

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Karen Austin, on behalf of herself
and all others similarly situated,

Plaintiff,

v.

South State Bank,

Defendant.

CASE NO. 2:20-cv-1993-RMG

COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Karen Austin (“Plaintiff”), on behalf of herself and all persons similarly situated, alleges the following based on personal knowledge as to the allegations regarding herself and on information and belief as to other allegations.

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, South State Bank (“South State”), arising from (1) the unfair and unconscionable assessment and collection of “overdraft fees” (“OD Fees”) on accounts that were never actually overdrawn; and (2) for routinely charging “Multiple Fees” more than one OD Fees or non-sufficient funds fees (“NSF Fee”) on a single item.

2. These practices breach contractual promises made in South State’s adhesion contracts and constitute deceptive practices.

3. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that South State will only charge OD Fees or NSF Fees on transactions where there are insufficient funds to cover them; and will only charge one such fee on

a given item.

4. South State also breaches its duty of good faith and fair dealing when it charges fee in the above circumstances.

5. South State's customers have been injured by South State's improper practices to the tune of millions of dollars billed from their accounts in violation of their agreements with South State.

6. On behalf of herself and the Classes, Plaintiff seeks damages, restitution, and injunctive relief for Defendant's violations as set forth more fully below.

JURISDICTION

7. This Court has original jurisdiction over this putative class action lawsuit pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2) & (6), because the aggregate sum of the claims of the members of each of the putative class exceeds \$5 million, exclusive of interest and costs, because Plaintiff bring this action on behalf of proposed class that are each comprised of over one hundred members, and because at least one of the members of each of the proposed class is a citizen of a different state than Defendant.

8. Venue is appropriate under 28 U.S.C. § 1391(b) because Plaintiff resides in this District and a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, in this District.

PARTIES

9. Plaintiff Karen Austin is a citizen of South Carolina and resident of Walterboro, SC.

10. Defendant South State Bank has nearly \$14 billion in assets and maintains its headquarters in Columbia, South Carolina.

I. SOUTH STATE CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT

A. Overview of Claim

11. South State 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.

12. Pursuant to its Account Documents, South State charges fees for debit card transactions that purportedly result in an overdraft.

13. Plaintiff brings this cause of action challenging South State’s practice of charging OD Fees on what are referred to in this complaint as “Authorize Positive, Purportedly Settle Negative Transactions” (“APPSN Transactions”).

14. Here’s how it works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, South State immediately reduces accountholders checking accounts for the amount of the purchase, sets aside funds in a checking account to cover that transaction, and as a result, the accountholder’s displayed “available balance” reflects that subtracted amount. As a result, customers’ accounts will always have sufficient available funds to cover these transactions because South State has already sequestered these funds for payment.

15. However, South State still assesses crippling OD Fees on many of these transactions and misrepresents its practices in its Account Documents.

16. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, South State 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.

17. South State maintains a running account balance in real time, tracking funds accountholders have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, South State 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.

18. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure that there are enough funds in the account to pay the transaction when it settles, 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).

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, South State 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 South State’s OD Fee revenue. APPSN Transactions only exist because intervening checking account

transactions supposedly reduce an account balance. But South State 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 South State was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

23. Besides being unfair and unjust, these practices breach contract promises made in South State’s adhesion contracts—contracts which fail to inform accountholders about, and in fact, misrepresent, the true nature of South State’s processes and practices. These practices also exploit contractual discretion to gouge accountholders.

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

25. In short, South State 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.

A. Mechanics of a Debit Card Transaction

26. A debit card transaction occurs in two parts. First, authorization for the purchase amount is instantaneously obtained by the merchant from South State. When a merchant physically or virtually “swipes” a customer’s debit card, the credit card terminal connects, via an intermediary, to South State, 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, South State immediately decrements the funds in an accountholder’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. 29, 2009).

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

30. South State (like all credit unions and banks) decides whether to "pay" debit card transactions at authorization. After that, South State 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 South State may choose to either pay the transaction or decline it. When the time comes to actually settle the transaction, it is too late—the financial institution 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.

B. South State's Account Contract

32. Plaintiff has a South State checking account, which is governed by South State's Account Documents.

33. Amongst the Account Documents which governs Plaintiff's relationship with South State is a document entitled, "Personal Deposit Account Agreement" ("Account Agreement"), attached hereto as Exhibit A.

34. The Account Agreement states in pertinent part that South State will immediately deduct and hold available funds for pending debit card transactions, and that for purposes of determining overdrafts "authorization" and "payment" are coterminous:

If there are not enough funds in your account to cover the amounts you owe us, we may overdraw your account without being liable to you. You agree to pay immediately all fees, overdrafts and other amounts you owe us.

[...]

You can avoid fees for overdrafts and declined or returned items by making sure your account always contains sufficient available funds to cover all of your transactions.

How do we decide to decline or return an item? When we determine that you do not have enough available funds in your account to cover a check or other item, then we consider the check or other item an insufficient funds item. You agree we may charge fees for insufficient funds items.

We pay insufficient funds items at our discretion, which means we do not guarantee we will always, or ever, authorize and pay them. If we overdraw your account to pay items on one or more occasions, we are not obligated to continue paying future insufficient funds items. We may pay all, some, or none of your overdrawn items, without notice to you. If we do not authorize and pay an item, then we will decline or return the transaction unpaid. In either case, the insufficient funds fee will still apply.

[...]

What types of holds can you place on an account that might affect insufficient items?

Sometimes funds in your account are not available to cover your checks and other items. When we determine funds in your account are subject to a hold, dispute, or legal process, then these funds are not available to cover your checks and other items. We usually make this determination once at the end of the day when we process items. Holds include deposit holds, holds related to cash withdrawals, and authorization holds we place on the account for debit card transactions.

Account Agreement at 18, 24 (emphases in original).

35. The Account Agreement further clarifies that funds placed on hold for debit card transactions may not be used for any other purpose while they are on hold:

In what order do transactions post? The order in which transactions are posted to your account impacts your account balance. Posting a credit increases your balance. Posting a debit or hold decreases your balance. Credits include deposits made in our branches, direct deposits, and other deposits or credits we make. Holds include deposit holds, debit card authorizations, and holds related to cash withdrawals and electronic transfers. Debits include items such as withdrawals, transfers, payments, checks, debit card transactions, and fees. When we process multiple transactions for your account on the same day, we group the different types of transactions into categories. At the end of each business day, our system will post all transactions within a category to your account by using the posting order below: 1. All deposits or credits; 2. Miscellaneous debits or deposit corrections; 3. ATM withdrawals; 4. In-branch withdrawals using our counter forms; 5. ACH debits; 6. Debit card transactions; 7. Telephone Banking and Online Banking transactions; 8. Checks negotiated at one of our banking centers; 9. All remaining checks, by check number, lowest to highest, as funds are available; and 10. Fees. We are not liable for dishonoring checks or drafts presented for payment due to insufficient funds in your account because of the transaction posting order. Any fees, or portions thereof, un-posted due to insufficient funds at the time for posting may be collected a later date without prior notice when sufficient funds are available in the account.

Id., 22-23.

36. While the Account Agreement discloses that certain, unspecified transactions may become overdrafts even though they are authorized when sufficient funds are in an account, this cannot possibly occur for transactions like debit cards for which sufficient funds are immediately placed on hold. Indeed, South State confirms that such “held” funds may not be used by any other transactions:

Do we charge a fee for overdrafts?

We generally determine at the time we post a debit to your account whether it creates an overdraft and whether an overdraft fee applies. You should note sometimes we authorize a transaction at a time when you have enough available funds to cover it, but because other transactions post before it and reduce your balance, the transaction creates an overdraft when we post it to your account. You can avoid fees for overdrafts by making sure your account always contains enough available funds to cover all of your transactions. **When your account balance includes some funds that are subject to a hold, dispute or legal process, you should note those funds are not available to cover your transactions.**

Id., 25-26 (emphasis added).

37. Separately, the Overdraft Opt-in Form, attached hereto as Exhibit B, misrepresents to customers that OD Fees will only be charged when there is not enough money in the account to “cover” a transaction, while also reiterating that for debit card transactions, “authorization” and “payment” are coterminous:

We do not guarantee that we will always authorize and pay every transaction for which there are insufficient funds. Whether we elect to pay a transaction for which there are insufficient funds or not, you will be charged a fee..

[...]

ATM/One-Time Debit Card Transactions: Federal regulations prohibit us from authorizing and paying overdrafts on ATM and one-time debit card transactions using AOP, unless you specifically opt-in to this service. You will receive the Authorization Form for ATM and One-Time Debit Card Overdraft Services at account opening, which provides additional information about this service as well as the opportunity to opt in. The form is also available on our website at SouthStateBank.com/ATM_DebitOptInForm and in your local branch should you choose to opt in or change your election at a later date. Your election will not be effective until you qualify for AOP.

38. The Overdraft Opt-in Forms also repeatedly states that in certain circumstances South State will not allow more than two overdrafts to occur per month—in other words, that it will not allow accounts to be overdrawn more than twice. A necessary corollary of that is that overdrafts are determined at the time of authorization:

HOW AOP WORKS: South State offers three (3) levels of AOP coverage, as set forth below. A notice will be mailed to you when your AOP is activated and/or your coverage amount is increased. Tier 1 If and when your account: (i) has an initial deposit, account balance or current and previous month-to-date deposits equal to or exceeding \$25, (ii) is not overdrawn, and (iii) you otherwise meet all Eligibility criteria above, we will activate AOP for your account, and the initial AOP limit will be \$100. If your account does not qualify for Tier 1 AOP coverage on the day of account opening, you cannot have more than two (2) NSF's for the current month and previous month and must meet the aforementioned criteria for AOP to be subsequently activated for your account. Tier 2 If and when your account: (i) has been open for at least 30 calendar days, (ii) has at least \$500 in deposits during the current and previous month, (iii) is not overdrawn, and (iv) you otherwise meet all Eligibility criteria above, your AOP limit will increase from \$100 to \$500. If Tier 1 AOP coverage has not already been activated for your account, you cannot have more than two (2) NSF's for the current month and previous month and must meet the aforementioned criteria for Tier 2 AOP to be subsequently activated for your account. Tier 3* If and when your account: (i) has been open for at least 18 months, (ii) the current account balance, or current and previous month- todate deposits equal or exceed \$500, (iii) has average daily balance of more than \$750 during the current and previous calendar years, (iv) is not overdrawn, and (v) you otherwise meet all Eligibility criteria above, your AOP limit will increase from \$500 to \$1,000. If Tier 1 or Tier 2 AOP coverage has not already been activated for your account, you cannot have more than two (2) NSF's for the current month and previous month and must meet the aforementioned criteria for Tier 3 AOP to be subsequently activated for your account.

39. For debit card transactions, the bank decides whether to “authorize and pay” a transaction at the moment the request is made, thus immediately reducing the available balance.

40. 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 South State assesses OD Fees on them anyway.

41. The above promise means that transactions are only overdraft transactions when they are authorized into a negative account balance. Of course, that is not true for APPSN Transactions.

42. APPSN transactions are always *initiated* at the time the customer swipes the debit card when there are sufficient available funds in the account.

43. In fact, South State 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 a secret posting process described below.

44. All the above representations and contractual promises are untrue. In fact, South State 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 South State may impose OD Fees on any APPSN Transactions.

45. The Account Documents misconstrues South State's true debit card processing and overdraft practices.

46. First, and most fundamentally, South State charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions. That is despite contractual representations that South State will only charge OD Fees on transactions with insufficient available funds to cover a given transaction.

47. South State assesses OD Fees on APPSN Transactions that do have sufficient funds available to cover them throughout their lifecycle.

48. South State'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 South State's actual practice and the contract causes accountholders like the Plaintiff to incur more OD Fees than they should.

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

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

posting process.

51. In reality, South State’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.

52. At the time of settlement, however, an available balance *does not change at all* for these transactions previously authorized into good funds. As such, South State 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.

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

54. This secret step allows South State to charge OD Fees on transactions that never should have caused an overdraft—transactions that were authorized into sufficient funds, and for which South State specifically set aside money to pay them.

55. This discrepancy between South State’s actual practices and the contract causes accountholders to incur more OD Fees than they should.

56. In sum, there is a huge gap between South State’s practices as described in the Account Documents and South State’s practices in reality.

C. South State Abuses Contractual Discretion

57. South State’s treatment of debit card transactions to charge OD Fees is more than a breach of the express terms of the numerous Account Documents. In addition, South State

exploits contractual discretion to the detriment of accountholders when it uses these policies.

58. Moreover, South State uses its contractual discretion to cause APPSN Transactions to incur OD Fees by knowingly authorizing later transactions that it allows to consume available funds previously sequestered for APPSN Transactions.

59. South State uses these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable accountholder would believe could cause OD Fees.

D. Plaintiff's Debit Card Transactions

60. As an examples, on March 19, 2018, December 18, 2018, June 18, 2018, January 22, 2019, February 11, 2019 and April 15, 2019, Plaintiff was assessed OD Fees in the amount of \$36.00 each for debit card transactions that settled on those days, despite the fact that positive funds were deducted immediately, prior to that day, for the transactions on which Plaintiff was assessed OD Fees.

II. SOUTH STATE CHARGES TWO OR MORE FEES ON THE SAME ITEM

61. As alleged more fully herein, South State's Account Documents allow it to take certain steps when its accountholders attempt a transaction but do not have sufficient funds to cover it. Specifically, South State may (a) authorize the transaction and charge a *single* OD Fee; or (b) reject the transaction and charge a *single* NSF Fee.

62. In contrast to its Account Documents, however, South State regularly assesses two or more NSF Fees on the *same* item or transaction.

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

64. South State's Account Documents never disclose this practice. To the contrary, South State's Account Documents indicate it will only charge a single NSF Fee on an item or per transaction.

A. Plaintiff's Experience

65. In support of her claims, Plaintiff offers an example of NSF Fees that should not have been assessed against her checking account. As alleged below, South State: (a) reprocessed a previously declined item; and (b) charged a fee upon reprocessing.

66. On January 22, 2020, Plaintiff attempted a single payment via ACH.

67. South State rejected payment of that item due to insufficient funds in Plaintiff's account and charged her a \$36 NSF Fee for doing so. Plaintiff does not dispute the initial fee, as it is allowed by South State Account Documents.

68. Then five days later, on January 27, 2020, South State again rejected the payment, and charged a *second* \$36 NSF Fee. South State labeled the payment a RETRY PYMT on her statements.

69. *In sum, South State charged Plaintiff \$72 in fees to attempt to process a single payment.*

70. Plaintiff understood the payment to be a single transaction as is laid out in South State's Account Documents, capable at most of receiving a single NSF Fee (if South State returned it) or a single OD Fee (if South State paid it).

71. The same pattern occurred numerous times for Plaintiff, with South State charging Multiple Fees for a single item, including on January 23 and February 6, 2020; February 4 and February 14, 2020; and February 18 and February 21, 2020.

B. The Imposition of Multiple Fees on a Single Transaction Violates South State's Express Promises and Representations

72. The Account Documents provide the general terms of Plaintiff's relationship with South State and therein South State makes explicit promises and representations regarding how transactions will be processed, as well as when NSF Fees and OD Fees may be assessed.

73. The Account Documents contain explicit terms indicating that fees will only be assessed once per transaction or single item—defined as a customer request for payment or transfer—when in fact South State regularly charges two or more fees per transaction or single item even though a customer only requested the payment or transfer once.

74. South State's Account Documents indicate that a singular NSF Fee can be assessed on checks, ACH debits, and electronic payments.

75. South State's Account Documents state that it will charge a single fee per item or transaction that is returned due to insufficient funds.

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

77. There is zero indication anywhere in the Account Documents that the same "item" or "transaction" is eligible to incur Multiple Fees.

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

79. There is zero indication anywhere in the Account Documents that the same "item" is eligible to incur Multiple Fees.

80. To the contrary, the Account Agreement makes clear that when an "item" is "declared an overdraft item," it retains that designation for all time and cannot become a new "overdraft item" when it is reprocessed a second or third time:

You further agree, as a result of a hold placed on your account, we shall have no liability based on any item which is returned unpaid, causes the account to go into overdraft status, results in any item being declared an “Overdraft Item,” or causes any other loss or damage.

[...]

An overdraft item may be created by check/draft, in-person withdrawal, ACH item or other electronic means.

Id., 43, 63.

81. The Account Agreement also plainly states numerous times that a single fee will apply on items that are returned:

We may charge you **a fee** for each returned item.

[...]

We may pay all, some, or none of your overdrawn items, without notice to you. If we do not authorize and pay an item, then we will decline or return the transaction unpaid. In either case, **the insufficient funds fee will still apply.**

[...]

The Personal Fee Schedule for your account, provided at account opening, explains the amount we will charge you regarding fees for overdrafts and for declined or returned items. Please review the Personal Fee Schedule for your account carefully.

Id., 22-24 (emphasis added).

82. The Fee Schedule, contained with the Account Agreement, indicates that only a single NSF Fee or OD Fee would be charged per item:

Non-sufficient Funds/Overdraft Fee (Checking and Savings)	
Overdraft Paid Item Fee.	\$36.00
NSF Returned Item Fee.	\$36.00

An overdraft item may be created by check/draft, in-person withdrawal, ACH item or other electronic means

Id., 63.

83. While “item” is never defined, the Account Agreement uses the phrase “check or other item” no fewer than eight times. Further, the Account Agreement refers to “[e]xamples of the items we will pay are checks you have written to other parties, checks cashed at a teller window, automatic drafts, bill payments, and other ACH items you have authorized.” These representations make clear that an “item” is equivalent to an accountholder instruction for payment.

84. With respect to the items discussed above, Plaintiff made only one instruction for payment for each.

85. Even if South State reprocesses an instruction for payment, it is still the same item. South State’s reprocessing is simply another attempt to effectuate an accountholder’s original order or instruction.

86. The Account Documents described never discuss a circumstance where South State may assess Multiple Fees for a single item that was returned for insufficient funds and later reprocessed one or more times and returned again.

87. In sum, South State promises that one NSF Fee will be assessed per check or other item, and these terms must mean all iterations of the same instruction for payment. As such, South State breached the contract when it charged more than one fee per item.

88. Reasonable consumers understand any given authorization for payment to be one, singular “item” as that term is used in South State’s Account Documents.

89. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same payment will be treated as the same “item,” which South State will either authorize (resulting in an overdraft item) or reject (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere does South

State disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor have South State customers ever agree to such fees or practices.

90. Customers reasonably understand, based on the language of the Account Documents and South State's other 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 NSF Fees. In other words, it is always the same item or transaction.

91. Banks and credit unions, like South State, that employ this abusive 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 South State never did here.

92. For example, First Hawaiian Bank engages in the same abusive practices as PCU, 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.

Terms and Conditions of FHB Online Services, First Hawaiian Bank 40, https://www.fhb.com/en/assets/File/Home_Banking/FHB_Online/Terms_and_Conditions_of_FHB_Online_Services_RXP1.pdf (emphasis added).

93. 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.

Consumer and Small Business Online Access Agreement, Klein Bank ¶ H, <https://www.kleinbankonline.com/bridge/disclosures/ib/disclose.html> (emphasis added).

94. Central Pacific Bank, a leading bank in Hawai'i, 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.

Miscellaneous Fee Schedule, Central Pacific Bank 1 (Feb. 15, 2019), <https://www.centralpacificbank.com/PDFs/Miscellaneous-Fee-Schedule.aspx>.

95. BP Credit Union likewise states: "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."

96. Regions Bank likewise states:

If an item is presented for payment on your account at a time when there is an insufficient balance of available funds in your account to pay the item in full, you agree to pay us our charge for items drawn against insufficient or unavailable funds, whether or not we pay the item. If any item is presented again after having previously been returned unpaid by us, you agree to pay this charge for each time the item is presented for payment and the balance of available funds in your account is insufficient to pay the item.

https://www.regions.com/virtualdocuments/Deposit_Agreement_6_1_2018.pdf.

97. First Financial Bank states, "Merchants or payees may present an item multiple times for payment if the initial or subsequent presentment is rejected due to insufficient funds or

other reason (representation). Each presentation is considered an item and will be charged accordingly.” Special Handling/Electronic Banking Disclosures of Charges, First Financial Bank
2 (Aug. 2018), https://www.bankatfirst.com/content/dam/first-financial-bank/eBanking_Disclosure_of_Charges.pdf.

98. Andrews Federal Credit Union states, “

You understand and agree that a merchant or other entity may make multiple attempts to resubmit a returned item for payment. Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to use for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item. When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft.

https://www.andrewsfcu.org/AndrewsFCU/media/Documents/Terms-and-Conditions_REBRANDED_Dec2019-Update.pdf

99. Consumers Credit Union states:

Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission 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 item.

https://www.myconsumers.org/docs/default-source/default-document-library/ccu_membership_booklet_complete.pdf?sfvrsn=6

100. Wright Patt Credit Union states:

Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and represented regardless of the number of times an item is presented or represented

to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

<https://www.wpcu.coop/en-us/PDFDocuments/Important%20Account%20Information%20Disclosure%20-%20WPCU.pdf>

101. Railroad & Industrial Federal Credit Union states,

Consequently, because we may charge an NSF fee for an NSF item each time it is presented, we may charge you more than one NSF fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

<https://www.rifcu.org/Documents/Disclosures/Account-Terms-Conditions.aspx>

102. Partners 1st Federal Credit Union states.

Consequently, because we may charge a fee for an NSF item each time it is presented, we may charge you more than one fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission 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 item.

https://www.partners1stcu.org/uploads/page/Consumer_Account_Agreement.pdf

103. Members First Credit Union states,

We reserve the right to charge an Non-Sufficient Funds Fee (NSF Fee) each time a transaction is presented if your account does not have sufficient funds to cover the transaction at the time of presentment and we decline the transaction for that reason. **This means that a transaction may incur more than one Non-Sufficient Funds Fee (NSF Fee) if it is presented more than once . . .** we reserve the right to charge a Non-Sufficient Funds (NSF Fee) for both the original presentment and the representment [.]

http://www.membersfirstfl.org/files/mfcufl/1/file/Membership_and_Account_Agreement.pdf

104. Community Bank, N.A. states,

We cannot dictate whether or not (or how many times) a merchant will submit a previously presented item. You may be charged more than one Overdraft or NSF

Fee if a merchant submits a single transaction multiple times after it has been rejected or returned.

<https://cbna.com/u/header/2019-Overdraft-and-Unavailable-Funds-Practices-Disclosure.pdf>

105. RBC Bank states,

We may also charge against the Account an NSF fee for each item returned or rejected, including for multiple returns or rejections of the same item.

<https://www.rbcbank.com/siteassets/Uploads/pdfs/Service-Agreement-for-Personal-Accounts.pdf>

106. Diamond Lakes Credit Union 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.

<https://www.diamondlakesfcu.org/termsconditions.html>

107. Parkside Credit Union states,

If the Credit Union returns the item, you will be assessed an NSF Fee. Note that the Credit Union has no control over how many times an intended payee may resubmit the same check or other item to us for payment. In the event the same check or other item is presented for payment on more than one occasion, your account will be subject to an additional charge on each occasion that the item is presented for payment. There is no limit to the total fees the Credit Union may charge you for overdrawing your account.

https://www.parksidecu.org/_/kcms-doc/1043/44277/Membership-and-Account-Agreement.pdf?__cf_chl_captcha_tk__=add6ebea42df3385074decd4b16c1f86a8369dc9-1580436763-0-AfXmB7FcyYTqzK9oMNBMSKM6k5fnKS5Xf-z7p3Tv-Pt951tDs7wM8yaaIV06w718t2nomyWR1Q8COWgpgfE07FJWZUeFkJN6lxbXDZG1SvidTWhYm9l85AbCd5afw2imyGdtdzKhXl9bQ9TYkjOlTVM4w8OFJOtE3wVIHrEITnQnSfoR5mZxM5O0bu4f_FHoHiJj0XsjNkVoGblk0-lti6-gMn-Wcu_o87SGQW6dOUF2i6rHGIM_CkdI-ULanKI2NS3KlhkYAuNatN9Jdwr7Plc6oJozMbZQeczuO7VlbrNuCFD0tjzkw1lsnof7uaRvLRAkfKYi3wh0tUU1c_Y6N4aH1qN8SPftOn8TYJHO7OoILvpMfamNTqv_djpbUI3GVA

108. South State provides no such disclosure, and in so doing, deceives its accountholders.

C. The Imposition of Multiple Fees on a Single Transaction Breaches South State’s Duty of Good Faith and Fair Dealing

109. 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. This creates an implied promise to act in accordance with the parties’ reasonable expectations and means that South State is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, South State 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 on the depositor.

110. Here—in the adhesion agreements South State foisted on Plaintiff and its other customers—South State 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, South State abuses that discretion to take money out of consumers’ account without their permission and contrary to their reasonable expectations that they will not be charged Multiple Fees for the same transaction.

111. South State abuses the power it has over customers and their credit union accounts and acts contrary to reasonable expectations under the Account Documents when it construes the word “item” to mean each iteration of the same payment. This is a breach of South State’s implied covenant to engage in fair dealing and to act in good faith.

112. Further, South State maintains complete discretion not to assess NSF Fees on transactions at all. By exercising its discretion in its own favor—and to the prejudice of Plaintiff and other customers—by charging more than one NSF Fee on a single item, South State breaches the reasonable expectation of Plaintiff and other customers and in doing so violates the implied covenant to act in good faith.

113. It was bad faith and totally outside Plaintiff's reasonable expectations for South State to use its discretion to assess two or more fees for a single attempted payment.

114. When South State charges Multiple Fees, South State uses its discretion to define the meaning of "item" in an unreasonable way that violates common sense and reasonable consumer expectations. South State uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more fees.

CLASS ACTION ALLEGATIONS

115. Plaintiff brings this action on behalf of herself 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. The proposed classes are defined as:

116. Plaintiff brings this action on behalf of herself and on behalf of all others similarly situated. The Classes are defined as:

All accountholders who, during the applicable statute of limitations, were charged OD Fees on APPSN Transactions on a South State checking account (the "OD Fees Class").

All accountholders who, during the applicable statute of limitations, were charged Multiple Fees on the same item on a South State checking account (the "Multiple Fees Class").

117. Excluded from the Classes are Defendant, Defendant's subsidiaries and affiliates, their officers, directors and member 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.

118. Plaintiff reserve the right to modify or amend the definition of the proposed Classes

and/or to add a subclass(es), if necessary, before this Court determines whether certification is appropriate.

119. 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 South State has acted on grounds generally applicable to the class. Such common legal or factual questions include, but are not limited to:

- a) Whether South State improperly charged OD Fees on APPSN Transactions;
- b) Whether South State improperly charged Multiple Fees on the same item;
- c) Whether the conduct enumerated above violates the contract;
- d) Whether the conduct enumerated above violates the covenant of good faith and fair dealing; and
- e) The appropriate measure of damages.

120. 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 identity of whom are within the exclusive knowledge of and can be ascertained only by resort to South State's records. South State 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.

121. 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.

122. Plaintiff's 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 South State, as described herein.

123. Plaintiff is a more than adequate representative of the Classes in that Plaintiff are South State checking account holders and have suffered damages as a result of South State's contract violations. In addition:

- a) Plaintiff 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 account holders against financial institutions;
- b) There is no conflict of interest between Plaintiff and the unnamed members of the Class;
- c) Plaintiff anticipate no difficulty in the management of this litigation as a class action; and
- d) Plaintiff's legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

124. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

125. South State has acted or refused to act on grounds generally applicable to the class, thereby making appropriate corresponding declaratory relief with respect to the Class as a whole.

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

FIRST CLAIM FOR RELIEF
BREACH OF CONTRACT INCLUDING THE
COVENANT OF GOOD FAITH AND FAIR DEALING
(Individually and on Behalf of the Classes)

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

128. Plaintiff, and all members of the proposed Classes contracted with South State for checking account services, including debit card services.

129. South State breached promises made to Plaintiff and all members of the proposed class when as described herein, South State charged OD Fees as a result of transactions that did not overdraw a checking account, on APPSN Transactions.

130. South State breached promises made to Plaintiff and all members of the proposed class when as described herein, South State charged Multiple Fees on the same items.

131. In addition, there exists an implied covenant of good faith and fair dealing in all contracts that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit – not merely the letter – of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

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

133. The implied covenant of good faith and fair dealing applies to the performance and enforcement of contracts, limits the parties' conduct when their contract defers decision on a particular term, omits terms, or provides ambiguous terms.

134. South State has breached the covenant of good faith and fair dealing and abused its discretion in its contract as described herein. Specifically, South State should not have used its discretion to charge OD Fees on APPSN Transactions or multiple fees on the same transaction. The Account Agreements do not have a contract term permitting OD Fees on such transactions,

nor Multiple Fees on the same transaction, and the documents are otherwise ambiguous as to any right for South State to charge OD Fees on APPSN Transactions or Multiple Fees on the same transaction.

135. South State breaches the covenant of good faith and fair dealing and abuses its discretion when it considered a balance inquiry to be a “transaction.”

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

137. Plaintiff and all members of the proposed Classes have sustained damages as a result of South State’s breaches of the contract.

PRAYER FOR RELIEF

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

- A. Certification for this matter to proceed as a class action on behalf of the Classes;
- B. Declaring South State’s OD Fee and multiple fee policies and practices to be in breach of its contract with accountholders;
- C. Restitution of all OD Fees and Multiple Fees paid to South State by Plaintiff and the members of the Classes, as a result of the wrongs alleged herein in an amount to be determined at trial;
- D. Actual damages in an amount according to proof;
- E. Pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;
- F. For costs and attorneys’ fees under the common fund doctrine, and all other applicable law;
- and
- G. Such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and the Class, hereby demand a trial by jury on all

claims so triable.

Dated: May 26, 2020

Respectfully submitted,

By: *s/ David M. Wilkerson*

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