintiff \$70 in fees on one item.**

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

125. Defendant also understands this because, on information and belief, Defendant's back office transactional data displays a re-presented item as a "RETRY PYMT" – meaning the re-presentation is merely a "retry" of the original item, rather than a new item subject to a new fee.

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

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

128. Moreover, any such reporting would have been futile as Defendant had made a decision to charge the fees in this specific manner to maximize profits at the expense of customers.

III. THESE IMPROPER FEES BREACHED DEFENDANT’S DUTY OF GOOD FAITH AND FAIR DEALING.

129. Pursuant to Rhode Island law, a duty of good faith and fair dealing is imposed on virtually every contract.

130. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are vested with a discretionary power over the other party. Further, as to bank transactions, the Uniform Commercial Code (“UCC”)—which has been adopted by all states—mandates good faith and fair dealing. As such, when a party such as Defendant gives itself discretion to act, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties’ reasonable expectations and means that Defendant is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Defendant has a duty to honor transaction requests in a way that is fair to Plaintiff and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties.

131. Here—in the adhesion agreements Defendant imposed on Plaintiff and its other customers—Defendant provided itself with numerous discretionary powers affecting customers’ bank accounts. But instead of exercising that discretion in good faith and consistent with consumers’ reasonable expectations, Defendant abused that discretion to take money out of consumers’ accounts without their permission and contrary to their reasonable expectations that they will not be charged these fees.

132. Defendant exercised its discretion in its own favor—and to the prejudice of Plaintiff and its other customers—when it assessed improper fees. Further, Defendant abused the power it had over customers and their bank accounts and acted contrary to their reasonable expectations under the Contract. This is a breach of Defendant’s implied covenant to engage in fair dealing and act in good faith.

133. It was bad faith and entirely outside Plaintiff’ reasonable expectations for Defendant to use its discretion to assess fees in these circumstances.

CLASS ACTION ALLEGATIONS

134. Pursuant to Fed. R. Civ. P. 23, Plaintiff brings this action individually and as a class action on behalf of the following proposed classes (the “Classes”):

The APSN Class: All citizens who are Defendant accountholders who, during the applicable statute of limitations, were assessed an overdraft fee on a debit card transaction that was authorized on sufficient funds and settled on negative funds in the same amount for which the debit card transaction was authorized.

The Multiple NSF Fee Class: All citizens who are Defendant accountholders who, during the applicable statute of limitations, were assessed multiple fees on an item that the accountholder only presented once.

135. Excluded from the Classes 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.

136. Plaintiff reserves the right to modify or amend the definition of the proposed Classes, if necessary, before this Court determines whether certification is appropriate.

137. The time period for the Classes 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.

138. The members of the Classes are so numerous that joinder is impractical. The Classes consist 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.

139.

140. 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.

141. The claims of Plaintiff are typical of the claims of the Classes in that Plaintiff, like all members of the Classes, was charged improper fees as set forth herein. Plaintiff, like all members of the Classes, has been damaged by Defendant's misconduct. Furthermore, the factual basis of Defendant's misconduct is common to all members of the Classes and represents a common thread of unlawful and unauthorized conduct resulting in injury to all members of the Classes. Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other members of the Classes.

142. Among the questions of law and fact common to the Classes include:

- a. Whether Defendant violated its Contract by charging OD Fees on APSN Transactions;
- b. Whether Defendant violated its Contract by charging multiple NSF fees on a single item;
- c. Whether Defendant's fee practices breached the Contract and the duty of good faith and fair dealing and/or unjustly enriched Defendant;
- d. The proper method or methods by which to measure damages; and

e. The declaratory relief to which the Classes are entitled.

143. Plaintiff is 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, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Classes.

144. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because 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 Classes will continue to suffer losses and Defendant's misconduct will proceed without remedy.

145. 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.

FIRST CLAIM FOR RELIEF

Defendant's Breach of Contract, Including Breach of the Covenant of Good Faith and Fair Dealing on Behalf of Plaintiff and the APSN Class

146. Plaintiff incorporates by reference the preceding paragraphs.

147. Plaintiff and Defendant have contracted for banking services, as embodied in

Defendant's Contract.

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

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

150. Defendant misconstrued in its Contract its true OD Fee practices and breached the express terms of its Contract.

151. No Contract provision authorizes Defendant to charge OD Fees on APSN Transactions.

152. Defendant breached the terms of its Contract by charging OD Fees on APSN Transactions.

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

154. Under Rhode Island law, virtually every contract contains an implied covenant of good faith and fair dealing between the parties, providing a safeguard so that contractual aims are satisfied, and parties do not act to injure the right of the other party to receive the fruits of the contract.

155. As such, 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.

156. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain and abuse of a power to specify terms.

157. Defendant abused the discretion it granted to itself when it charged OD Fees on APSN Transactions.

158. In these and other ways, Defendant violated its duty of good faith and fair dealing.

159. Defendant willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing fee revenue from Plaintiff and other members of the APSN Class.

160. Plaintiff and members of the APSN Class have sustained damages as a result of Defendant's breaches of the parties' contracts and breaches of contract through violations of the covenant of good faith and fair dealing.

SECOND CLAIM FOR RELIEF

Defendant's Breach of Contract, Including Breach of the Covenant of Good Faith and Fair Dealing on Behalf of Plaintiff and the Multiple NSF Fee Class

161. Plaintiff incorporates by reference the preceding paragraphs.

162. Plaintiff and Defendant have contracted for banking services, as embodied in Defendant's Contract.

163. All of Defendant's account holders, including Plaintiff and the members of the Multiple NSF Fee Class, are subject to the Contract.

164. All contracts entered by Plaintiff and the Multiple NSF Fee Class are identical or

substantively identical because Defendant's form contracts were used uniformly.

165. Defendant misconstrued in its Contract its true fee practices and breached the express terms of its Contract.

166. No Contract provision authorizes Defendant to charge multiple fees on the same transaction.

167. Defendant breached the terms of its Contract by charging multiple fees on the same transaction.

168. Plaintiff and members of the Multiple NSF Fee Class have performed all, or substantially all, of the obligations imposed on them under the agreements.

169. Under Rhode Island law, virtually every contract contains an implied covenant of good faith and fair dealing between the parties, providing a safeguard so that contractual aims are satisfied, and parties do not act to injure the right of the other party to receive the fruits of the contract.

170. 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.

171. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of the

spirit of the bargain and abuse of a power to specify terms.

172. Defendant abused the discretion it granted to itself when it charged multiple fees on an item.

173. In these and other ways, Defendant violated its duty of good faith and fair dealing.

174. Defendant willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing fee revenue from Plaintiff and other members of the Multiple NSF Fee Class.

175. Plaintiff and members of the Multiple NSF Fee Class have sustained damages as a result of Defendant's breaches of the parties' contracts and breaches of contract through violations of the covenant of good faith and fair dealing.

THIRD CLAIM FOR RELIEF

Unjust Enrichment In the Alternative to the First and Second Claims for Relief On Behalf of Plaintiff and the Classes

176. Plaintiff incorporates by reference the preceding paragraphs.

177. This Count is brought solely in the alternative to Plaintiff's breach of contract and breach of the covenant of good faith and fair dealing claims.

178. To the detriment of Plaintiff and the Classes, Defendant has been, and continues to be, unjustly enriched as a result of its wrongful conduct alleged herein.

179. Plaintiff and the Classes conferred a benefit on Defendant when they paid Defendant fees that were not allowed under the Contract.

180. Defendant unfairly, deceptively, unjustly, and/or unlawfully accepted said benefits, which, under the circumstances, would be unjust to allow Defendant to retain.

181. Defendant's unjust enrichment is traceable to, and resulted directly and proximately

from, the conduct alleged herein.

182. Plaintiff and the Classes, therefore, seek disgorgement of all wrongfully obtained fees received by Defendant as a result of its inequitable conduct as more fully stated herein.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Classes, respectfully requests that the Court:

- a. Certify this case as a class action, designating Plaintiff as class representative and designating the undersigned as Class Counsel;
- b. Award Plaintiff and the Classes actual damages in an amount according to proof;
- c. Award Plaintiff and the Classes restitution in an amount to be proven at trial;
- d. Award Plaintiff and the Classes pre-judgment interest in the amount permitted by law;
- e. Award Plaintiff and the Classes attorneys' fees and costs as permitted by law;
- f. Declare Defendant's practices outlined herein to be unlawful and a breach of contract;
- g. Grant Plaintiff and the Classes a trial by jury;
- h. Grant leave to amend these pleadings to conform to evidence produced at trial; and
- i. Grant such other relief as the Court deems just and proper.

Jury Demand

Plaintiff demands trial by jury.

Dated: June 10, 2024

Respectfully submitted,

/s/Christopher M. Lefebvre #4019

Christopher M. Lefebvre

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