

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

**CHARLES KELLY**, on behalf of himself  
and all others similarly situated,  
Plaintiff,

v.

**COMMUNITY BANK, N.A**  
Defendant.

Case No. 8:19-CV-0919 (MAD/CFH)

**CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff Charles Kelly, by counsel, and for his Class Action Complaint against the Defendant, he alleges as follows:

**INTRODUCTION**

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Community Bank, N.A. (“Community”), arising from a) the unfair and unconscionable assessment and collection of “Overdraft Fees” (“OD Fees”) or insufficient funds fees (“NSF Fees”) on accounts that were not actually overdrawn; and b) the assessment and collection of OD Fees or NSF Fees on intrabank payments and transfers.

2. Besides being deceptive, unfair and unconscionable, these practices breach contract promises made in Community’s adhesion contracts.

3. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that Community will only charge OD Fees or NSF Fees on transactions where there are insufficient funds to “cover” them.

4. As happened to Plaintiff, however, Community charges OD Fees even when there are sufficient funds to “cover” a debit card transaction, and also charges OD Fees or NSF Fees on intrabank payments and transfers knowing that there are insufficient funds in its accountholders’

accounts at the time it attempts the payments and transfers.

5. Moreover, Community abuses contractual discretion—specifically the promise to reject attempted transactions “if we feel it is inappropriate to extend credit/cover the transaction”—when it pushes through payments and transfers to itself, for the sole purpose of causing OD Fees and NSF Fees.

6. Plaintiff and other Community customers have been injured by Community’s practices. On behalf of himself and the putative class, Plaintiff seeks damages, restitution and injunctive relief for Community’s breach of contract, deceptive practices.

### **JURISDICTION**

7. This Court also has original jurisdiction of this action under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1335(d)(2) and (6), this Court has original jurisdiction because the aggregate claims of the putative class members exceed \$5 million, exclusive of interest and costs, and based upon information and belief, at least one of the members of the proposed classes is a citizen of a different state than Defendant.

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

### **PARTIES**

9. Plaintiff Kelly is a natural person who is a citizen of Pennsylvania and resides in Greenfield Township, PA. Plaintiff has a personal checking account with Community, which is governed by Community’s Deposit Agreement and Overdraft Practices document.

10. Defendant Community is a credit union with approximately \$10 billion in assets.

Defendant is one of the largest banks headquartered in St. Lawrence County, New York, making it a New York citizen, and maintains branch locations across the states of Massachusetts, New York, Pennsylvania, and Vermont.

**FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

11. Plaintiff has a checking account with Community.

12. Community issues debit cards to its checking account customers, including Plaintiff, which allows its customers to have electronic access to their checking accounts for purchases, payments, withdrawals and other electronic debit transactions.

13. Pursuant to its standard account agreement, Community charges fees (currently in the amount of \$35) for debit card transactions that purportedly result in an overdraft.

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

**A. Overview of Claim**

14. Mr. Kelly brings this cause of action challenging Community’s practice of charging OD Fees on what are referred to in this complaint as “Authorize Positive, Purportedly Settle Negative Transactions,” or “APPSN Transactions.”

15. Here’s how it works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Community 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 Community has already sequestered these funds for payment.

16. However, Community still assesses harsh \$35 OD Fees on many of these

transactions and misrepresents its practices in its account documents.

17. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, Community 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.

18. Community 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, Community 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.

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

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

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

A financial institution authorized an electronic transaction, which reduced a customer's available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer's available balance and pushed the account into overdraft status; and

when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged. Because such fees caused harm to consumers, one or more supervised entities were found to have acted unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which was not appropriately disclosed. They therefore could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive. At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer's available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that the disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer's decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing fees under these circumstances was found to be unfair.

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

22. There is no justification for these practices, other than to maximize Community's OD Fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduce an account balance. But Community 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 Community was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

23. Besides being deceptive, unfair, and unconscionable, these practices breach contract promises made in Community's adhesion contracts—contracts which fundamentally

misconstrue and mislead consumers about the true nature of Community's processes and practices. These practices also exploit contractual discretion to gouge consumers.

24. In plain, clear, and simple language, the checking account contract documents covering OD Fees promise that Community will only charge OD Fees on transactions that have insufficient funds to cover that transaction.

25. In short, Community 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**

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

27. At this step, if the transaction is approved, Community 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.

28. 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. 25, 2009).

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

30. Community (like all banks) decides whether to "pay" debit card transactions at authorization. After that, Community is obligated to pay the transaction no matter what. For debit card transactions, that moment of decision can only occur at the point of sale, at the instant the transaction is authorized or declined. It is at that point—and only that point—when Community may choose to either pay the transaction or decline it. When the time comes to actually settle the transaction, it is too late—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).

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

### **C. Community's Account Contract**

32. Plaintiff's Community checking account is currently governed by Community's standardized Deposit Agreement. Ex. 1.

33. The Deposit Agreement and relevant contract documents covering OD Fees provide that Community will not charge OD Fees on transactions that have sufficient funds to cover them at the time they are initiated.

34. Community's Deposit Agreement promises that overdraft determinations are made when a transaction is "authorized and paid":

OVERDRAFT PRACTICES –Under our standard Automated and Non-Automated Overdraft Protection Programs, the Bank may, at its discretion, *authorize and pay* certain overdraft items when you do not have sufficient available funds in your account. The Overdraft Protection Programs are not lines of credit. We do not guarantee that we will always pay any type of transaction and payment of an overdraft does not mean that future overdrafts will be paid. If we pay an overdraft, you agree that the total amount of the overdraft (including the amount of overdraft fees and other applicable fees) is due and payable on demand and that you are liable as set forth in this agreement and under applicable law. For consumer accounts, we may not pay overdrafts for ATM and everyday debit card transactions unless you authorize us to do so.

*Id.* at pp. 2-3 (emphasis added).

35. The Overdraft Practices document, Ex. 2, states:

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we cover the transaction on your behalf.

[...]

While we will have the discretion to cover overdrafts on accounts, any such payment is a discretionary courtesy, and not a right of the customer or an obligation of Bank. *Bank, in its sole and absolute discretion, can cease covering overdrafts at any time without prior notice of reason or cause if we feel it is inappropriate to extend credit/ cover the transaction.*

[...]

What are the standard overdraft practices that come with my account? We may *authorize and pay* overdraft items for the following types of transactions: • Checks and other transactions made using your checking or money market account number • Automatic bill payments • Recurring debit card transactions (example: monthly membership dues) 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 may 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.

[...]

You will not be charged an overdraft, NSF, or Consecutive Day OD fee if your aggregate overdrawn balance is less than \$5.

(emphasis added).

36. For debit card transactions, the bank decides whether to “authorize and pay” a debit card transaction at the moment of authorization. Community represents to its customers that it is one step, just like consumers using debit cards believe.

37. 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 Community assesses OD Fees on them anyway.

38. The above promises indicate that transactions are only overdraft transactions when they are authorized into a negative account balance. Of course, that is not true for APPSN transactions.

39. In fact, Community actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to settle those same transactions. Instead, it uses the secret posting process described below.

40. Community charges OD Fees even when sufficient funds exist to cover transactions that are “authorized and paid” into a positive balance. No express language in any document states that Community may impose OD Fees on any APPSN Transactions.

41. The account documents misconstrue Community’s true debit card processing and overdraft practices.

42. First, and most fundamentally, Community charges OD Fees on debit card transactions for which there are sufficient funds available to use to cover the transactions.

43. Community assesses OD Fees on APPSN Transactions that **do** have sufficient funds available to cover them throughout their lifecycle.

44. Community’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

Community's actual practice and the contract causes consumers like Mr. Kelly to incur more OD Fees than they should.

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

46. Because these withdrawals take place at authorization, they cannot be re-debited later. But that is what Community does when its re-debits the account during a secret batching posting process.

47. In reality, Community'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.

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

49. Upon information and belief, something more is going on: at the moment a debit card transaction is getting ready to settle, Community does something new and unexpected by its customers, during the middle of the night, during its nightly batch posting process. Specifically, Community releases the hold placed on funds for the transaction for a split-second, putting money back into the account, and then re-debits the same transaction a second time.

50. This secret step allows it to charge OD Fees on transactions that never should have been subject to them—transactions that were authorized into sufficient funds, and for which Community specifically set aside money to pay them.

51. This discrepancy between Community's actual practices and the contract causes

accountholders to incur more OD Fees than they should.

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

**D. Reasonable Consumers Understand Debit Card Transactions are Debited Immediately**

53. 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, they are necessarily applied to the debit card transactions for which they are debited.

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

55. Community 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 do not allow debt like credit cards do, and because the money comes directly out of a checking account.

56. Consumer Action, a national nonprofit consumer education and advocacy organization, advises consumers determining whether they should use a debit card that "[t]here is no grace period on debit card purchases the way there is on credit card purchases; the money is immediately deducted from your checking account. Also, when you use a debit card you lose the one or two days of 'float' time that a check usually takes to clear." See [http://www.consumeraction.org/helpdesk/articles/what\\_do\\_i\\_need\\_to\\_know\\_about\\_using\\_a\\_debit\\_card](http://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card) (last visited July 11, 2019).

57. 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.” See [https://www.consumer-action.org/english/articles/understanding\\_debit\\_cards](https://www.consumer-action.org/english/articles/understanding_debit_cards) (last visited July 11, 2019).

58. That is a large part of the reason that debit cards have risen in popularity. In 2016, the number of terminals that accept debit cards in the United States had increased by approximately 1.4 million compared to 2011, 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.”<sup>1</sup>

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

#### **E. Plaintiff Kelly’s Debit Card Transactions**

60. As an example, on June 3, 2019, Mr. Kelly was assessed an OD Fee in the amount of \$35.00 for a DIRECTV debit card transaction authorized on May 31, 2019 that settled that day. However, that transaction was authorized and paid into a positive account balance prior to that day. Further, at that time of authorization, positive funds were deducted immediately for the debit card transaction on which he was later assessed an OD Fee.

### **II. COMMUNITY ASSESSES OD AND NSF FEES ON TRANSFERS TO OTHER COMMUNITY ACCOUNTS AND ON PAYMENTS TO ITSELF**

#### **A. Plaintiff’s Experience**

61. Community charges OD Fees and NSF Fees—sometimes numerous fees for the

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<sup>1</sup> 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> (last visited July 11, 2019).

same transactions—when it knows or is chargeable with knowing, that an accountholder’s payment or transfer from a Community checking account to *another Community account* may cause the first account to become overdrawn. In other words, Community charges its accountholders \$35 OD Fees or NSF Fees to attempt to pay or transfer funds to itself, or to reject a payment or transfer to itself, when it knows, or is chargeable with knowing, that the transferor account is or will be in an insufficient or overdrawn state if the payment or transfer is honored.

62. This result is absurd, undisclosed, and an abuse of discretion under the contract.

63. For example, Plaintiff made transfers from his checking account to his savings account with Community on March 11, 2019 and May 28, 2019. Both times, Community charged him \$35 OD Fees, *even though it knew each transfer attempt would cause fees and massively reduce the effective amount transferred.*

64. Since there is no contractual basis which permits Community to attempt to pay *itself* from an account that has insufficient funds to do so, this technique is beyond reasonable consumer expectations.

65. Rather than cancelling or delaying the transfer to the savings account, based on its actual or chargeable knowledge of Plaintiff Kelly’s account balances, Community pushed it through. For pushing through attempts for intrabank transfers that it knew, or should have known, would be futile, Community charged Plaintiff Kelly multiple \$35 OD Fees.

66. This is true even though Community had the ability to check account balances before submitting transactions for intrabank transfers, using its bird’s-eye view of all Community accounts.

67. Furthermore, the practice is counter to the Electronic Fund Transfers Act Disclosure, attached hereto as Exhibit 3, which is part of the account documents that govern the relationship

between Community and its customers. Specifically, the Electronic Fund Transfers Act Disclosure provides:

If you request that we automatically transfer funds on a specific date, we will make one attempt to electronically transfer the funds on that date. **If sufficient funds are not available, the transfer will not be completed.**

Ex. 3. at p. 4 (emphasis added). No reasonable consumer reading that would expect an OD Fee or NSF Fee to be charged, as that is not mentioned as a possible outcome of an attempted intrabank transfer.

68. Community has the contractual discretion to reject transfer attempts. There is no authorization or justification for Community to attempt a transaction to itself that it knows will fail.

#### **B. The Purpose and Nature of OD and NSF Fees**

69. When a bank pays an overdraft, it is extending credit. It is very expensive credit, indeed, according to the FDIC:

For almost all study population banks operating an automated overdraft program, the main fee associated with the program was an NSF usage fee. Usage fees reported by these banks ranged from \$10 to \$38; the median fee was \$27, charged on a per-transaction basis in almost all cases. In this context, a \$27 fee charged for a single advance of \$60 that was repaid in two weeks **roughly translated into an APR of 1,173 percent.** Many surveyed banks (24.6 percent) assessed additional fees on accounts that remained in negative balance status in the form of flat fees or interest charged on a percentage basis.

FDIC Study of Bank Overdraft Programs, 2008 (emphasis added).

70. In a normal situation, when Community is making an approve or reject decision on a transaction submitted by another entity for payment, Community usually has little or no insight into the nature of the transaction or the costs and benefits of paying or returning that transaction. As such, for those transactions Community relies exclusively on an automated, internal program that makes pay or return decisions based on an accountholder's credit risk, past overdraft behavior,

and account balance history often called an overdraft coverage or matrix limit:

As automated processes are necessary for institutions that choose to authorize or decline ATM and POS transactions that will overdraw an account, many institutions—including study banks—use these same processes to make pay-return decisions for check and ACH transactions. These institutions generally run programs that assign to each account a limit as to the amount of overdraft coverage the institution is willing to extend. For accounts that have opted in to ATM and POS debit overdraft coverage, when a request for authorization is received that exceeds the available funds, the bank will determine whether to authorize the transaction by reviewing it against the assigned overdraft coverage limit. Similarly, in nightly (or intra-day) posting, the bank will review potential NSF and overdraft items against the assigned overdraft coverage limit. Items processed during nightly (and intra-day) posting will generally be paid up to the coverage limit; once the account’s limit is reached, subsequent items will be returned unpaid.

*CFPB Study of Overdraft Programs*, at 49.

71. But when Community is deciding whether to submit, approve or reject transactions that transfer money to *other Community* accounts or that *pay itself*, Community is both the submitting Bank *and* the merchant being paid. This provides Community with unique insight into, and control over, whether and how transactions to pay or transfer money to Community accounts are processed.

72. Thanks to an aggressive “cross-selling” effort by Community, there are hundreds of thousands of Community checking accountholders who also regularly pay Community or transfer funds between Community accounts, because they also hold Community savings accounts, lines of credit, credit cards, and mortgages.

**C. Community Has Made a Major Effort to Cross-Sell Its Products, Promising Convenience and Efficiency but Also Providing It With a Bird’s-Eye View of Its Accountholders’ Financial Details**

73. Banks like Community have made a major effort to “cross-sell” products. Consumers may have a checking account, but also a credit card, line of credit, and/or savings account, etc.

74. This allows for assessment of additional fee revenue.

75. Selling additional products to existing customers has long been a key priority for many banks with the explicit goal of improving the bottom line.

76. As one industry publication put it: “Cross-selling comes with its advantages, of course. It considerably reduces customer acquisition costs, servicing, and marketing and communication costs and thereby substantially increases spread for banks. It is well understood and key finding that greater the number of products held by customer leads to an increased probability of retention.” *Cross Selling at Banks: Adopting the Right Strategy for a Healthy Bottom Line*, Customer Think (Jan. 2010), available at [http://customerthink.com/cross\\_selling\\_at\\_banks\\_adopting\\_right\\_strategy\\_for\\_health\\_bottom\\_line/](http://customerthink.com/cross_selling_at_banks_adopting_right_strategy_for_health_bottom_line/) (last visited July 11, 2019).

77. It continues: “The more relationships a bank has with a customer, the more loyal the customer will be and the bank gets to know the customer through several relationships, thus the assessment of the credit quality of the customer can be bettered. At the end it will be a win-win situation for both the bank and customer as it is cheaper and easier to get customer from one’s own data base than going out for getting new customers. Banks should be careful in exploiting this situation and see that the bottom line along with the top line goes up and not just cross sell of products.”

78. Community shares information across accounts, targeting products and services, as it tracks in intimate detail various consumer accounts at once, giving the bank unique access to the complete financial picture of a consumer on an hour to hour basis.

79. Community routinely and systematically shares detailed information across accounts. In some cases, the cross-selling and information gathering is used solely to charge consumers with fees and increase fee revenue.

**D. Community's Relevant Account Disclosures**

80. The Overdraft Practices document, Ex. 2, states:

While we will have the discretion to cover overdrafts on accounts, any such payment is a discretionary courtesy, and not a right of the customer or an obligation of Bank. *Bank, in its sole and absolute discretion, can cease covering overdrafts at any time without prior notice of reason or cause if we feel it is inappropriate to extend credit/ cover the transaction.*

(emphasis added).

81. Consistent with express representations in the contract, reasonable consumers understand that the Bank may “cease covering” payment orders and transfers to other Community accounts. It can do so without even submitting them unnecessarily. Read reasonably and in good faith, the contract indicates Community will not bother submitting a transaction when it knows attempted payment will be futile.

82. Reasonable consumers are entitled to understand that Community will not use the intimate, detailed financial information regarding various Community accounts held by the same person as a tool to maximize NSF and OD Fees charged to them.

83. Reasonable consumers believe the Bank would reject transfers or payments to itself, or to other Community accounts, when such transfers would cause a NSF or OD Fee to be charged.

84. Reasonable consumers understand that transfers to Community accounts or payments to Community do not count as “items” that are subject to NSF or OD Fees, since Community has the right to protect its interests on the accounts that a consumer is attempting to transfer to or make a payment on. For example, if a consumer attempts a bill payment to a Community line of credit or credit card on insufficient funds, Community can charge a late fee in that circumstance. No reasonable consumer expects it will also charge OD Fees or NSF Fees on the originating account, and the Electronic Funds Transfer Act Disclosure states that the “transfer will not be completed” if “sufficient funds are not available. Ex. 3 at 4.

85. Neither the Deposit Agreement nor any other account document ever states that transfers to other Community accounts incur NSF or OD Fees.

86. The Deposit Agreement does not state that Community will attempt to push through a transfer or payment to itself, even where it knows, or should know, that it will cause an OD Fee or NSF Fee.

87. Community exploits contractual discretion to the detriment of accountholders and breaches its duty of good faith and fair dealing when it applies these policies.

### **CLASS ALLEGATIONS**

88. Plaintiff brings this action on behalf of himself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of Rule 23.

89. The proposed classes (“Classes”) are defined as:

All Community Bank, N.A. checking accountholders in the United States who, during the applicable statute of limitations period through the date of class certification, were charged OD Fees on transactions that did not overdraw their checking accounts (the “National APPSN Class”);

All Community checking accountholders in the state of Pennsylvania who, during the applicable statute of limitations period through the date of class certification, were charged OD Fees on transactions that did not overdraw their checking accounts (the “Pennsylvania APPSN Subclass”);

All Community Bank, N.A. checking accountholders in the United States who, during the applicable statute of limitations, were charged NSF or OD Fees on transfers to other Community accounts or payments to itself (the “National IntraBank Transfer Fees Class”).

All Community Bank, N.A. checking accountholders in the state of Pennsylvania who, during the applicable statute of limitations, were charged NSF or OD Fees on transfers to other Community accounts or payments to itself (the “Pennsylvania IntraBank Transfer Fees Subclass”).

90. Plaintiff reserves the right to modify or amend the definition of the proposed Classes

before the Court determines whether certification is appropriate.

91. Excluded from the Classes are Community, its parents, subsidiaries, affiliates, officers and directors; any entity in which Community 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.

92. 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 knowledge of and can be ascertained only by resort to Community's records.

93. The claims of the representative Plaintiff are typical of the claims of the Classes in that the representative Plaintiff, like all members of the Classes, was charged OD Fees by Community on transactions that did not actually overdraw his checking account. The representative Plaintiff, like all members of the Classes, has been damaged by Community's misconduct in that they have been charged OD Fees or NSF Fees that violate the account contract. Furthermore, the factual basis of Community's misconduct is common to all members of the Classes and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Classes.

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

95. Among the questions of law and fact common to the Classes are whether Community:

- a. imposed OD Fees or NSF Fees on debit card transactions when those transactions did not overdraw accounts or on intrabank transfers;
- b. imposed OD Fees or NSF Fees on intrabank transfers or payments to itself

knowing that there were insufficient funds in its accountholders' accounts at the time it attempts the payments and transfers;

- c. the proper method or methods by which to measure damages; and
- d. the declaratory relief to which Class members are entitled.

96. Plaintiff's claims are typical of the claims of other members of the Classes, in that they arise out of the same wrongful overdraft policies and practices of Community. Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other member of either Class.

97. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions 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.

98. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual member's claim is small relative to the complexity of the litigation, and due to the financial resources of Community, no member of either Class 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 Community's misconduct will proceed without remedy.

99. Even if members of the Classes could themselves afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows claims to be heard

which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale and comprehensive supervision by a single court.

**FIRST CLAIM FOR RELIEF**  
**Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**  
**(On Behalf of Plaintiff and the Classes)**

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

101. Plaintiff and Community have contracted for bank account deposit, checking, ATM, and debit card services.

102. Community breached promises included in the account documents as described herein when it charged OD Fees on APPSN transactions that did not overdraw checking accounts.

103. Community also breached the account documents as described herein when it charged NSF Fees or OD Fees on transfers to other Community accounts or payments to itself.

104. Under applicable state law, good faith is an element of every contract pertaining to the assessment of overdraft fees. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

105. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A failure to act in good faith may be overt or

may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing include evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

106. Community has also breached the covenant of good faith and fair dealing in its account agreement with customers through its overdraft policies and practices as alleged herein.

107. Plaintiff and members of the Classes have performed all, or substantially all, of the obligations imposed on them under the contract.

108. Plaintiff and members of the Classes have sustained damages as a result of Community's breach of the contract.

**SECOND CLAIM FOR RELIEF**  
**Violations of Pennsylvania Consumer Protection Laws**  
**(On Behalf of Plaintiff and the Pennsylvania Subclasses)**

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

110. This claim is asserted on behalf of the members of the Pennsylvania Subclasses under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), PA ST 73 P.S. § 201-1, *et seq.*

111. Community engaged in unfair and/or deceptive acts or practices relating to the imposition of overdraft fees on consumers, in violation of the UTPCPL, PA ST 73 P.S. § 201-1, *et seq.*

112. The UTPCPL, PA ST 73 P.S. § 201-3 prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”

113. PA ST 73 P.S. § 201-2(4)(xxi) defines “unfair methods of competition” and “unfair

or deceptive acts or practices” as “engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding.”

114. Pursuant to PA ST 73 P.S. § 201-9.2, et seq., Plaintiff and putative class members purchased services, in the form of banking services, from Community that were used primarily for personal; family or household purposes.

115. Community engaged in unlawful conduct, made affirmative misrepresentations, or otherwise violated the UTPCPL by, inter alia, knowingly and intentionally employing an unfair and deceptive policies and practices of assessing OD and NSF Fees, when a transaction was authorized on a positive balance and on intrabank transfers; and misrepresenting and failing to disclose its policies and practices of assessing OD and NSF Fees, when a transaction was authorized on a positive balance and on intrabank transfers.

116. Community also engaged in unlawful conduct in violation of the UTPCPL by making knowing and intentional omissions. Community knowingly failed to disclose its policies and practices of assessing OD and NSF Fees, when a transaction was authorized on a positive balance and on intrabank transfers, in its account documents.

117. Community intended that Plaintiff and putative class members rely on the acts of concealment and omissions, so that Plaintiff and putative class members would continue to incur overdraft fees.

118. Community’s conduct caused Plaintiff and putative class members to suffer ascertainable losses in the form of excessive overdraft fees that, but for Community’s unfair and deceptive practices and policies, would not otherwise have been imposed.

119. A causal relationship exists between Community’s unlawful conduct and the ascertainable losses suffered by Plaintiffs and the Class. Had Community not acted unlawfully,

Plaintiff and putative class members would not have incurred excessive overdraft fees in violation of the UTPCPL.

120. As redress for Community's repeated and ongoing violations of the UTPCPL, Plaintiff and putative class members are entitled to, inter alia, damages and declaratory relief.

**PRAYER FOR RELIEF**

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

- a. Declaring Community's OD Fee policies and practices to be wrongful, unfair and unconscionable;
- b. Restitution of all OD Fees paid to Community by Plaintiff and the Class, as a result of the wrongs alleged herein in an amount to be determined at trial;
- c. For each member of the National APPSN Class and National Intrabank Transfer Fees Class, actual damages in an amount according to proof;
- d. For each member of the Pennsylvania APPSN Class and Pennsylvania Intrabank Transfer Fees Class, actual damages, statutory damages, and/or treble damages in accordance with Pennsylvania law;
- e. Pre-judgment interest at the maximum rate permitted by applicable law;
- f. Costs and disbursements incurred by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- g. Such other relief as this Court deems just and proper.

**TRIAL BY JURY IS DEMANDED**

Dated: July 26, 2019

Respectfully submitted,



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