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COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT

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TIMOTHY SKEES, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

PEOPLES BANK, F.K.A. LIMESTONE
BANK, INC.,

Defendant.

Cause No.

CLASS ACTION COMPLAINT

JURY DEMAND

CLASS ACTION COMPLAINT

Plaintiff, Timothy Skees, individually and on behalf of all persons preliminarily defined below (the “Class”), makes the following allegations based on information and belief, except as to allegations specifically pertaining to Plaintiff, which are based on personal knowledge:

NATURE OF THE ACTION

1. This is a civil action seeking monetary damages, restitution, injunctive relief, and declaratory relief from Defendant Peoples Bank as successor of Limestone Bank (“Defendant” or “Limestone Bank”), arising from Limestone Bank’s improper assessment and collection of \$33 OD Fees on debit card transactions authorized on sufficient funds, and multiple fees on an item.

2. Besides being deceptive, these practices breached contract promises made in Limestone Bank’s adhesion contracts which, upon information and belief, include the Overdraft Opt-In Form attached hereto as Exhibit A,¹ the Deposit Account Agreement attached hereto as Ex. B and the Fee Schedule attached hereto as Exhibit C, (collectively, the “Contract”).

¹ Pursuant to federal regulation, Limestone Bank was required to obtain its customers’ affirmative consent or “opt-in” to Limestone Bank’s payment of one-time debit card transactions

NOT ORIGINAL

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05/16/2024 12:32:42

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3. Plaintiff and other Limestone Bank customers have been injured by Limestone Bank's practices. Plaintiff, individually and on behalf of the class of individuals preliminarily defined below, bring claims from breach of contract, including the duty of good faith and fair dealing, unjust enrichment, violations of the Electronic Fund Transfers Act (Regulation E) C.F.R. § 1005 *et seq.* (authority derived from 15 U.S.C. § 1693 *et seq.*) and violations of the Kentucky Consumer Protection Act (KRS §§ 367.110 – 367.300) (the "KCPA").

4. Through these practices, Limestone Bank made substantial revenue to the tune of millions of dollars, seeking to turn its customers' financial struggles into revenue. Plaintiff, like thousands of others, have fallen victim to Limestone Bank's fee revenue maximization schemes.

PARTIES

5. Plaintiff is an individual and a citizen of Kentucky, and a resident of Brownsville, Edmonson County, Kentucky, and had a checking account with Limestone Bank at all times relevant hereto.

6. Limestone Bank was a Kentucky banking corporation based in Louisville, Jefferson County, Kentucky. In April 2023, Limestone Bank merged into Peoples Bank, was dissolved, and ceased to exist. Peoples Bank thus acquired Limestone Bank's assets and liabilities.²

7. Peoples Bank is a for profit corporation with more than \$9.1 billion in assets. Peoples Bank is headquartered in Marietta, Washington County, Ohio and maintains more than 140 full-service branches, including in this County.

using a form that "shall be substantially similar to [the] Model Form" attached hereto as Ex. A. 12 C.F.R. § 1005.17(b)(iii), (d).

² Pursuant to Limestone Bank and Peoples Bank's merger agreement, "[a]ll rights of creditors and all liens of Limestone Bank shall be preserved unimpaired, and all debts, liabilities and duties of Limestone Bank shall at the Effective Time become obligations of the Surviving Bank and may be enforced against it to the same extent as if such debts, liabilities and duties had been incurred or contracted by it."

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

JURISDICTION AND VENUE

8. Defendant regularly and systematically conducts business and provides ⁸⁸⁹¹⁰ retail banking services in this state and provides retail banking services to customers in this state, including Plaintiff and members of the putative Classes. As such, it is subject to the jurisdiction of this Court.

9. Pursuant to CR 8.01, the amount in controversy exceeds the minimum jurisdiction of the Jefferson Circuit Court.

10. Venue is likewise proper in this county pursuant to KRS § 452.450 because Limestone Bank maintained its principal office in this County and the parties' contract was made or to be performed in this County.

BACKGROUND FACTS

11. In 2021, the largest financial institutions in America charged customers almost \$11 billion in overdraft 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>.

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

13. 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

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

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).

88910

14. Through the imposition of these fees, Limestone Bank made substantial revenue to the tune of tens of millions of dollars, seeking to turn its customers’ financial struggles into revenue.

I. LIMESTONE BANK ASSESSED OVERDRAFT FEES ON DEBIT CARD TRANSACTIONS THAT WERE AUTHORIZED ON SUFFICIENT FUNDS

A. Overview of the Claim

15. Plaintiff brings this action challenging Limestone Bank’s practice of charging OD Fees on what are referred to in this Complaint as “Authorize Positive, Settle Negative Transactions,” or “APSN Transactions.”

16. Limestone Bank’s practice was as follows: the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Limestone Bank 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 always had sufficient funds available to cover these transactions because Limestone Bank already held the funds for payment.

17. However, Limestone Bank still assessed crippling OD Fees on many of these transactions and misrepresented its practices in the account documents.

18. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, Limestone Bank later assessed OD Fees on those same

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000004 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

transactions when they settle days later into a negative balance. These types of transactions are APSN Transactions.

88910

19. Limestone Bank maintained a running account balance, tracking funds consumers have for immediate use. This running account balance was 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, Limestone Bank held the funds needed to pay the transaction, subtracting the dollar amount of the transaction from the customer’s available balance. Such funds were not available for any other use by the accountholder and were specifically reserved for a given debit card transaction.

20. Indeed, the entire purpose of the immediate debit and hold of positive funds was to ensure that there are enough funds in the account to pay the transaction when it settled:

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).

21. That means when any subsequent, intervening transactions were initiated on a checking account, they were compared against an account balance that has already been reduced to account for pending debit card transactions. Therefore, many subsequent transactions incurred OD Fees due to the unavailability of the funds held for earlier debit card transactions.

22. Still, despite always reserving sufficient available funds to cover the transactions and keeping the held funds off-limits for other transactions, Limestone Bank improperly charged OD Fees on APSN Transactions.

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DOCUMENT

05/16/2024 12:32:42

PM

23. The Consumer Financial Protection Bureau (“CFPB”) has expressed concern with this very issue, flatly calling the practice “unfair” and/or “deceptive” when:

88910

[A] financial institution authorized an electronic transaction, which reduced a customer’s available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer’s available balance and pushed the account into overdraft status; and when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged. Because such fees caused harm to consumers, one or more supervised entities were found to have acted unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which was not appropriately disclosed. They therefore could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive.

At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer’s available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that the disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer’s decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing the fees under these circumstances was found to be unfair.

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

24. 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

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000006 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

institutions use processes that are unintelligible for many consumers and that consumers cannot control . . .

88910

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>.

25. There was no justification for these practices, other than to maximize Limestone Bank’s OD Fee revenue. APSN Transactions only exist because intervening transactions supposedly reduce an account balance. But Limestone Bank was free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it did the latter to the tune of millions of dollars each year.

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000007 of 000031

NOT ORIGINAL

DOCUMENT

PM

05/16/2024 12:32:42

26. But Limestone Bank was not content with these millions in OD Fees. Instead, it sought millions more in OD Fees on APSN Transactions. 88910

27. Besides being deceptive, these practices breached contract promises made in Limestone Bank’s adhesion contracts, which fundamentally misconstrued and misled consumers about the true nature of Limestone Bank’s processes and practices. Limestone Bank also exploited its contractual discretion by implementing these practices to gouge its customers.

B. 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 Limestone Bank. When a customer physically or virtually “swipes” their debit card, the credit card terminal connects, via an intermediary, to Limestone Bank, 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, Limestone Bank immediately decremented the funds in a consumer’s account and held funds in the amount of the transaction but did not yet transfer the funds to the merchant.

30. Sometime thereafter, the funds are actually transferred from the customer’s account to the merchant’s account.

31. Limestone Bank (like all banks and credit unions) decided 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 Limestone Bank could choose to either pay the transaction or to decline it. When the time comes to actually transfer funds for the transaction to the merchant, it is too late for the bank to deny payment—the bank has no discretion and must pay the charge. This “must

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000008 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

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).

88910

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

C. Limestone Bank’s Contract

33. Upon information and belief, Limestone Bank promised in its contract that “[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway.” Ex. A (emphasis in original).

34. Limestone Bank’s Deposit Account Agreement states:

[i]f your account lacks sufficient funds available to pay a check, preauthorized transfer or other debit activity presented for payment, we may (1) return the item, or (2) pay the item at our discretion. If we return the item without paying it, we may charge you a returned NSF fee. If we do pay the item on your behalf, you will be responsible to pay the overdrawn balance and an overdraft fee.

Ex. B at 2.

35. In breach of these promises, Limestone Bank assessed OD Fees when there was “enough money” or “sufficient funds” in the account “to cover” or “pay” the withdrawal request.

36. Defendant also promises that it will reduce the available balance in the account when a debit card transaction is authorized and place a hold on the funds for the settlement of that transaction:

AUTHORIZATION HOLDS: An authorization hold is a temporary hold that is placed on your account for certain debit card transactions. The amount of the temporary hold may be more than the actual amount of the transaction, so your available account balance will temporarily be reduced by the amount of the temporary hold. If the authorization hold or the processing of subsequent transactions causes your account to have non-sufficient funds to pay the transaction, your account may be subject to an Overdraft Fee or subject to our Overdraft practices, and if applicable, any overdraft protection plan.

Id. at 8. *See also id.* at 7 (Purchases made with your card... will cause your ‘designated account’ to be debited for the amount of the purchase.”

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

37. Upon information and belief, Limestone Bank further promised that authorization and payment occurred simultaneously and that overdrafts would be determined at the time

88910

Limestone Bank “authorize[d] and pa[id]” 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 [Institution Name] to **authorize and pay** 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 [telephone number], visit [Web site], or complete the form below and [present it at a branch][mail it to:

__ I do not want [Institution Name] to **authorize and pay** overdrafts on my ATM and everyday debit card transactions.

__ I want [Institution Name] to **authorize and pay** overdrafts on my ATM and everyday debit card transactions.

Ex. A (emphasis added).

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000010 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

38. Limestone Bank’s Deposit Account Agreement promised, “[a]s part of our standard overdraft practice, we do not *authorize and pay* overdrafts on ATM or everyday debit card transactions unless you request us to do so.” Ex. B at 2 (emphasis added). ⁸⁸⁹¹⁰

39. Upon information and belief, Limestone Bank linked payment to authorization *nine times*, meaning that transactions were paid, and therefore overdrafts were determined, at authorization.

40. For APSN Transactions, which are immediately deducted from a positive account balance and held aside for payment of that same transaction, there is always enough money to cover the transaction—yet Limestone Bank assessed OD Fees on them anyway.

41. The above promises indicate that transactions are only overdraft transactions when there is not enough money to cover the transaction at the time the customer swipes his or her debit card to pay for an item. Of course, that is not true for APSN Transactions.

42. In fact, Limestone Bank actually authorized transactions on positive funds, set those funds aside on hold, then failed to use those same funds to post those same transactions. Instead, it used a secret posting process described below.

43. All of the above representations and contractual promises are untrue. Limestone Bank charged fees even when sufficient funds existed to cover transactions that were authorized into a positive balance. No express language in any document stated that Limestone Bank may impose fees on any APSN Transactions.

44. First, and most fundamentally, Limestone Bank charged OD Fees on debit card transactions for which there were sufficient funds available to cover throughout their lifecycle.

45. Limestone Bank’s practice of charging OD Fees even when sufficient available funds exist to cover a transaction violated its contractual promise not to do so. This discrepancy

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000011 of 000031

NOT ORIGINAL

DOCUMENT

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05/16/2024 12:32:42

between Limestone Bank’s actual practice and the Contract caused consumers like Plaintiff to incur more OD Fees than they should. 88910

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

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

48. Limestone Bank’s actual practice was to assay the same debit card transaction twice to determine if it overdraws an account—both at the time a transaction of authorization and later at the time of settlement.

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

50. Upon information and belief, something more was going on: at the moment a debit card transaction was getting ready to settle, Limestone Bank released the hold placed on funds for the transaction for a split second, putting money back into the account, then re-debited the same transaction a second time.

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

52. In sum, there was a huge gap between Limestone Bank’s practices as described in the Contract and Limestone Bank’s actual practices.

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000012 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

53. Banks and credit unions like Limestone Bank that employ this abusive practice require their accountholders to expressly agree to it—something Limestone Bank here ⁸⁸⁹¹⁰ never did.

54. 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.

55. Limestone Bank and its accountholders made no such agreement. The Contract thus misled and deceived accountholders.

D. Reasonable Consumers Understand Debit Card Transactions Are Debited Immediately

56. Limestone Bank’s assessment of OD Fees on transactions that did not overdraw an account was 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.

57. Limestone Bank was aware that this is precisely how its accountholders reasonably understand debit card transactions work.

58. Limestone Bank knew that consumers prefer debit cards for these very reasons. Consumer research shows that consumers prefer debit cards as budgeting devices because they don’t allow debt like credit cards as the money comes directly out of the checking account.

59. 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

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

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>. 88910

60. 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>.

61. 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.

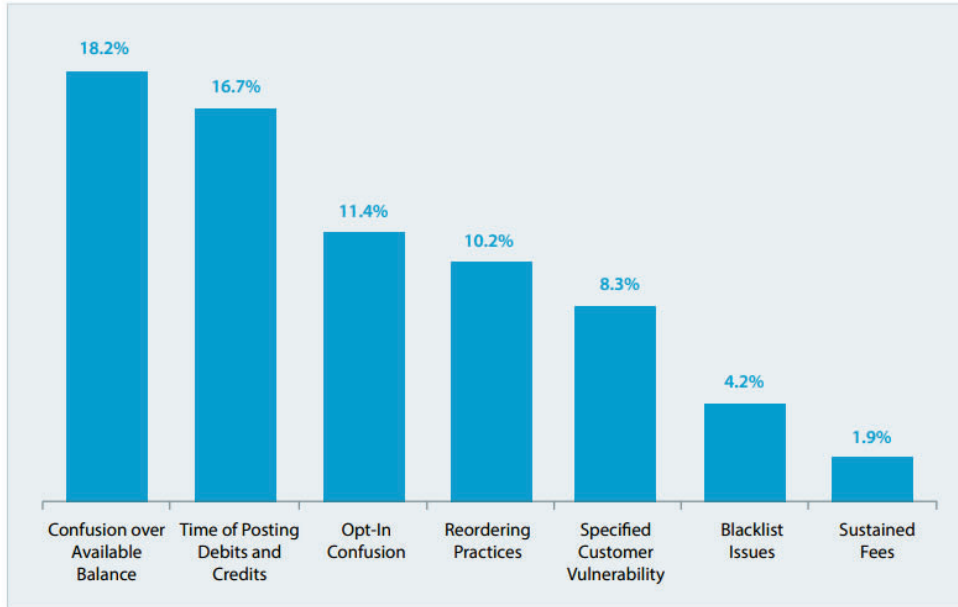
62. Accordingly, “[o]ne of the most salient themes [in complaints to the CFPB] . . . is the difficulty avoiding overdrafts even when consumers believed they would. Often, this was related to bank practices that make it difficult for consumers to know balance availability, transaction timing, or whether 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>.

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000014 of 000031

63. 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.

64. 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.

65. Ultimately, unclear and misleading fee representations like those in Limestone Bank’s account documents mean that consumers like Plaintiff “who are carefully trying to avoid overdraft, and often believe they will avoid it . . . end up being hit by fees nonetheless.” *Id.*

66. 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>.

NOT ORIGINAL

DOCUMENT

PM

05/16/2024 12:32:42

67. Despite this recommendation, Limestone Bank continued to assess OD Fees on transactions that were authorized on sufficient funds.

88910

68. Limestone Bank 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.

69. Limestone Bank was also aware of consumers’ confusion regarding OD Fees but nevertheless failed to make its customers agree to these practices.

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

70. On or around March 30, 2020, Plaintiff was assessed a \$33 OD Fees on a debit card transaction, even though the transactions had been previously authorized on sufficient funds.

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

II. THE IMPOSITION OF MULTIPLE FEES ON AN ITEM VIOLATES LIMESTONE BANK’S EXPRESS PROMISES AND REPRESENTATIONS

72. Limestone Bank unlawfully maximized its already profitable fees through its deceptive and contractually-prohibited practice of charging multiple NSF fees, or an NSF fee followed by an overdraft fee, on an item.

73. Unbeknownst to consumers, when Limestone Bank reprocessed an electronic payment item, ACH item, or check for payment after it was initially rejected for insufficient funds, Limestone Bank chose to treat it as a new and unique item that was subject to yet another fee. But Limestone Bank’s contract never stated that this counterintuitive and deceptive result could be possible and, in fact, said nothing at all about how overdraft fees or NSF fees were assessed.

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

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

88910

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-presentation 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-presentation of unpaid transactions. Terms were not clearly defined and disclosure forms did not explain that the same transaction might result in multiple

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000017 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

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.*

88910

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

80. 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.

81. Limestone Bank, however, engaged in this abusive and deceptive practice in violation of its own contract and against the reasonable expectations of its customers.

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000018 of 000031

NOT ORIGINAL

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05/16/2024 12:32:42

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82. The Contract allowed Limestone Bank 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, Limestone Bank could (a) pay the item and charge a \$35.00 fee; or (b) reject the item and charge a \$35.00 fee.³

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83. In contrast to the Contract, however, Limestone Bank regularly assessed two or more \$35.00 fees on an item.

A. The Imposition of Multiple Fees on an Item Violates Limestone Bank’s Express Promises and Representations

84. The Contract provided the general terms of Plaintiff’s relationship with Limestone Bank, and therein Limestone Bank made explicit promises and representations regarding how an item would be processed, and how fees would be assessed.

85. The Contract states:

15. Non-Sufficient Funds and Overdrafts. If your account lacks sufficient funds available to pay a check, preauthorized transfer or other debit activity presented for payment, we may (1) return the item, or (2) pay the item at our discretion. If we return the item without paying it, we may charge you a returned NSF fee. If we do pay the item on your behalf, you will be responsible to pay the overdrawn balance and an overdraft fee. Overdrafts may be covered by our standard overdraft practice that comes with your account or an overdraft protection plan, such as a link to an account or a line of credit. As part of our standard overdraft practice, we do not authorize and pay overdrafts on ATM or everyday debit card transactions unless you request us to do so. Our handling of these items may subject your account to a fee as disclosed in the Fee Schedule or other Disclosures. We will process checks and other debit items in the order identified in your Truth In Savings Disclosure.

86. Limestone Bank’s Fee Schedule states:

| | |
|---|--------------------|
| Overdraft Fee - Per occurrence created by check, in-person withdrawal, ATM, or other electronic means when account is overdrawn by \$5.00 or more | \$10.00 \$35.00 |
| Premature Account Closing - If closed within 90 days of opening | \$25.00 |
| Research - Per copy | \$1.00 |
| Research - Per hour | \$25.00 |
| Return Deposit Item - Per item | \$10.00 |
| Returned NSF Fee - Per occurrence created by check, in-person withdrawal, ATM, or other electronic means | \$35.00 |

Ex. C.

87. Taken together, these promises mean that Defendant may charge “a returned NSF fee” (singular) of “\$35.00” or “an overdraft fee” (singular) of “\$35.00” on “the item.”

³ Limestone Bank increased its Overdraft and Returned NSF Fee to \$35 effective on or before February 10, 2022.

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05/16/2024 12:32:42

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88. The same “item” on an account could not conceivably become a new one each time it was rejected for payment then reprocessed, especially when—as here—Plaintiff took ⁸⁸⁹¹⁰ no action to resubmit it (i.e., Plaintiff presented the item only once – there was no second consumer-initiated “occurrence” with respect to the item).

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

90. Even if Limestone Bank reprocessed an instruction for payment, it was still the same “item.” Its reprocessing was simply another attempt to effectuate an account holder’s original order or instruction.

91. Limestone Bank and its customers never agreed that Limestone Bank could assess multiple fees for a single check, in-person withdrawal, ATM or electronic item that was returned for insufficient funds and later reprocessed one or more times and returned again.

92. In sum, Limestone Bank promised that one fee would be assessed on an item, and this term must mean all iterations of the same instruction for payment. As such, Limestone Bank breached the Contract when it charged more than one fee per item.

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

94. 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 Limestone Bank would either authorize (resulting in an overdraft item) or reject (resulting in a returned item) when it decided there are insufficient funds in the account. Nowhere did Limestone Bank and its customers agree that Limestone Bank would treat each reprocessing of a check, in-person withdrawal, ATM, or other electronic payment item, subject to additional fees.

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000020 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

95. Customers reasonably understood, based on the language of the Contract, that Limestone Bank's reprocessing of checks, electronic payment items, and ACH items were simply additional attempts to complete the original order or instruction for payment, and as such, would not trigger fees. In other words, it was always the same item.

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96. Banks and credit unions like Limestone Bank that employ this abusive practice require their accountholders to expressly agree to it.

97. 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).

98. The Contract provided no such authorization, and actually promised the opposite—Limestone Bank could charge, at most, a fee on an item.

B. Plaintiff's Experience

99. In support of Plaintiff's claim, Plaintiff offers examples of fees that should not have been assessed against Plaintiff's checking account. As alleged below, Limestone Bank: (a) reprocessed a previously declined item; and (b) charged a fee upon reprocessing.

100. On or around November 22, 2022, Plaintiff attempted a payment to LendingClub.

101. Limestone Bank rejected payment of that item and charged a \$35.00 fee for doing so.

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000021 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

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102. Unbeknownst to Plaintiff and without Plaintiff's request to Limestone Bank to reprocess the item, on November 29, 2022, Limestone Bank rejected the same item and charged Plaintiff a second \$35.00 fee for doing so.

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103. *In sum, Limestone Bank charged Plaintiff \$70 in fees on an item.*

104. Plaintiff understood the payments to be a single item as is laid out in the Contract, capable of receiving, at most, a single fee if Limestone Bank returned it, or a single fee if Limestone Bank paid it.

105. Limestone Bank also understood the payment to be single item too as evidenced by the fact that, upon information and belief, additional submissions of the same item by the merchant were coded by Limestone Bank as a "RETRY PYMT" of the original item and not a new item subject to a new fee.

III. NONE OF THESE FEES WERE ERRORS

106. The improper fees charged by Limestone Bank to Plaintiff's account were not errors by Limestone Bank, but rather were intentional charges made by Limestone Bank as part of its standard processing of transactions.

107. 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 Limestone Bank's standard practices.

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

CLASS ACTION ALLEGATIONS

109. Plaintiff brings this action individually and as a class action on behalf of the following proposed classes (the "Classes"):

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05/16/2024 12:32:42

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APSN Class: All citizens of Kentucky who were Limestone Bank 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.

Multiple Fee Class: All citizens of Kentucky who were Limestone Bank accountholders who, during the applicable statute of limitations, were assessed multiple fees on an item.

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

110. 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.

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

112. 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.

113. The claims of Plaintiff are typical of the claims of the proposed Classes in that the representative Plaintiff, like all members of the Classes, was charged improper fees as set forth herein. The representative Plaintiff, like all members of the Classes, has been damaged by Limestone Bank's misconduct. Furthermore, the factual basis of Limestone Bank's misconduct is common to all members of the Classes and represents a common thread of unlawful and

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000023 of 000031

NOT ORIGINAL

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05/16/2024 12:32:42

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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. 88910

114. There are questions of law and fact that are common to all members of the Classes and those common questions predominate over any questions affecting only individual members of the Classes.

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

- Whether Limestone Bank imposed OD Fees on APSN Transactions;
- Whether Limestone Bank imposed multiple fees on an item;
- Whether these practices breached the contract and Limestone Bank's duty of good faith and fair dealing;
- Whether Limestone Bank was unjustly enriched by its fee assessment practices;
- Whether Limestone Bank violated the KCPA;
- The proper method or methods by which to measure damages; and
- The declaratory and injunctive relief to which the Classes are entitled.

116. 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.

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

Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000024 of 000031

NOT ORIGINAL

DOCUMENT

05/16/2024 12:32:42

PM

118. 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.

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

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

120. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

121. Plaintiff and Limestone Bank contracted for banking services account services as embodied in Limestone Bank's account documents. *See Exs. A - C.*

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

123. Limestone Bank breached the express terms of its own agreements as described herein.

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05/16/2024 12:32:42

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124. Kentucky imposes a duty of good faith and fair dealing on contracts between banks and their customers because banks are inherently in a superior position to their checking account holders because, from a superior vantage point, they offer customers contracts of adhesion, often with terms not readily discernible to a layperson.

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125. Limestone Bank abused its discretion in its own favor—and to the prejudice of Plaintiff and other customers—by charging OD Fees on APSN Transactions. This is an abuse of the power that Limestone Bank had over Plaintiff and his bank account, was contrary to Plaintiff’s reasonable expectations under the Contract, and breached Limestone Bank’s implied covenant to engage in fair dealing and to act in good faith.

126. 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.

127. Limestone Bank breached the covenant of good faith and fair dealing in the contract through its policies and practices as alleged herein.

128. Limestone Bank harmed Plaintiff and members of the APSN Class by abusing its contractual discretion that no reasonable customer would anticipate.

129. Plaintiff and members of the APSN Class have performed all, or substantially all, of the obligations imposed on them under the Contract.

130. Plaintiff and members of the APSN Class have sustained damages because of Limestone Bank’s breach of the Contract.

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05/16/2024 12:32:42

131. Plaintiff and members of the APSN Class have sustained damages because of Limestone Bank's breach of the covenant of good faith and fair dealing.

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SECOND CLAIM FOR RELIEF
Breach of Contract, Including Breach of the Duty of Good Faith and Fair Dealing
(On Behalf of Plaintiff and the Multiple Fee Class)

132. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

133. Plaintiff and Limestone Bank contracted for banking services account services as embodied in Limestone Bank's account documents. *See* Exs. A - C.

134. All contracts entered by Plaintiff and the Multiple Fee Class are identical or substantively identical because Limestone Bank's form contracts were used uniformly.

135. Limestone Bank has breached the express terms of its own agreements as described herein.

136. Kentucky imposes a duty of good faith and fair dealing on contracts between banks and their customers because banks are inherently in a superior position to their checking account holders because, from a superior vantage point, they offer customers contracts of adhesion, often with terms not readily discernible to a layperson.

137. Limestone Bank abused its discretion in its own favor—and to the prejudice of Plaintiff and other customers—by charging multiple fees on an item. This is an abuse of the power that Limestone Bank had over Plaintiff and his bank account, was contrary to Plaintiff's reasonable expectations under the Contract, and breached Limestone Bank's implied covenant to engage in fair dealing and to act in good faith.

138. 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

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05/16/2024 12:32:42

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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.

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139. Limestone Bank breached the covenant of good faith and fair dealing in the contract through its policies and practices as alleged herein.

140. Limestone Bank harmed Plaintiff and members of the Multiple Fee Class by abusing its contractual discretion that no reasonable customer would anticipate.

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

142. Plaintiff and members of the Multiple Fee Class have sustained damages because of Limestone Bank’s breach of the Contract.

143. Plaintiff and members of the Multiple Fee Class have sustained damages because of Limestone Bank’s breach of the covenant of good faith and fair dealing.

**THIRD CLAIM FOR RELIEF
(Unjust Enrichment)
(On behalf of Plaintiff and the Classes)**

144. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

145. Plaintiff and members of the Classes conferred a benefit on Limestone Bank at the expense of Plaintiff and members of the Classes when they paid improper fees.

146. There was an appreciation of this benefit by Limestone Bank in the form of the substantial revenue that Limestone Bank generated from the imposition of such fees.

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05/16/2024 12:32:42

147. Limestone Bank inequitably accepted such improper fees without payment to Plaintiff and members of the Classes for their value. 88910

148. Limestone Bank should not be allowed to profit or enrich itself inequitably at Plaintiff and the Classes' expense and should be required to make restitution to Plaintiff and the Classes.

FOURTH CLAIM FOR RELIEF
Violation of the Kentucky Consumer Protection Act (KRS §§ 367.110 – 367.300)
(On Behalf of Plaintiff and the Classes)

149. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

150. The Commonwealth of Kentucky believes that “the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services.” KRS § 367.120(1).

151. In furtherance of this public policy objective, the Kentucky Consumer Protection Act (the “KCPA”) was enacted in order to prevent “unfair, false, misleading or deceptive acts or practices in the conduct of any trade or commerce.” KRS § 367.170(1).

152. Limestone Bank engaged in trade or commerce as defined in the KCPA because it offered its bank account deposit, checking, and debit card services to the people of Kentucky, including Plaintiff and members of the Classes.

153. Plaintiff has standing to bring this action under KRS § 367.220 because he entered into a contract with Limestone Bank for the purchase of its bank account deposit, checking and debit card services primarily for personal, family or household purposes.

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05/16/2024 12:32:42

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154. “Unfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce” are unlawful pursuant to the KCPA. KRS § 367.170(1). 88910

155. Limestone Bank engaged in unfair, false, misleading, or deceptive acts or practices or otherwise violated KCPA by, among other things, knowingly and intentionally employing a policy and practice of charging improper fees.

156. Limestone Bank’s conduct caused Plaintiff and the members of the Classes to suffer ascertainable losses in the form of improper fees that, but for Limestone Bank’s unfair, false, misleading, or deceptive practices and policies described herein, would not have otherwise been imposed.

157. Plaintiff and Classes members are entitled to damages, declaratory relief, injunctive relief, and attorneys’ fees and costs. KRS § 367.220.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff and members of the Classes demand a jury trial on all claims so triable and judgment as follows:

- a. Certification for this matter to proceed as a class action;
- b. Declaratory and injunctive relief to the extent Limestone Bank was in breach of its contract;
- c. Designation of Plaintiff as Class Representative, and designation of the undersigned as Class Counsel;
- d. Restitution of all improper fees paid to Limestone Bank by Plaintiff and the Classes, because of the wrongs alleged herein in an amount to be determined at trial;
- e. Actual damages in an amount according to proof;
- f. Pre- and post- judgment interest at the maximum rate permitted by applicable law;

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05/16/2024 12:32:42

- g. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law;
- h. Enjoin Defendant from engaging in the practices outlined herein; and
- i. Such other relief as this Court deems just and proper.

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JURY DEMAND

Plaintiff, by counsel, demands trial by jury.

Dated: April 23, 2024

/s/ Andrew E. Mize
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** Pro Hac Vice applications to be submitted
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Presiding Judge: HON. JENNIFER BRYANT WILCOX (630455)

COM : 000031 of 000031