

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY, CAMDEN DIVISION**

CORTNEY D. HASSLER, on behalf of himself and all others similarly situated,	:	Civil Action No. _____
	:	
Plaintiff,	:	
	:	<u>CLASS ACTION</u>
vs.	:	
	:	Complaint For Violations of the New Jersey
SOVEREIGN BANK, and JOHN DOES	:	Consumer Fraud Act, Breach of Contract, and
1-20,	:	Unjust Enrichment.
	:	
Defendants.	:	<u>JURY TRIAL DEMANDED</u>
	:	

PLAINTIFF’S CLASS ACTION COMPLAINT AND JURY DEMAND

Plaintiff Cortney Hassler (“Plaintiff”), on behalf of himself and all persons similarly situated, by and through their attorneys, alleges as follows.

INTRODUCTION

1. This is a class action brought on behalf of Plaintiff, individually, and on behalf of other similarly situated consumers who were subject to the systematic practice of Defendant Sovereign Bank (collectively with the John Doe Defendants, “Defendant” or “Sovereign”) of the re-ordering of electronic debit transactions from the highest dollar amount to lowest dollar amount so as to deplete the customer’s available funds as quickly as possible while maximizing the amount of “Insufficient Fund Fee[s]”, also referred to as “Overdraft Fees” collected by Defendant.

2. This systematic and automated re-ordering of debit transactions by Defendant has no relation to the date or time that the transactions were actually received by Defendant, nor does it bear any relation to the date or time the debit transaction was initiated by the customer. Significantly, Sovereign systematically engages in this routine practice notwithstanding language

in its Deposit Agreement which states that it “may” (or may not) reorder these transactions. Further, Sovereign inexplicably delays posting debit transactions and engages in these reordering practices even though it represents to its customers that “[w]hen you make a purchase using your Card [Sovereign Visa CheckCard or ATM Card] the amount of your purchase is automatically deducted from your checking account.”

3. Consumers, including Plaintiff, depend on Sovereign to ensure that charges are automatically and immediately posted to their accounts in the chronological order in which they occur. Instead, Sovereign routinely posts charges to consumers’ accounts in a non-chronological and manipulating manner. Upon information and belief, Sovereign routinely enforces an automated policy whereby charges incurred are posted to consumers’ accounts in order of largest to smallest amounts, even when larger charges are received days after smaller charges. Sovereign engages in this unfair, deceptive, and fraudulent practice in order to increase the number and amount of service fees it may impose upon consumers’ accounts that become prematurely overdrawn as a result of this practice. By deducting larger charges before smaller charges, regardless of the order in which Sovereign receives the charges, the consumers’ accounts are depleted sooner, to the detriment of the account holder (and contrary to the discretionary language in the account agreement). Often times the amount of the overdraft charges exceed the amount of the underlying transactions. These overdraft fees generate substantial revenue for Sovereign Bank.

4. These wrongful acts by Defendant Sovereign constitute violations of the New Jersey Consumer Fraud Act (NJCFRA) in addition to a breach of contract, unjust enrichment and conversion under New Jersey statutory and common law.

PARTIES

5. Plaintiff Cortney Hassler is a resident of Williamstown, County of Gloucester in the State of New Jersey.

6. The members of the Class are those individuals that have been harmed by Defendant's acts and practices, specifically those acts and practices related to Defendant's unfair, deceptive, unconscionable, and bad faith assessment and collection of excessive overdraft charges through the use of a non-chronological and/or largest-to-smallest re-ordering system and policy relating to the posting of debits to customer accounts in a manner contrary to that set forth in the deposit agreement. Upon information and belief, members of the Class number in the thousands.

7. Defendant Sovereign Bank and its related entities Sovereign Bancorp, Inc., the parent company of Sovereign Bank, is a financial institution with principal markets in the Northeast United States. Sovereign offers a broad array of financial services and products including retail banking, business and corporate banking, cash management, capital markets, wealth management, and insurance.

8. Defendant Sovereign Bank is headquartered in Wyomissing, Pennsylvania and is one of the largest banking institutions in the Northeastern United States, with 750 branches, and more than 2,300 automated teller machines ("ATMs").

9. Various others, presently unknown to Plaintiff, participated as co-conspirators with the Defendants in the violations of law alleged in this Complaint, and have engaged in conduct and made statements in furtherance thereof. The acts charged in this Complaint have been done by Defendants and their co-conspirators, or were authorized, ordered or done by their respective officers, agents, employees or representatives while actively engaged in the

management of each Defendants' business or affairs. These others shall be referred to herein as the "John Doe Defendants."

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this class action pursuant to 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005, because the matter in controversy exceeds \$5 million, exclusive of interest and costs, and is a class action in which some members of the Class are citizens of states different than Defendants. *See* 28 U.S.C. § 1332(d)(2)(A).

11. This Court has personal jurisdiction over Defendant Sovereign because it owns and operates business that is located within this state.

12. Venue properly lies in this district pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the acts giving rise to Plaintiffs' claims occurred in this district, Plaintiff is a resident of this jurisdiction, and because Defendant Sovereign conducts substantial business in this judicial district. Defendant has sufficient minimum contacts with the State of New Jersey and intentionally avails itself of the consumers and markets within the State of New Jersey through the promotion, marketing, sale, and service of checking and savings accounts in this State.

FACTUAL BACKGROUND

13. Defendant Sovereign Bank and its related entities Sovereign Bancorp, Inc., the parent company of Sovereign Bank, is a financial institution with principal markets in the Northeast United States. Sovereign offers a broad array of financial services and products

including retail banking, business and corporate banking, cash management, capital markets, wealth management, and insurance.¹

14. Defendant Sovereign is the 19th largest banking institution in the United States, with Sovereign Bancorp, Inc, a parent company of Sovereign Bank, being an \$85 billion

15. As one of the larger banks in the nation, Sovereign issues debit cards to its checking account customers. These debit cards allow Sovereign customers to have electronic access to their checking accounts in order to debit funds directly and instantaneously from their account for purchases from merchants, on-line usage, payment of bills, cash withdrawals, perform deposits at ATMs, and for other electronic debit transactions.

i. Defendant's Misleading Statements Regarding the Order of Debit Transactions.

16. Defendant has promoted its checking account services through promotional and marketing materials published and issued through the media, in brochures available at Defendant's banking centers, and on its website.

17. Plaintiff became aware of the plans and accounts offered by Defendant through advertisements, and in particular, Defendant's advertisements for "free" checking accounts that are marketed as offering no minimum balances, no monthly service fee, and no direct deposit requirement. Defendant advertises its "Sovereign Free Checking" as offering the following:

- a. Free Online Banking with BillPay
- b. No monthly maintenance fee
- c. No minimum balance requirement
- d. Visa® CheckCard or ATM card

¹ http://www.sovereignbank.com/companyinfo/company_information/our_history/company_history.asp

- e. ¼% rate discount for new secured consumer loans with automatic payment from a Sovereign account
 - f. Easy-to-balance monthly statement
18. Plaintiff has had a Free Checking Account with Defendant Sovereign since 2001.

With each “Sovereign Free Checking” account, Defendant also provides a Visa® CheckCard to its customers and advertised as offering of the following features:

Features

- Make purchases anywhere a Visa debit card is accepted;
- It’s also your ATM card, so you can get cash at more than 2,300 Sovereign ATMs in our network, including over 1,100 ATMs in CVS/Pharmacy locations throughout the Northeast;
- Be protected by Visa’s Zero Liability program for all signature-based purchases;
- Receive all card activity in your itemized monthly account statement, along with your checks or ATM transactions;

Benefits

- Cash Back – Automatically earn up to 20% cash back on every online and in-store purchase you make at participating retailers with Sovereign Cash Rewards;
- Pay Bills – Using your Visa CheckCard, you can pay a variety of bills by phone or online, such as your phone, insurance, cable TV, or utility bills.

19. Consumers, including Plaintiff, depend on Sovereign to ensure that charges are posted to consumers’ accounts in the chronological order in which Sovereign receives them and,

similarly, in the order in which the consumer actually accumulates such charges. Instead, Sovereign routinely posts charges to consumers' accounts in a non-chronological and manipulating manner. Upon information and belief, Sovereign routinely enforces a policy whereby charges incurred are posted to consumers' accounts in order of largest to smallest amounts, even when larger charges are received days after smaller charges. Upon information and belief, Sovereign engages in this unfair, deceptive, and fraudulent practice in order to increase the number and amount of service fees it may impose upon consumers' accounts that are consequently overdrawn as a result of this practice. By deducting larger before smaller charges, regardless of the order in which Sovereign receives the charges, the consumers' accounts are emptied sooner and subsequently, smaller charges result in multiple overdraft fees thereby creating an overall increase in service fee revenues for Sovereign.

20. Defendant makes available to its customers a pamphlet titled "Personal Deposit Account Agreement" dated June 2008. Within the twenty-nine pages of this pamphlet, Defendant includes the following language applicable to withdrawals:

We reserve the right to pay the withdrawals you make from your Account regardless of the method of withdrawal in any order we determine. This includes withdrawals made at an ATM or by computer, POS purchases, checks, pre-authorized payments and by any other means we make available to you. The order in which you make withdrawals from your Account *may* not be the same as the order in which we post those transactions to your Account each business day. **Generally**, we post payment transactions each business day in descending order, starting with the largest payment order that is presented for payment. This means, for example, that your \$900 mortgage payment will be paid before the \$100 purchase you made at the supermarket. The order in which we post your transactions *may* affect whether you incur fees for insufficient or unavailable funds.²

21. Defendant also includes the following language outlining the discretion it may exercise by denying a transaction due to insufficient funds. This language is in contrast to

² Personal Deposit Account Agreement (Mid-Atlantic), June. 2008, pgs. 4-5 (emphasis added).

Defendant's actual practice and policy of permitting transactions to occur despite inadequate funds:

If you write a check or other order or otherwise request a withdrawal from your Account, such as by using an ATM or making a purchase using a Visa CheckCard or ATM Card, for more money than you have available for withdrawal from your Account, we *may* either permit you to withdraw the funds by complying with the payment order or we *may* refuse to honor the payment order. You *may* incur a fee for each payment order that is presented against your account when you do not have sufficient available funds.³

22. In addition to this discretionary language, Defendant states “[w]hen you make a purchase using your Card [Sovereign Visa CheckCard or ATM Card] the amount of your purchase is automatically deducted from your checking account.”⁴ Accordingly, any debit card transactions should be instantly posted to the account of Plaintiff and Class members, and should only be posted in the order that the transactions actually occurred. Sovereign has no basis to delay posting these “automatic[]” transactions that are supposedly deducted from consumers’ accounts “when you make a purchase” and then re-order them from highest to lowest.

23. Even if Plaintiffs were given materials containing’ such language that could possibly be interpreted to authorize or disclose Sovereign’s practices as described above, any such notice or authorization was inadequate and clearly ineffective. Furthermore, the documentation made available by Defendant does not provide Sovereign the right to manipulate consumer account postings in order to achieve the highest number of overdraft fees and other related service charges on a consumer’s account.

24. Defendant fails to adequately notify and explain to its customers that it engages in a non-discretionary and consistent policy of re-ordering transactions from largest to smallest. Contrary to Defendant’s language that it “may” re-order transactions and such re-ordering “may”

³ Personal Deposit Account Agreement (Mid-Atlantic), June, 2008, p. 10 (emphasis added).

⁴ *Id.* at 19.

affect fees incurred, Defendant fails to disclose to Plaintiffs and customers that it will always re-order these transactions from highest to lowest, without any discretion as Defendant would have inferred, for the purpose of maximizing the potential fees incurred by its customers.

25. Defendant fails to adequately notify and explain to its customers that it engages in a non-discretionary and consistent policy of permitting a transaction to post to an account for more money than is available for withdrawal from the account. This policy is contrary to Defendant's language that it "may" permit or deny transactions where such a withdrawal is for a higher amount than contained in the account. Moreover, Defendant fails to disclose and put Plaintiffs and customers on notice that such a policy will always incur a fee for payments made in a higher amount than available within the account. Instead, Defendant inaccurately represents to customers that such fees "may" result despite a knowingly consistent practice of levying such fees at all instances.

26. Defendant fails to adequately notify and explain to its customers that despite the language contained in such Agreement, the amount of a purchase is not automatically and instantaneously deducted from the customer's checking account. Defendant includes misleading and deceptive language in its Agreement that reads "[w]hen you make a purchase using your Card [Sovereign Visa CheckCard or ATM Card] the amount of your purchase is automatically deducted from your checking account."⁵ Such language implies that debit card transactions will be "automatically deducted" at the time and in the order of which they occur. Instead, Defendant engages in a practice of delaying the posting of a transaction for hours or days in order to maximize the potential for any insufficient fund fees that may be imposed.

27. Plaintiffs and those similarly situated that have incurred similar charges were not sufficiently made aware of Sovereign's deceptive and unfair practices. Charging customers'

⁵ *Id.*

accounts in this manner, without conspicuous and adequate notice, and without an option to opt-out of such practice, is inherently deceptive, unfair, a failure to operate in good faith, and prohibited by New Jersey law.

ii. Facts Related to Plaintiff.

28. The four “Insufficient Fund Fees” incurred by Plaintiff on August 28th and September 2nd, 2008 are examples of Sovereign’s fraudulent, deceptive, and unfair business practices. In the morning of August 28th, 2008, Plaintiff initiated a payment to Brinks Security in the amount of \$39.58. This transaction should have resulted in a positive balance of \$72.77. At or about 3:00 pm that day, Plaintiff then made a debit card purchase in the amount of \$140.00. This transaction should have resulted in a negative balance of \$67.23 and only one insufficient funds fee being posted to the account. Plaintiff’s account statement should have reflected as follows:

Chronological Posting of Charges

Posting Date	Transaction Date	Amount	Account Balance
8/28/2008	Insufficient Funds	\$33.00	(\$100.23)
8/28/2008	8/28/2008	\$140.00	(\$67.23)
8/28/2008	8/28/2008	\$39.58	\$72.77
	Starting Balance:		\$112.35

29. Instead, Defendant intentionally manipulated these transactions by rearranging them from largest to smallest so as to levy two insufficient fund fees against Plaintiff’s checking account as shown below.

Defendant's Rearranging of Charges

Posting Date	Transaction Date	Amount	Account Balance
	Insufficient Funds		
8/28/2008		\$33.00	(\$133.23)
8/28/2008	8/28/2008	\$39.58	(\$100.23)
	Insufficient Funds		
8/28/2008		\$33.00	(\$60.65)
8/28/2008	8/28/2008	\$140.00	(\$27.65)
Starting Balance:			\$112.35

30. In the early evening of September 2nd, 2008, Plaintiff made a debit purchase transaction at Don Pablo's Restaurant in the amount of \$80.00. This transaction should have resulted in a positive balance of \$46.52. Later that evening, Plaintiff initiated a cash withdrawal in the amount of \$404.50 with his debit card. This transaction resulted in the first negative balance of the day, (\$357.98), and thereby only one insufficient funds fee should have been posted to the account. These transactions, without any rearranging, should have been posted to Plaintiff's account as follows:

Chronological Posting of Charges

Posting Date	Transaction Date	Amount	Account Balance
	Insufficient Funds		
9/2/2008		\$33.00	(\$390.98)
9/2/2008	8/31/2008	\$404.50	(\$357.98)
9/2/2008	8/31/2008	\$80.00	\$46.52
Starting Balance:			\$126.52

31. Instead, Defendant intentionally manipulated these transactions by rearranging them from largest to smallest so as to levy two insufficient fund fees against Plaintiff's checking account as shown below.

Defendant's Rearranging of Charges

Posting Date	Transaction Date	Amount	Account Balance
	Insufficient Funds		
9/2/2008		\$33.00	(\$423.98)
9/2/2008	8/31/2008	\$80.00	(\$390.98)
	Insufficient Funds		
8/28/2008		\$33.00	(\$310.98)
9/2/2008	8/31/2008	\$404.50	(\$277.98)
Starting Balance:			\$126.52

32. Instead of one overdraft fee, Defendant levied Plaintiff's account with two insufficient fund fees of \$33.00 through the re-ordering of Plaintiff's transactions on August 28th and September 2nd, 2008. In doing so, Defendant manipulated the account postings, despite the true order of the transactions, so that a majority of the larger postings cleared Plaintiff's account first. This allowed Defendant to deplete Plaintiff's account earlier and increase the potential for imposing additional insufficient funds fees. As a result, Defendant charged two additional, and unnecessary, insufficient fund fees to Plaintiff's account of \$33.00 each on August 28th and September 2nd, 2008. Because of this result, Sovereign must have rearranged, delayed, and/or aggregated these charges in order to maximize the number and amount of insufficient funds fees that it could assess Plaintiff.

33. As a result of these transactions and charges, Sovereign has improperly deprived Plaintiff and Class members of significant funds. Plaintiff clearly had sufficient funds to cover one of the August 28, 2008 transactions and one on September 2, 2008. Despite such adequate funds, Sovereign chose to post these and other charges in a non-chronological and manipulative fashion, in order to maximize the number of "Insufficient Funds Fee[s]" that it could somehow justifiably allocate to Plaintiff's account.

34. According to some reports, approximately 90% of banks' consumer-fee income comes from overdraft and insufficient-funds charges, which are expected to increase to \$42 billion this year from \$20.7 billion in 1999.⁶

CLASS ACTION ALLEGATIONS

35. This action is brought on behalf of Plaintiffs, individually and as a class action, pursuant to FED. R. CIV. P. 23(a), 23(b)(2) and/or 23(b)(3) on behalf of all consumers who have incurred service fees, specifically these fees include an "Insufficient Funds Fee" and/or an "Overdraft Fee", incurred as a result of Defendant's policy and procedure of (i) inexplicably delaying the posting of debit purchase transactions, and/or (ii) re-ordering the posting of charges to consumer accounts in a non-chronological fashion so as to maximize the number and amount of service fees that Defendant may impose upon consumers' accounts that are consequently overdrawn. The Class does not include Defendants, or their officers, directors, agents, or employees.

36. Specifically, Plaintiffs seek to represent the following Classes:

Nationwide Class: All persons in the United States who incurred "Insufficient Funds Fee[s]" and/or "Overdraft Fee[s]" on CheckCard transactions, as a result of Defendant's policy and procedure of re-ordering the posting of CheckCard charges from highest to lowest.

37. In the alternative, and pursuant to Fed. R. Civ. P. 23(c)(5), Plaintiffs seek to represent the following Sub-Classes:

New Jersey Sub-Class: All persons residing in New Jersey who incurred "Insufficient Funds Fee[s]" and/or "Overdraft Fee[s]" on CheckCard transactions, as a result of Defendant's policy and procedure of re-ordering the posting of CheckCard charges from highest to lowest.

38. The Nationwide Class is comprised of literally thousands of consumers, the joinder of whom in one action is impracticable. The New Jersey Sub-Class is likewise

⁶ <http://www.careerjournal.com/article/SB122645109077719219.html>

sufficiently large to make joinder impracticable. Disposition of the claims in a class action will provide substantial benefits to both the parties and the Court.

39. The rights of each member of the Class were violated in a similar fashion based upon Defendants' uniform actions.

40. This action has been brought and may be properly maintained as a class action for the following reasons:

a. Numerosity: Members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class contains thousands and perhaps tens of thousands of members. Defendant services millions of families throughout the United States, including New Jersey. The Class is therefore sufficiently numerous to make joinder impracticable, if not impossible. The precise number of Class members is unknown to Plaintiff.

b. Existence and Predominance of Commons Questions of Fact and Law: Common questions of law and fact exist as to all members of the Class. These questions predominate over the questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

i. Whether Defendant violated the New Jersey Consumer Fraud Act (NJCFCA) by Defendant's practice and procedure through the re-ordering of electronic debit transactions so as to deplete the customer's available funds as quickly as possible and maximize the number of overdraft fees to be charged to an account.

ii. Whether Defendant's actions constituted a breach of contract due to the failure to operate with good faith and fair dealing in transactions with checking account customers in seeking to maximize the amount of overdraft fees allocated to an account.

iii. Whether Defendant's actions constituted conversion due to Defendant's wrongful possession and detention of funds through unfair and deceptive practices in seeking to maximize the amount of overdraft fees allocated to an account.

iv. Whether Defendant's actions constituted an unjust enrichment for them since Defendant has received and is holding funds rightfully belonging to Plaintiff and those similarly situated.

v. The appropriate nature of class-wide equitable relief; and

vi. The appropriate measurement of restitution and/or measure of damages to award to Plaintiff and members of the Class.

These and other questions of law or fact which are common to the members of the Class predominate over any questions affecting only individual members of the Class.

c. Typicality: Plaintiff's claims are typical of the claims of the Class since Plaintiff was a banking customer of Defendant as was each member of the Class. Furthermore, Plaintiff and all members of the Class sustained monetary and economic injuries arising out of Defendant's wrongful conduct. Plaintiff is advancing the same claims and legal theories on behalf of himself and all absent class members.

d. Adequacy: Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the Class that he seeks to represent; he has retained counsel competent and highly experienced in complex class action litigation; and they intend to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiff and his counsel.

e. Superiority: A class action is superior to other available means of fair and efficient adjudication of the claims of Plaintiff and members of the Class. The injury suffered by each individual Class member is relatively small in comparison to the burden and expense of

individual prosecution of the complex and extensive litigation necessitated by Defendant's conduct. It would be virtually impossible for members of the Class individually to redress effectively the wrongs done to them. Even if the members of the Class could afford such individual litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

f. Defendant has acted, and refused to act, on grounds generally applicable to the Class, thereby making appropriate final injunctive relief with respect to the Class as a whole; and

g. In the absence of a class action, Defendant would be unjustly enriched because it would be able to retain the benefits and fruits of its wrongful conduct.

VIOLATIONS ALLEGED

COUNT I VIOLATIONS OF THE NEW JERSEY CONSUMER FRAUD ACT

41. Plaintiff and the Class incorporates by reference each preceding paragraph as though fully set forth at length herein.

42. Plaintiffs and members of the Class are customers of Defendant Sovereign incurred "Insufficient Funds Fee[s]" and/or "Overdraft Fee[s]" on CheckCard transactions, as a result of Defendant's policy and procedure of re-ordering the posting of CheckCard charges from highest to lowest.

43. Defendant uses various forms of media to advertise, call attention to, or give publicity to the sale of its banking and checking services. However, these services are not as

represented in these advertisements, but rather, are misleading and deceptive representations that Defendant will safeguard consumers' deposits. Defendant does not sufficiently or adequately inform consumers of the possibility of incurring additional service fees after extracting money from consumers' accounts in a non-chronological manner. This practice of posting charges in a non-chronological manner is not adequately represented in Defendant's terms of service. Such terms are deceptive in that consumers are not sufficiently informed of the true practices of Defendant, or that they will be subject to additional fees because of the manner in which Defendant posts charges to consumers' accounts.

44. The New Jersey Consumer Fraud Act ("NJCFCA") protects consumers against "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise..." N.J. STAT. ANN. § 56:8-2.

45. In violation of the NJCFCA, Defendant has affirmatively misrepresented and knowingly concealed, suppressed, and failed to disclose material facts with the intent that others rely upon such concealment and deception in connection with the sale and service of Defendant's banking and checking services to the consuming public.

46. The conduct of Defendant, as set forth above, constitutes unlawful acts and practices that are prohibited by the NJCFCA. These practices that are unlawful under the NJCFCA include, without limitation, affirmative misconduct and knowing omissions.

47. As a result of Defendant's unfair, unlawful, fraudulent and/or deceptive trade practices, Plaintiffs and members of the Class have suffered an ascertainable loss of monies, property, and/or value.

COUNT II
BREACH OF CONTRACT

48. Plaintiff incorporates by reference the allegations of all foregoing Paragraphs as if such had been set forth in full herein.

49. Under New Jersey law, every contract in New Jersey contains an implied covenant of good faith and fair dealing.⁷ In every contract there is an implied covenant 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.

50. Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further; bad faith *may* be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions; evasion of the spirit of the bargain, lack of diligence and slacking off, 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.

51. Where an agreement permits one party to unilaterally determine the extent of the other's required performance, an obligation of good faith in making such a determination is implied. Defendant may unilaterally choose whether to impose overdraft charges by posting transactions in any order Defendant wishes and by unilaterally deciding whether to honor requested transactions when consumers have insufficient funds. Because the occurrence, amount, and frequency of overdraft charges are set unilaterally by Defendant, Defendant has an obligation to impose overdraft charges on consumers' bank accounts in good faith. Defendant has breached this obligation by intentionally delaying and rearranging the posting of transactions

⁷ *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 690 A.2d 575 (1997).

to accounts in order to maximize the amount of overdraft charges. For example, Defendant has the ability to post check card transactions to checking accounts immediately because Defendant is made aware of check card transactions as they occur due to the electronic nature of these transactions. Instead of posting check card transactions to accounts immediately, however, or even posting check card transactions in chronological order, Defendant chooses to delay the posting of these transactions for hours or days and re-order these transactions in a non-chronological fashion so as to maximize the imposition of overdraft charges.

52. In breach of its duties of good faith and fair dealing, Defendant has assessed excessive, unreasonable, and unnecessary overdraft charges against Plaintiffs, Class Members, and the General Public. These overdraft charges are not set in accordance with the reasonable expectations of the parties.

53. Plaintiff seeks a judicial declaration determining that the charges actually set by Defendant are not consonant with Defendant's duties of good faith and fair dealing. Plaintiffs also seek compensatory damages resulting from Defendant's breach of its duties of good faith and fair dealing.

COUNT III **UNJUST ENRICHMENT**

54. Plaintiff incorporates by reference the allegations of all foregoing Paragraphs as if such had been set forth in full herein. This claim is plead in the alternative.

55. By entering into deposit agreements with and providing overdraft payments to Defendant, Plaintiff and Class members conferred a tangible economic benefit upon Defendant. Plaintiff and Class members would have expected remuneration from the Defendant at the time the benefit was conferred had they known the true facts regarding Defendant's practices and

policies. Failing to require Defendant to provide remuneration under these circumstances would result in it being unjustly enriched.

56. Defendant was and continues to be unjustly enriched at the expense of Plaintiffs and Class members.

57. Defendant's retention (without an offsetting return payment) of the benefit conferred upon it by Plaintiffs and members of the Class would be unjust and inequitable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests, on behalf of himself and members of the Class, that this Court:

- A. determine that the claims alleged herein may be maintained as a class action under Rule 23(a), (b)(2), and/or (b)(3) of the Federal Rules of Civil Procedure, and issue order certifying the Class as defined above;
- B. award all actual, general, special, incidental, statutory, punitive and consequential damages to which Plaintiffs and Class members are entitled;
- C. award pre-judgment and post-judgment interest on such monetary relief;
- D. grant appropriate injunctive and/or declaratory relief as the Court may deem reasonable;
- E. award reasonable attorney's fees and costs; and grant such further and other relief that this Court deems appropriate.

JURY DEMAND

Plaintiffs, on behalf of themselves and the putative class, demand a trial by jury on all issues so triable.

Dated: November 25, 2008

Respectfully submitted,

By: //s// Joseph G. Sauder
CHIMICLES & TIKELLIS LLP
Joseph G. Sauder
Matthew D. Schelkopf
Benjamin F. Johns
One Haverford Centre
361 West Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500
Facsimile: (610) 649-3633
E-mail: JosephSauder@chimicles.com
MatthewSchelkopf@chimicles.com
BFJ@chimicles.com

Christopher G. Hayes
LAW OFFICE OF CHRISTOPHER G. HAYES
225 South Church Street
West Chester, PA 19382
Telephone: (610)-431-9505
Facsimile: (610)-431-1269
E-mail: chris@chayeslaw.com