

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

MARY LOU FALLIS and KYLA
DELORME, on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

GATE CITY BANK,

Defendant.

Civil No. 09-2019-CV-04007

**AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

1. Plaintiffs Mary Lou Fallis and Kyla Delorme, on behalf of themselves and all persons similarly situated, allege the following based on personal knowledge as to allegations regarding Plaintiffs and on information and belief as to other allegations.

INTRODUCTION

2. Plaintiffs bring this action on behalf of themselves and classes of all similarly situated consumers against Defendant Gate City Bank (“GCB” or “Bank”) arising from (a) the Bank’s routine practice of assessing more than one insufficient funds fee (“NSF Fee”) or overdraft fee (“OD Fee”) on the same item; and (b) assessing OD Fees on transactions that did not actually overdraw the account.

3. These practices breach contractual promises, violate the covenant of good faith and fair dealing, and violate state consumer protection law.

4. GCB’s customers have been injured by the Bank’s improper practices to the tune of millions of dollars bilked from their accounts in violation of their agreements with GCB.

5. On behalf of themselves and the Classes, Plaintiffs seek damages, restitution, and injunctive relief for Defendant’s violations as set forth more fully below.

PARTIES

6. Mary Lou Fallis is a resident of Fort Totten, North Dakota, and holds a GCB checking account.

7. Kyla Delorme is a resident of Saint Michael, North Dakota, and holds a GCB checking account.

8. Defendant GCB is engaged in the business of providing retail banking services to consumers, including Plaintiffs and members of the putative Classes. GCB has its headquarters in Fargo, North Dakota. GCB has \$2.5 billion in assets and provides banking services to customers through 39 bank branches.

JURISDICTION AND VENUE

9. This Court has personal jurisdiction over GCB, and subject matter jurisdiction over the claims asserted in this case.

10. Venue is proper in this Court pursuant to N.D.C.C. § 28-04-04 because GCB transacts business in Cass County.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

I. GATE CITY BANK CHARGES MORE THAN ONE FEE ON THE SAME ITEM

11. As alleged more fully herein, GCB's "Account Documents", which comprise the agreement between the Bank and Plaintiff, allow it to charge a *single* \$32 NSF Fee or a *single* \$32 OD Fee when an item is returned for insufficient funds or paid into insufficient funds.

12. GCB breaches the Account Documents when it charges more than one \$32 NSF Fee on the same item, since the Account Documents explicitly state—and reasonable consumers understand—that the same item can only incur a single NSF or OD Fee.

13. This abusive practice is not universal in the financial services industry. Indeed, major banks like JP Morgan Chase—the largest consumer bank in the country—do not undertake the practice of charging more than one NSF Fee on the same item when it is reprocessed. Instead, Chase charges one NSF Fee even if an item is resubmitted for payment multiple times.¹

14. GCB's Account Documents never discloses this practice. To the contrary, the Deposit Agreement indicates it will only charge a single NSF Fee or OD Fee on each item.

A. Plaintiff Fallis's Experience.

15. In support of her claims, Plaintiff Fallis offers an example of fees that should not have been assessed against her checking account. As alleged below, GCB: (a) reprocessed a declined item; and (b) charged an additional fee upon reprocessing, for a total assessment of *\$64 in fees on each single item.*

16. On July 1, 2019, Plaintiff Fallis attempted an ACH payment.

17. GCB rejected payment of that item due to insufficient funds in Plaintiff Fallis' account and charged her an \$32 NSF Fee for doing so. Plaintiff Fallis does not dispute the initial fee, as it is allowed by GCB's Deposit Agreement.

18. Unbeknownst to Plaintiff, and without her request to GCB to reprocess the item, however, fifteen days later, on July 16, 2019, GCB processed the same item yet again, and again rejected the item and again and charged Plaintiff Fallis a \$32 NSF Fee for doing so.

19. *In sum, GCB assessed Plaintiff Fallis \$64 in fees in its effort to process a payment of far less than that amount.*

¹ As indicated by Chase's printed disclosures, an "item" maintains its integrity even if multiple processes are effected on it: "If we return the same item multiple times, we will only charge you one Returned Item Fee for that item within a 32-day period."

20. Plaintiff Fallis understood the payment to be a single item as is laid out in GCB's contract, capable at most of receiving a single NSF Fee (if GCB returned it) or a single OD Fee (if GCB paid it).

21. The same pattern occurred on April 29, 2019 and May 2, 2019, when the same check item was assessed two NSF Fees, and on May 10, 2019 and May 15, 2019, when the same check item was also assessed two NSF Fees.

B. The Imposition of Multiple Fees on a Single Item Violates GCB's Express Promises and Representations.

22. Importantly, the GCB Deposit Agreement, one of the Account Documents, attached hereto as Ex. A, makes no mention whatsoever of the possibility of multiple fees for the same item, and indeed does not discuss the circumstances that give rise to an NSF Fee in the first place.

23. According to the Fee Schedule, another of the Account Documents, at most a *single* fee per "item" will be assessed when and "NSF condition" is "created":

NSF Fee

This fee is imposed when a NSF condition is created by check, in-person withdrawal, ATM withdrawal, or other electronic means.....\$32/item.

Fee Schedule (Ex. B hereto) (emphasis added).

24. The same check, automatic bill payment or other electronic payment on an account cannot conceivably become a new item each time it is rejected for payment then reprocessed, especially when—as here—Plaintiff Fallis took no action to resubmit the item.

25. Even if GCB reprocesses an instruction for payment, it is still the same item. The Bank's reprocessing is simply another attempt to effectuate an accountholder's original order or instruction.

26. As alleged herein, Plaintiff Fallis took only a single action to “create” a single payment; she may therefore be charged only a single fee.

27. Moreover, by using one term and one line item to disclose an NSF fee when an item is either paid into overdraft or returned for insufficient funds, GCB bolsters the reasonable assumption that only a single fee can be assessed on an item. Here’s why: For an item paid into overdraft, there is no chance it can be subject to reprocessing and thus no chance it could be subject to a second or third fee, since it has already been paid. No reasonable contract reading could allow the *other* circumstance—when an item is returned—to be treated so differently from a fee perspective and assessed two or three times on the same item.

28. The disclosures described above never discuss a circumstance where GCB may assess multiple NSF or OD Fees for an item that was returned for insufficient funds and later reprocessed one or more times and returned again.

29. In sum, GCB promises that one \$32 NSF Fee or one \$32 OD Fee will be assessed per item, and this must mean all iterations of the same instruction for payment. As such, GCB breached the contract when it charged more than one fee per item.

30. Reasonable consumers understand any given authorization for payment to be one, singular item, as that term is used in GCB’s Account Documents.

31. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same transaction will be treated as the same “item,” which the Bank will either authorize (resulting in an overdraft) or reject (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere does GCB disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor do GCB customers ever agree to such fees.

32. Customers reasonably understand, based on the language of the Account Documents, that the Bank’s reprocessing of checks or ACH payments are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger additional NSF or OD Fees. In other words, it is always the same item.

33. Banks like GCB that employ this abusive multiple fee practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that do engage in this abusive practice disclose it expressly to their accountholders—something Defendant here never did.

34. For example, First Hawaiian Bank engages in the same abusive practices as Defendant, but at least currently discloses it in its online banking agreement, in all capital letters, as follows:

YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT OF A RETURNED ITEM AND RESUBMISSION.

(emphasis added).

35. Klein Bank similarly states in its online banking agreement:

[W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment (electronic or check) is submitted to us for payment from your Bill Payment Account when, at the time of posting, your Bill Payment Account is overdrawn, would be overdrawn if we paid the item (whether or not we in fact pay it) or does not have sufficient available funds; or (2) we return, reverse, or decline to pay an item for any other reason authorized by the terms and conditions governing your Bill Payment Account. We will charge an NSF/Overdraft Fee as provided in this section regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the bill payment.

36. Central Pacific Bank, a leading bank in Hawaii, states in its Fee Schedule under the “MULTIPLE NSF FEES” subsection: “Items and transactions (such as, for example, checks and electronic transactions/payments) returned unpaid due to insufficient/non-sufficient (“NSF”) funds

in your account, may be resubmitted one or more times for payment, and a \$32 fee will be imposed on you each time an item and transaction resubmitted for payment is returned due to insufficient/nonsufficient funds.

37. BP Credit Union likewise states: “Your account may be subject to a fee for each item regardless of whether we pay or return the item. We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.”

38. GCB provides no such disclosure, and in so doing, deceives its accountholders.

C. The Imposition of Multiple NSF Fees or OD Fees on a Single Item Breaches GCB’s Duty of Good Faith and Fair Dealing.

39. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are invested with a discretionary power over the other party. In such circumstances, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties’ reasonable expectations and means that the Bank is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the Bank has a duty to honor transaction requests in a way that is fair to Plaintiff and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties. Here—in the adhesion agreements, the Account Documents, GCB foisted on Plaintiff and its other customers—GCB has provided itself numerous discretionary powers affecting customers’ credit union accounts. But instead of exercising that discretion in good faith and consistent with consumers’ reasonable expectations, the Bank 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 multiple fees for the same transaction.

40. GCB exercises its discretion in its own favor—and to the prejudice of Plaintiff Fallis and its other customers—when it defines “item” in a way that directly leads to more NSF and OD Fees. Further, GCB abuses the power it has over customers and their bank accounts and acts contrary to their reasonable expectations under the Account Documents. This is a breach of the Bank’s implied covenant to engage in fair dealing and act in good faith.

41. GCB also abuses discretion under the contract to engage in a reject-then-pay pattern of first rejecting—and charging an NSF fee on—an item and then, days later, paying that same item and charging an OD fee, despite the customer being in the same (insufficient funds) financial situation.

42. By so acting to maximize fee assessments, GCB fails to exercise its power fairly and in good faith. Indeed, had GCB paid the item into overdraft on the first processing attempt (as it in fact chose to do on the second processing attempt) it would have charged Plaintiff Fallis a single OD Fee. Instead, GCB first rejected the item so that it could charge an NSF Fee; then, only upon resubmission, it paid the same item and charged Plaintiff Fallis an OD Fee. The extra step served no purpose except to increase GCB’s fee revenue, and was an abuse of the discretionary powers it granted to itself under the contract.

43. By exercising its discretion in its own favor—and to the prejudice of Plaintiff Fallis and other customers—by charging more than one NSF Fee or OD Fee on a single item, GCB breaches the reasonable expectation of Plaintiff Fallis and other customers and in doing so violates the implied covenant to act in good faith.

44. It was bad faith and totally outside Plaintiff Fallis’ reasonable expectations for GCB to use its discretion to assess two or three NSF Fees for a single attempted payment.

II. GCB CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT

A. Overview of Claim

45. Plaintiff Delorme brings this cause of action challenging GCB's practice of charging overdraft fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions," or "APPSN Transactions."

46. Here's how it works: at the moment debit card transactions are authorized on an account with positive funds to cover the transaction, GCB immediately reduces consumers' checking accounts for the amount of the purchase, sets aside funds in a checking account to cover that transaction, and as a result, the consumer's displayed "available balance" reflects that subtracted amount. As a result, customers' accounts will always have sufficient available funds available to cover these transactions because GCB has already sequestered these funds for payment.

47. However, GCB still assesses crippling OD Fees on many of these transactions, and misrepresents its practices in its account documents.

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

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

50. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure that there are enough funds in the account to pay the transaction when it settles, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

When a consumer uses a debit card to make a purchase, a hold may be placed on funds in the consumer's account to ensure that the consumer has sufficient funds in the account when the transaction is presented for settlement. This is commonly referred to as a "debit hold." During the time the debit hold remains in place, which may be up to three days after authorization, those funds may be unavailable for the consumer's use for other transactions.

Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29, 2009).

51. That means when any *subsequent*, intervening transactions are initiated on a checking account, they are compared against an account balance that has already been reduced to account for any earlier debit card transactions. This means that many subsequent transactions incur OD Fees due to the unavailability of the funds sequestered for those debit card transactions.

52. Still, despite keeping those held funds off-limits for other transactions, GCB improperly charges OD Fees on those APPSN Transactions, although the APPSN transactions *always* have sufficient available funds to be "covered."

53. Indeed, the Consumer Financial Protection Bureau ("CFPB") has expressed concern with this very issue, flatly calling the practice "deceptive" when:

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

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

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

54. There is no justification for these practices, other than to maximize GCB's overdraft fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduce an account balance. But GCB is free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year. But GCB was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

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

56. Besides being deceptive, unfair, and unconscionable, these practices breach contract promises made in GCB's adhesion contracts—contracts which fundamentally misconstrue and mislead consumers about the true nature of GCB's processes and practices. These practices also exploit contractual discretion to gouge consumers.

57. In plain, clear, and simple language, the checking account contract documents covering overdraft fees promise that GCB will only charge overdraft fees on transactions that have insufficient funds to cover that transaction.

58. In short, GCB is not authorized by contract to charge OD Fees on transactions that have not overdrawn an account, but it has done so and continues to do so.

B. Mechanics of a Debit Card Transaction

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

60. At this step, if the transaction is approved, GCB immediately decrements the funds in a consumer’s account and sequesters funds in the amount of the transaction, but does not yet transfer the funds to the merchant.

61. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure that there are enough funds in the account to pay the transaction when it settles, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

When a consumer uses a debit card to make a purchase, a hold may be placed on funds in the consumer’s account to ensure that the consumer has sufficient funds in the account when the transaction is presented for settlement. This is commonly referred to as a “debit hold.” During the time the debit hold remains in place, which may be up to three days after authorization, those funds may be unavailable for the consumer’s use for other transactions.

Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29, 2009).

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

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

C. GCB's Account Contract

64. Plaintiff Delorme has a GCB checking account, which is governed by GCB's standardized Account Documents.

65. The Deposit Agreement promises that GCB immediately places holds on debit card transactions at the moment of authorization, and that those held funds are off limits for other, later transactions:

A Temporary Debit Authorization Hold Affects Your Account Balance

On debit card purchases, merchants may request a temporary hold on your account for a specified sum of money, which may be more than the actual amount of your purchase. When this happens, our processing system cannot determine that the amount of the hold exceeds the actual amount of your purchase. This temporary hold, and the amount charged to your account, will eventually be adjusted to the actual amount of your purchase, but it may be up to three days before the adjustment is made. Until the adjustment is made, the amount of funds in your account available for other transactions will be reduced by the amount of the temporary hold. If another transaction is presented for payment in an amount greater than the funds left after the deduction of the temporary hold amount, that transaction will be a nonsufficient funds (NSF) transaction if we do not pay it or an overdraft transaction if we do pay it. You will be charged an NSF or overdraft fee according to our NSF or overdraft fee policy.

66. The Deposit Agreement also promises that the moment of authorization, which is when GCB chooses whether to "honor" a debit card transaction or not, is dispositive for purposes of OD Fees:

Overdrafts. You understand that we may, at our discretion, honor withdrawal requests that overdraw your account. However, the fact that we may honor withdrawal requests that overdraw the account balance does not obligate us to do

so later. So you can NOT rely on us to pay overdrafts on your account regardless of how frequently or under what circumstances we have paid overdrafts on your account in the past. We can change our practice of paying overdrafts on your account without notice to you.

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

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

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

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

71. The Deposit Agreement misrepresents GCB’s true debit card processing and overdraft practices.

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

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

74. GCB’s practice of charging OD Fees even when sufficient available funds exist to cover a transaction violates a contractual promise not to do so. This discrepancy between GCB’s actual practice and the contract causes consumers like Plaintiff Delorme to incur more overdraft fees than they should.

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

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

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

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

79. This discrepancy between GCB's actual practices and the contract causes consumers to incur more overdraft fees than they should.

80. In sum, there is a huge gap between GCB's practices as described in the account documents and GCB's practices in reality.

D. GCB Abuses Contractual Discretion

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

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

83. Moreover, GCB uses its contractual discretion to cause APPSN Transactions to incur overdraft fees by knowingly authorizing later transactions that it allows to consume available funds previously sequestered for APPSN Transactions

84. GCB uses all of these contractual discretion points unfairly to extract overdraft fees on transactions that no reasonable consumer would believe could cause overdraft fees.

E. Reasonable Consumers Understand Debit Card Transactions are Debited Immediately

85. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with immediate withdrawal of funds for debit card transactions. That is because if funds are immediately debited, they cannot be depleted by intervening transactions (and it is that subsequent depletion that is the necessary condition of APPSN Transactions). If funds are immediately debited, then, they are necessarily applied to the debit card transactions for which they are debited.

86. GCB was and is aware that this is precisely how accountholders reasonably understand debit card transactions to work.

87. GCB knows that many consumers prefer debit cards for these very reasons. Consumer research indicates that consumers prefer debit cards as a budgeting device; because they don't allow debt like credit cards do; and because the money comes directly out of a checking account.

88. 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.” *See* http://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card (last visited June 8, 2016).

89. Further, Consumer Action informs consumers that “Debit cards offer the convenience of paying with plastic without the risk of overspending. When you use a debit card, you do not get a monthly bill. You also avoid the finance charges and debt that can come with a credit card if not paid off in full.”

90. That 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 (along with credit cards) viewed debit cards “as a more convenient option than refilling their wallets with cash from an ATM.”²

91. Not only have consumers increasingly substituted from cash to debit cards, but they believe that a debit cards purchase is the fundamental equivalent to a cash purchase, with the swipe of a card equating to handing over cash, permanently and irreversibly.

92. GCB was aware of a consumer perception that debit transactions reduce an available balance *in a specified order*—namely, the order the transactions are actually initiated—and its account agreement only supports this perception.

F. Plaintiff Delorme’s APPSN Transactions

93. On May 24, 2019, June 24, 2019, September 7, 2019, and November 4, 2019, among other instances, Plaintiff Delorme was assessed overdraft fees for debit card transactions that settled on those days, despite the fact that positive funds were deducted and held immediately for each transaction on which she was assessed overdraft fees.

CLASS ACTION ALLEGATIONS

94. Plaintiffs bring this action on behalf of themselves and on behalf of all others similarly situated. The Classes include:

All North Dakota citizens who, within the applicable statute of limitations period, were charged multiple NSF and/or OD Fees for the same debit item in a GCB checking account (the “Multiple Fee Class”) (Proposed Class Representative: Mary Fallis).

(i) ² Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*, MarketWatch, Mar. 23, 2016, <http://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23>.

All North Dakota citizens who, within the applicable statute of limitations period, were charged OD Fees on transactions that were authorized into a positive available balance (the “APPSN Class”) (Proposed Class Representative: Kyla Delorme).

95. Excluded from the Classes are Defendant, Defendant’s subsidiaries and affiliates, their officers, directors, and the members of their immediate families, and any entity in which Defendant has a controlling interest, the legal representatives, heirs, successors, or assigns of any such excluded party, the judicial officer(s) to whom this action is assigned, and the members of their immediate families.

96. Plaintiffs reserve the right to modify or amend the definition of the proposed Classes and/or to add subclasses if necessary before this Court determines whether certification is appropriate.

97. The questions here are ones of common or general interest such that there is a well-defined community of interest among the members of the Classes. These questions predominate over questions that may affect only individual class members because GCB has acted on grounds generally applicable to the Classes. Such common legal or factual questions include, but are not limited to:

- a) Whether GCB improperly charged NSF Fees;
- b) Whether GCB improperly charged OD Fees;
- c) Whether any of the conduct enumerated above violates the contract;
- d) Whether any of the conduct enumerated above violates the covenant of good faith and fair dealing;
- e) Whether any of the conduct enumerated above violates state consumer protection law; and
- f) The appropriate measure of damages.

98. The parties are numerous such that joinder is impracticable. Upon information and belief, and subject to class discovery, the Classes consist of thousands of members or more, the

identities of whom are within the exclusive knowledge of and can be ascertained only by resort to GCB's records. GCB has the administrative capability through its computer systems and other records to identify all members of the Classes, and such specific information is not otherwise available to Plaintiff.

99. It is impracticable to bring members' of the Classes individual claims before the Court. Class treatment permits a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort, expense, or the possibility of inconsistent or contradictory judgments that numerous individual actions would engender. The benefits of the class mechanism, including providing injured persons or entities with a method for obtaining redress on claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in the management of this class action.

100. Plaintiffs' claims are typical of the claims of the other members of the Classes in that they arise out of the same wrongful business practices by GCB, as described herein.

101. Plaintiffs are more than adequate representatives of the Classes in that Plaintiffs have a GCB checking account and have suffered damages as a result of GCB's contract violations, GCB's violations of the covenant of good faith and fair dealing, and GCB's unjust enrichment. In addition:

- a) Plaintiffs are committed to the vigorous prosecution of this action on behalf of herself and all others similarly situated and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers against financial institutions;
- b) There is no conflict of interest between Plaintiffs and the unnamed members of the Class;
- c) Plaintiffs anticipate no difficulty in the management of this litigation as a class action; and

d) Plaintiffs' legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

102. Plaintiffs know of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

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

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

CAUSES OF ACTION: COUNT I
BREACH OF CONTRACT
(On Behalf of Plaintiffs and the Classes)

105. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Petition as if fully set forth herein.

106. Plaintiffs and GCB contracted for checking account services, as embodied in the Account Documents (the Deposit Agreement and Fee Schedule).

107. GCB breached the terms of the contract. No contractual provision authorizes GCB to charge overdraft fees on APPSN Transactions, or to charge more than one fee on the same item.

108. Plaintiffs and members of the putative Classes have performed all of the obligations on them pursuant to the Account Documents.

109. Plaintiffs and members of the putative Classes have sustained monetary damages as a result of each of Defendant's breaches.

COUNT II
BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
(On Behalf of Plaintiffs and the Classes)

110. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Petition as if fully set forth herein.

111. Plaintiffs and GCB contracted for checking account services, as embodied in the Account Documents, the Deposit Agreement and Fee Schedule.

112. North Dakota mandates that an implied covenant of good faith and fair dealing govern every contract. For banking transactions, this is also mandated by the Uniform Commercial Code that has been adopted in each state. The covenant of good faith and fair dealing constrains Defendant's discretion to abuse self-granted contractual powers.

113. This good faith requirement extends to the manner in which a party employs discretion conferred by a contract.

114. 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.

115. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes her 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. Other examples of violations of good faith and fair dealing are 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.

116. GCB breached the covenant of good faith and fair dealing as explained herein.

117. Each of Defendant's actions was done in bad faith and was arbitrary and capricious.

118. Plaintiffs and members of the putative Classes have performed all of the obligations imposed on them pursuant to the Account Documents.

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

COUNT III
VIOLATION OF NORTH DAKOTA CONSUMER PROTECTION LAW
N.D. Cent. Code §§ 51-15-01 et seq.
(On behalf of Plaintiffs and the Classes)

120. Plaintiffs repeat, reallege, and incorporate by reference each of the foregoing paragraphs of this Petition as if fully set forth herein

121. GCB's practice of charging more than one NSF Fee on the same item violates N.D. Cent. Code §§ 51-15-01 *et seq.*

122. N.D. Cent. Code §§ 51-15-01 *et seq.* broadly prohibits deceptive acts or practices in the state of North Dakota.

123. GCB is a "person" under N.D. Cent. Code § 51-15-01(4).

124. In furnishing services in North Dakota, GCB engaged in deceptive, unfair, and unlawful trade acts or practices, in violation of N.D. Cent. Code § 51-15-01(4), including, but not limited to, the following:

- a. GCB misrepresented material facts, pertaining to the sale and/or furnishing of banking services to Plaintiffs and the Classes by representing and advertising that it would only assess a single fee for a single item and by representing and advertising that it would only assess OD Fees on transactions that overdraw a consumer's account; and
- b. GCB omitted, suppressed, and concealed the material fact that it would charge multiple fees for a single item and that it would charge OD Fees on APPSN transactions.

125. GCB systematically engaged in these deceptive, misleading, and unlawful acts and practices, to the detriment of Plaintiffs and members of the Classes.

126. GCB knowingly engaged in such acts and practices.

127. As a direct and proximate result of GCB's deceptive trade practices, members of the class suffered injury and/or damages, including the payment of NSF and OD Fees.

128. Had Plaintiffs known they could be charged more than one fee on a single transaction or that they could be charged OD Fees on APPSN transactions, they each would have made different payment decisions so as to avoid incurring such fees.

129. As a result of GCB's violations, Plaintiffs and members of the Classes have paid and will continue to pay NSF and OD Fees. Accordingly, they have suffered and will continue to suffer actual damages.

130. Accordingly, Plaintiffs and Class members are entitled to relief including, but not limited to, actual damages, treble damages, injunctive relief, and/or attorney's fees and costs.

PRAYER FOR RELIEF

131. WHEREFORE, Plaintiffs, individually and on behalf of the Classes, demand a jury trial on all claims so triable and judgment as follows:

A. Certifying the proposed Classes, appointing the Plaintiffs as representative of the Classes, and appointing counsel for Plaintiffs as lead counsel for the respective Classes;

B. Declaring that GCB's policies and practices as described herein constitute a breach of contract and a breach of the covenant of good faith and fair dealing and a violation of state consumer protection law;

C. Enjoining GCB from the wrongful conduct as described herein;

D. Awarding restitution of all fees at issue paid to GCB by Plaintiffs and the Classes as a result of the wrongs alleged herein in an amount to be determined at trial;

E. Compelling disgorgement of the ill-gotten gains derived by GCB from its misconduct;

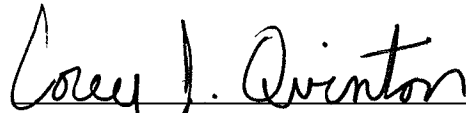
- F. Awarding actual and/or compensatory damages in an amount according to proof;
- G. Awarding pre-judgment interest at the maximum rate permitted by applicable law;
- H. Reimbursing all costs, expenses, and disbursements accrued by Plaintiffs in connection with this action, including reasonable attorneys' fees, costs, and expenses, pursuant to applicable law and any other basis; and
- I. Awarding such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

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

Dated: January 7, 2020.

FISHER BREN & SHERIDAN, LLP



Corey J. Quinton (#05342)
Tyler S. Carlson (#06948)
3137 32nd Avenue South, Suite 212
Fargo, ND 58103
Telephone: (701) 205-4242
cquinton@fisherbren.com
tcarlson@fisherbren.com

Jeffrey Kaliel*
KALIEL PLLC
1875 Connecticut Avenue NW, 10th Floor
Washington, DC 20009
Telephone: (202) 320-4783
jkaliel@kalielpllc.com

Jeff Ostrow*
Jonathan M. Streisfeld*
Daniel Tropin*
KOPELOWITZ OSTROW
FERGUSON WEISELBERG GILBERT
One West Las Olas Blvd., Suite 500
Fort Lauderdale, FL 33301
Telephone: (954) 525-4100
ostrow@kolawyers.com
streisfeld@kolawyers.com
tropin@kolawyers.com
Attorneys for Plaintiff

Pro hac vice application to be promptly filed