

**IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI,
AT KANSAS CITY**

<p>DAVID MONK, on behalf of himself and all others similarly situated,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>FIRST FEDERAL BANK OF KANSAS CITY,</p> <p>SERVE at:</p> <p>FIRST FEDERAL BANK OF KANSAS CITY 8308 NW Prairie View Road Kansas City, MO 64151</p> <p style="text-align: center;">Defendant.</p>	<p>CASE NO. _____</p> <p><u>JURY TRIAL DEMANDED</u></p>
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CLASS ACTION PETITION

Plaintiff David Monk (“Plaintiff”), on behalf of himself and all others similarly situated, brings this Class Action Petition against Defendant First Federal Bank of Kansas, and alleges the following:

INTRODUCTION

1. Plaintiff brings this action individually and on behalf of Class of all similarly situated consumers against Defendant First Federal Bank of Kansas (“Defendant”), arising from its routine practice of assessing \$35 fees (“OD Fees”) on transactions that did not actually overdraw checking.
2. Defendant misleadingly and deceptively misrepresents its fee practices including,

upon information and belief, in its take-it-or-leave-it form adhesion contracts.

3. This is a civil action seeking monetary damages, restitution, and declaratory and injunctive relief.

4. As described herein, Defendant's practices violate Missouri common law and, upon information and belief, the contract.

5. Defendant's improper scheme to extract funds from account holders has victimized Plaintiff and hundreds of other similarly situated consumers. Unless enjoined, Defendant will continue to engage in these schemes and will continue to cause substantial injury to its consumers. Plaintiff asserts this action pursuant to Missouri Rule 52.08, on behalf of himself and all others similarly situated, seeking monetary damages, restitution, and declaratory and injunctive relief.

PARTIES

6. Plaintiff is a citizen of the state of Missouri, residing in Kansas City, Missouri, and is an accountholder at First Federal Bank of Kansas City.

7. Defendant First Federal Bank of Kansas City is a Kansas bank with its corporate office in Leawood, Kansas. Defendant First Federal Bank of Kansas City was, at the time of certain of the unlawful transactions, a Missouri bank with its headquarters located in Kansas City, Missouri. Defendant Federal Bank of Kansas City is engaged in the business of providing retail banking services to consumers, including Plaintiff and members of the putative Class. Defendant has a branch located at 8308 NW Prairie View Road in Kansas City, MO 64151.

JURISDICTION AND VENUE

8. This Court has personal jurisdiction over Defendant because Defendant conducts business and maintains its headquarters and numerous bank branches in Missouri, including in Kansas City.

9. Venue is proper in this Court pursuant to Mo. Rev. Stat. 508.010(4) because no count alleges a tort, the sole Defendant is a non-resident of the state (as the main office is located in Leawood, Kansas), and there is personal jurisdiction over Defendant (as Defendant maintains several branches in Missouri, including in Kansas City).

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

10. Overdraft fees and insufficient funds fees (“NSF fees”) are among the primary fee generators for banks. According to a banking industry market research company, Moebs Services, in 2018 alone, banks generated an estimated \$34.5 billion from overdraft fees. Overdraft Revenue Inches Up in 2018, <https://bit.ly/3cbHNKV>.

11. Unfortunately, the customers who are assessed these fees are the most vulnerable customers. Younger, lower-income, and non-white account holders are among those who were more likely to be assessed overdraft fees. Overdrawn: Consumer Experiences with Overdraft, Pew Charitable Trusts 8 (June 2014), <https://bit.ly/3ksKD0I>.

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. In line with this industry trend, the New York Attorney General recently asked other industry leading banks to end the assessment of all OD Fees by the summer of 2022. *NY Attorney General asks banks to end overdraft fees*, Elizabeth Dilts Marshall, Reuters (April 6, 2022). Through the imposition of these fees, Defendant has made substantial revenue to the tune of tens of millions of dollars, seeking to turn its customers’ financial struggles into revenue.

14. A recent politico article highlighted that data from California revealed that “credit unions are taking millions from their most vulnerable customers and spending it on perks and bonuses for executives that resemble those of big banks more than nonprofits.” Aaron Klein, *Credit Unions Are Making Money Off People Living Pay Check to Paycheck: Theres a new predator making money off overdraft fees: Credit Unions*, Politico (October 4, 2023), <https://www.politico.com/news/magazine/2023/10/05/credit-unions-overdraft-fees-00119904>.

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

A. Overview of the Claim

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

15. Here’s how the practice works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Defendant immediately reduces consumers’ checking accounts for the amount of the purchase, sets aside funds in 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.

16. However, Defendant still assesses crippling \$35 OD Fees on many of these transactions and misrepresents its practices in the Contract.

17. 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.

18. Defendant maintains a running account balance, tracking funds consumers have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, Defendant holds the funds needed to pay the transaction, subtracting the dollar amount of the transaction from the customer's available balance. Such funds are not available for any other use by the account holder and are specifically reserved for a given debit card transaction.

19. 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).

20. 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.

21. 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.

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

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

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

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

23. The CFPB has also stated:

Consumers are likely to reasonably expect that a transaction that is authorized at point of sale with sufficient funds will not later incur overdraft fees. Consumers may understand their account balance based on keeping track of their expenditures, or increasingly through the use of mobile and online banking, where debit card transactions are immediately reflected in mobile and online banking balances. Consumers may reasonably assume that when they have sufficient available balance in their account at the time they entered into the transaction, they will not incur overdraft fees for that transaction. But consumers generally cannot reasonably be expected to understand and thereby conduct their transactions to account for the delay between authorization and settlement—a delay that is generally not of the

consumers' own making but is the product of payment systems. Nor can consumers control the methods by which the financial institution will settle other transactions—both transactions that precede and that follow the current one—in terms of the balance calculation and ordering processes that the financial institution uses, or the methods by which prior deposits will be taken into account for overdraft fee purposes.

Consumer Financial Protection Bureau, “Circular 2022-06” (June 2016).

24. The CFPB has even called out APSN transactions specifically as “unanticipated:”

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

Id.

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

26. Furthermore, the CFPB has found that when unfair APSN overdraft fees were assessed, consumers could not reasonably avoid “substantial injury, irrespective of account-opening disclosures.,” stating:

While work is ongoing, at this early stage, Supervision has already identified at least tens of millions of dollars of consumer injury and in response to these examination findings, institutions are providing redress to over 170,000 consumers. Supervision found instances in which institutions assessed unfair APSN overdraft fees using the consumer's available balance

for fee decisioning, as well as unfair APSN overdraft fees using the consumer's ledger balance for fee decisioning. **Consumers could not reasonably avoid the substantial injury, irrespective of account-opening disclosures.** As a result of examiner findings, the institutions were directed to cease charging APSN overdraft fees and to conduct lookbacks and issue remediation to consumers who were assessed these fees.

Consumer Financial Protection Bureau, "Supervisory Highlights Junk Fees Special Edition" (March 2023).

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

28. Besides being deceptive, upon information and belief, 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.

B. Mechanics of a Debit Card Transaction

29. 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.

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

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

32. Defendant (like all banks and credit unions) decides whether to "pay" debit card

transactions at authorization. For debit card transactions, that moment of decision can only occur at the point of sale, when the transaction is authorized or declined. It is at that point—and only that point—that Defendant may choose to either pay the transaction or to decline it. When the time comes to actually transfer funds for the transaction to the merchant, it is too late for the bank to deny payment—the bank has no discretion and must pay the charge. This “must pay” rule applies industry wide and requires that, once a financial institution authorizes a debit card transaction, it “must pay” it when the merchant later makes a demand, regardless of other account activity. See *Electronic Fund Transfers*, 74 Fed. Reg. 59033-01, 59046 (Nov. 17, 2009).

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

C. Defendant’s Contract

34. Plaintiff had had a Defendant checking account, which was governed by First Federal Bank of Kansas City’s overdraft disclosures, at all times material hereto.

35. At the time Plaintiff incurred the wrongful fees, Defendant promised in the contract that an overdraft occurs when there is not enough available balance in an account to pay an item. Defendant also promised that it will place holds on funds at the time of authorization of a debit card transaction, which is when Plaintiff pays the merchant, and that these holds reduce the account’s available balance:

We are not obligated to pay any item presented for payment if your account does not contain sufficient available funds. An available balance calculates an account’s balance based on electronic transactions that the Bank has authorized (and therefore are obligated to pay – such as Point of Sale transactions) but not yet settled. An available balance also reflects holds on deposits that have not yet cleared.

Courtesy Overdraft Coverage Program

Rather than automatically returning, unpaid, any insufficient fund items that you may have, if your eligible account has been maintained in good standing, we will consider – as a discretionary courtesy or service and not a right of yours nor an obligation on our part –

approving your reasonable overdrafts with using First Federal Bank of Kansas City's Courtesy Overdraft Coverage Program

Ex. A, p. 1.

36. 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 Defendant assesses OD Fees on them anyway.

37. The promises made by Defendant in the contract 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.

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 alleged representations and contractual promises are untrue. Defendant charges fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. Upon information and belief, no express language in any document states that Defendant may impose fees on any APSN Transactions.

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

41. 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.

42. Next, sufficient funds for APSN Transactions are actually debited from the account

immediately, consistent with standard industry practice.

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

44. Defendant's actual practice is to assay the same debit card transaction twice to determine if it overdraws an account—both at the time a transaction of authorization and later at the time of settlement.

45. 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.

46. 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.

47. 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.

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

D. Reasonable Consumers Understand Debit Card Transactions Are Debited Immediately

50. 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.

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

52. Defendant knows that consumers prefer debit cards for these very reasons.

53. 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.

54. Consumer Action, a national nonprofit consumer education and advocacy organization, advises consumers determining whether they should use a debit card that "[t]here is no grace period on debit card purchases the way there is on credit card purchases; the money is immediately deducted from your checking account. Also, when you use a debit card you lose the one or two days of 'float' time that a check usually takes to clear." *What Do I Need To Know About Using A Debit Card?*, ConsumerAction (Jan. 14, 2019), <https://bit.ly/3v5YL62>.

55. 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>.

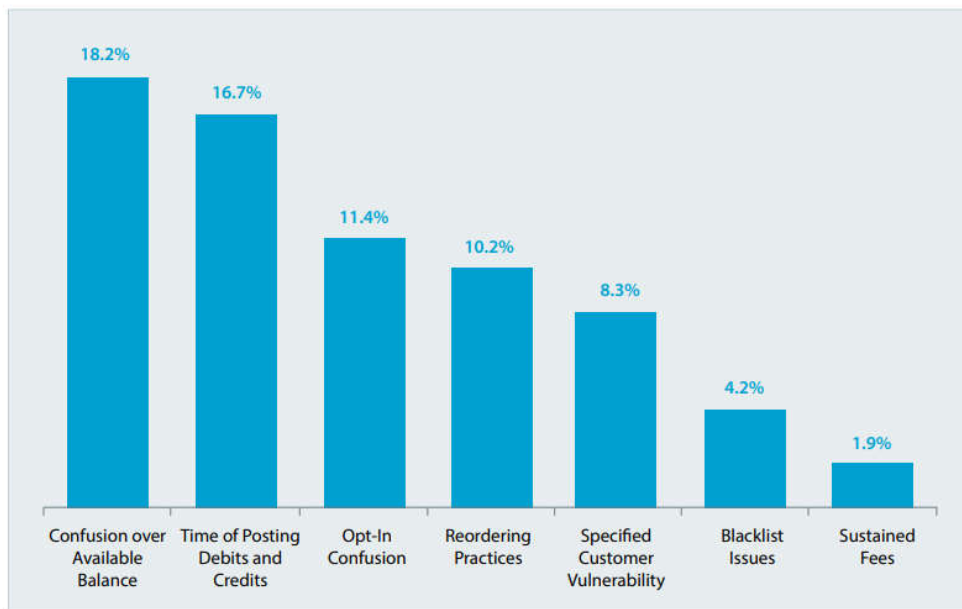
56. Not only have consumers increasingly substituted debit cards for cash, but they believe that a debit card purchase is the functional equivalent to a cash purchase, with the swipe

of a card equating to handing over cash, permanently and irreversibly.

57. 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>.

58. 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.

59. 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.

60. Ultimately, unclear and misleading fee representations like those in Defendant'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.*

61. 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>.

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

63. 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.

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

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

65. On or around April 18, 2022, Plaintiff was assessed \$35 OD Fees on a debit card transactions that settled that day, even though the transactions had been previously authorized on sufficient funds.

66. Because Defendant 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. NONE OF THESE FEES WERE ERRORS.

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

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

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

III. THE IMPOSITION OF THESE IMPROPER FEES BREACHES DEFENDANT'S DUTY OF GOOD FAITH AND FAIR DEALING

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

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

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

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

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

CLASS ACTION ALLEGATIONS

75. Description of the Class: Plaintiff brings this class action individually and on behalf of the Class of persons (“the Class”) defined as follows:

All persons who, during the applicable statute of limitations, were checking account holders of Defendant and 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.

76. Excluded from the Class are Defendant’s officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded from the Class are any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

77. Plaintiff reserves the right to modify or amend the definition of the proposed Class, including by adding subclass, before this Court determines whether certification is appropriate.

78. This action is brought and may be properly maintained as a class action pursuant to

the provisions of Rule 52.08.

79. Plaintiff readily satisfies the requirements set forth in Rule 52.08(a).

80. Numerosity Requirement: The members of the proposed Class are so numerous that individual joinders of all members is impracticable. The exact number and identities of the members of the proposed Class are unknown at this time and can be ascertained only through appropriate discovery. Plaintiff is informed and believes that, based on the nature of the banking industry and the significant number of banking customers frequently engaging in debit card transactions, the class affected by Defendant's breach of contract and improper charging of fees consists of thousands of members.

81. Commonality and Predominance Requirements: Defendant's conduct toward Plaintiff and the Class raises common questions of law and fact that predominate over any questions affecting only individual members of the Class, as Defendant improperly and regularly charges OD Fees on APSN transactions.

82. Plaintiff satisfies the commonality requirement because their claims arise from a practice that Defendant applies to all of the similarly situated putative Class members, and because Plaintiff's claims are based on the same legal theories as all members of the Class, namely, that charging OD Fees on APSN transactions violates Defendant's contracts with Plaintiff and the Class.

83. Because Defendant's conduct was the same as to all Class members, the material elements of Plaintiff's claims and those of the putative Class are subject to common proof, and the outcome of Plaintiff's individual actions will be dispositive for the Class.

84. These common legal and factual questions, which do not vary from Class member to Class member, and which may be determined without reference to the individual circumstances of any Class member include, but are not limited to, the following:

- a. Whether Defendant assesses OD Fees on APSN transactions;
- b. Whether Defendant breached its own contract by charging OD Fees on APSN transactions;
- c. Whether Defendant breached the covenant of good faith and fair dealing;
- d. The proper method or methods by which to measure damages; and
- e. The declaratory and injunctive relief to which the Class are entitled.

There are common answers to these questions such that they can be answered in one fell swoop with respect to all Class members.

85. Typicality Requirement: Plaintiff's claims are typical of the claims of the members of the Class as they arise from the same core practices, namely, Defendant charging OD Fees on APSN transactions on the same item in breach of its contracts with Plaintiff and the putative Class members. The material facts underlying the claims of each putative Class member are the same material facts as those supporting Plaintiff's claims. Plaintiff and the other Class members have sustained injuries from, and are facing harm arising out of, Defendant's common course of conduct as complained of herein. The losses of each Class member were caused directly by Defendant's wrongful conduct as alleged herein.

86. Adequacy of Representation Requirement: Plaintiff will fairly and adequately represent and protect the interests of the Class as they arise from the same core practices. By proving her individual claims, Plaintiff will necessarily prove the claims of the Class and prove Defendant's liability to the Class. Plaintiff has no known conflicts of interest with any members of the Class; their interests and claims are not antagonistic to those of any other Class members; and their claims are not subject to any unique defenses.

87. Plaintiff has retained counsel with substantial experience in prosecuting complex

class action litigation, including complex consumer class actions. Plaintiff and her counsel are committed to vigorously prosecuting this action on behalf of the Class and have the financial resources to do so.

88. Plaintiff satisfies the requirements set forth in Rule 52.08(b).

89. Predominance and Superiority Requirement: As alleged above with respect to the commonality requirement, Defendant's conduct toward Plaintiff and the Class raise common questions of law and fact that predominate over any questions affecting only individual members of the Class, as Defendant improperly and regularly charges OD Fees on APSN transactions.

90. Plaintiff and the members of the Class suffered, and will continue to suffer, harm as a result of Defendant's unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy.

91. Because the Class encompasses thousands of claims, a single class action is more efficient than thousands of individual actions, each requiring the same discovery and proof. Given the relatively small amount of claims of each Class member, it is likely that absent class representation, such claims will not be brought, and the Class will never have appropriate redress for Defendant's improper conduct.

92. Even if individual Class members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversies engendered by Defendant's common course of conduct. The class action device allows a single court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable handling of all class members' claims in a single forum. The conduct of this action as a class action conserves the resources of the parties and of the judicial system and protects the

rights of the Class members.

93. Class treatment ensures uniformity and consistency in results, enables the many small claims of Class members as well as claims for class-wide declaratory relief to be brought efficiently, and will provide relief to Class members for their past and future injuries. It will also deter Defendant from engaging in such wrongful conduct in the future.

94. There are no unusual difficulties likely to be encountered in the maintenance of this action as a class action suit, as this Court can effectively manage the class action.

95. More specifically, the Class is not so large that it would be unmanageable, and no difficulties are foreseen providing notice to individual claimants because Defendant keeps records of customer accounts during the class period, including records of customers to whom it charged OD Fees on APSN transactions. Therefore, both the membership of the Class and the amount of individual damages is readily ascertainable from Defendant's records.

96. Thus, a class action is superior and more efficient to other available methods for the fair and efficient adjudication of this controversy. Indeed, unless a class is certified, Defendant will continue to unlawfully charge OD Fees on APPSN Transactions.

97. Risk of Inconsistent or Varying Adjudication: Class action treatment is proper, and this action should be maintained as a class action because the risks of separate actions by individual members of the Class would create a risk of: (a) inconsistent or varying adjudications with respect to individual Class members which would establish incompatible standards of conduct for Defendant as the party opposing the Class; and/or (b) adjudications with respect to individual Class members would, as a practical matter, be dispositive of the interests of other Class members not party to the adjudication or would substantially impair or impede their ability to protect their interests.

98. Action Generally Applicable to Class as a Whole: Defendant, as the party opposing the Class, has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

99. Plaintiff satisfies the requirements set forth in Rule 52.08(a) and (b).

**BREACH OF CONTRACT INCLUDING THE
COVENANT OF GOOD FAITH AND FAIR DEALING
(Individually and on Behalf of the Class)**

100. Plaintiff repeats and incorporates all of the preceding allegations as if fully set forth herein.

101. Plaintiff, and all members of the proposed Class contracted with Defendant for checking account services, including debit card services. *See, Exhibit A.*

102. Defendant breached promises made to Plaintiff and all members of the proposed class when as described herein, Defendant charged OD Fees on APSN transactions.

103. Plaintiff and all members of the proposed Class have performed all, or substantially all, of the obligations imposed on them under the contract.

104. Plaintiff and all members of the proposed Class have sustained damages as a result of Defendant's breaches of the contract.

COUNT II

**BREACH OF THE COVENANT OF
GOOD FAITH AND FAIR DEALING**

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

106. Plaintiff, and all members of the proposed Class contracted with Defendant for checking account services, including debit card services. *See, Exhibit A.*

107. Missouri law implies a covenant of good faith and fair dealing in every contract. Good faith is also mandated by the Uniform Commercial Code, which covers banking transactions.

108. Whether by common law or statute, all contracts impose upon each party a duty of good faith and fair dealing that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. 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.

109. This good faith requirement extends to the manner in which a party employs discretion conferred by a contract. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing are evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

110. Defendant breached the covenant of good faith and fair dealing in the contract through its policies and practices as alleged herein, including the fact and manner in which Defendant charged OD Fees on APSN transactions. *See, Exhibit A.*

111. Defendant abuses its discretion in its own favor—and to the prejudice of Plaintiff and other customers—by charging Overdraft Fees on debit card transactions authorized on sufficient funds. This is an abuse of the power that Defendant has over Plaintiff and his bank account, is contrary to Plaintiff's reasonable expectations under the Contract, and breaches

Commerce's implied covenant to engage in fair dealing and to act in good faith.

112. Each of Defendant's actions violated the duty of good faith and fair dealing and was arbitrary and capricious.

113. The covenant of good faith and fair dealing constrains Defendant's discretion to abuse self-granted contractual powers.

114. Plaintiffs and members of the putative Class have performed all of the obligations on them pursuant to the contract.

115. Plaintiffs and members of the putative Class have sustained monetary damages as a result of each of Defendant's breaches of the covenant of good faith and fair dealing.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated respectfully requests that the Court:

- (a) Certify this case as a class action under Rule 52.08, designating Plaintiff as named representative of the Class, and designating the undersigned as Class Counsel;
- (b) Award Plaintiff and the Class members actual, incidental, and consequential damage, any applicable penalties and interest, authorized attorneys' fees, interest, and costs, and any further relief as the Court deems just, equitable, and proper;
- (c) Award Plaintiff and the Class Members restitution of all improper fees paid to Commerce by Plaintiff and the Class because of the wrongs alleged herein in an amount to be determined at trial;
- (d) Pre- and post- judgment interest at the maximum rate permitted by applicable law;
- (e) Declare Defendant's practices outlined herein to be unlawful;
- (f) Enjoin Defendant from engaging in the practices outlined herein;
- (g) Grant Plaintiff and the Class a trial by jury;
- (h) Reimbursing all costs, expenses, and disbursements accrued by Plaintiffs in connection with this action, including reasonable attorneys' fees, costs, and expenses, pursuant to applicable law and any other basis; and

- (i) Grant such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff and all others similarly situated hereby demand trial by jury on all issues in this Class Action Petition that are so triable.

Dated: February 23, 2024

Respectfully submitted,

By: /s/ Tiffany M. Yiatras
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**to seek admission Pro Hac Vice

**ATTORNEYS FOR PLAINTIFF AND THE
PROPOSED CLASS**