

**UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

STACEY SCHULTES, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

DACOTAH BANK,

Defendant.

Case No. _____

CLASS ACTION

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

COMES NOW the Plaintiff Stacey Schultes, by counsel, for his Class Action Complaint against the Defendant, alleges as follows:

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Dacotah Bank (“Dacotah”), arising from the unfair and unconscionable assessment and collection of Overdraft Fees (“OD Fees”) on transactions that did not overdraw an account.

2. The plain language of Dacotah’s adhesion contracts specifically promises that Dacotah will only charge OD Fees or NSF Fees on items when such items cause the account to have a negative balance.

3. The Account Agreement between Dacotah and Mr. Schultes and its other accountholders contains a promise that an “overdraft” is only a “withdrawal request[s] that overdraw[s] your account” or “account balance.” *See* Exhibit 1 attached hereto.

4. The Account Agreement does not define “account balance,” or specify the manner

in which an account balance is calculated for purposes of determining overdrafts.

5. According to the monthly account statements prepared by Dacotah, Mr. Schultes's account balance was not negative when he was charged OD Fees on certain transactions. Thus, the items did not actually overdraw Mr. Schultes's account and Dacotah charged hefty OD Fees anyway.

6. These practices work to catch accountholders in an increasingly devastating cycle of bank fees.

7. Mr. Schultes and other Dacotah customers have been injured by Dacotah's practices. On behalf of himself and the putative class, Mr. Schultes seeks damages, restitution and injunctive relief for Dacotah's breach of contract and violation of North Dakota's consumer protection law.

JURISDICTION

8. 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 classes exceeds \$5 million, exclusive of interest and costs, Mr. Schultes brings this action on behalf of proposed classes that are each comprised of over one hundred members, and at least one of the members of each of the proposed classes is a citizen of a different State than Dacotah.

9. Venue and personal jurisdiction are proper in this district because Dacotah is located in a county encompassed by this District.

CLASS ACTION ALLEGATIONS

10. Mr. Schultes brings this action on behalf of himself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the

numerosity, commonality, typicality, adequacy, predominance and superiority requirements of Rule 23.

11. The proposed classes are defined as:

All Dacotah checking account holders who, during the applicable statute of limitations, were charged OD Fees or NSF Fees on items that did not overdraw their checking accounts (the “Class”).

All Dacotah checking account holders in the State of North Dakota who, during the applicable statute of limitations, were charged OD Fees or NSF Fees on items that did not overdraw their checking accounts (the “North Dakota Subclass”).

Together, the Class and North Dakota Subclass are referred to as the “Classes.”

12. Mr. Schultes reserves the right to modify or amend the definition of the proposed Classes before the Court determines whether certification is appropriate.

13. Excluded from the Classes are Dacotah, its parents, subsidiaries, affiliates, officers and directors, any entity in which Dacotah has a controlling interest, all customers who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

14. The members of the Classes are so numerous that joinder is impractical. The Classes consist of thousands of members, the identity of whom is within the knowledge of and can be ascertained only by resort to Dacotah’s records.

15. The claims of Mr. Schultes are typical of the claims of the Classes in that he, like all Class members, was charged improper NSF Fees and OD Fees. Mr. Schultes, like all Class members, has been damaged by Dacotah’s misconduct in that he paid improper NSF Fees and OD Fees. Furthermore, the factual basis of Dacotah’s misconduct is common to all Class members, and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Classes.

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

17. Among the questions of law and fact common to the Classes are whether Dacotah:

- a. Charged OD Fees or NSF Fees on items when those items did not overdraw accounts;
- b. Breached its contract with consumers by charging OD Fees or NSF Fees on items when those items did not overdraw accounts;
- c. Breached the covenant of good faith and fair dealing by charging OD Fees or NSF Fees on items when those items did not overdraw accounts;
- d. Violated North Dakota consumer protection law by charging OD Fees or NSF Fees on items when those items did not overdraw accounts;
- e. Whether Mr. Schultes and the Class were damaged by Defendant's conduct and if so, the proper measure of damages.

18. Mr. Schultes is committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers and against financial institutions. Accordingly, Mr. Schultes is an adequate representative and will fairly and adequately protect the interests of the Class.

19. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of Dacotah, no Class member could afford to seek legal redress individually for the claims alleged herein.

Therefore, absent a class action, the Class members will continue to suffer losses and Dacotah's misconduct will proceed without remedy. Moreover, given that the improper fees were assessed in a uniform manner, common issues predominate over any questions, to the extent there are any, affecting only individual members.

20. Even if Class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows claims to be heard which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale and comprehensive supervision by a single court.

PARTIES

21. Mr. Schultes is a natural person who is a citizen of North Dakota and resides in Cleveland, North Dakota. Mr. Schultes has a personal checking account with Dacotah.

22. Dacotah Bank offers banking services to consumers and businesses. Dacotah is headquartered in Aberdeen, South Dakota and maintains branch locations across the State of North Dakota, Minnesota, and South Dakota.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

A. Dacotah's Account Documents Promise That It Will Only Charge OD Fees or NSF Fees on Transactions That Actually Overdraw An Account

23. Mr. Schultes's checking account with Dacotah was, at all relevant times, governed by Dacotah's standardized Account Agreement and Overdraft Form, the material terms of which are drafted by Dacotah, amended by Dacotah from time to time at its convenience and

complete discretion, and imposed by Dacotah on all of its customers.

24. In plain, clear, and simple language, the contract documents discussing OD Fees and NSF Fees promise that Dacotah will only charge OD Fees or NSF Fees on items which would place the account in the negative.

25. The Account Agreement between Dacotah and Mr. Schultes and its other accountholders contains a promise that an “overdraft” is only a “withdrawal request[s] that overdraw[s] your account” or “account balance.” See Exhibit 1 attached hereto.

26. The Account Agreement does not define “account balance,” or specify the manner in which an account balance is calculated for purposes of determining overdrafts.

27. Contrary to these promises, Dacotah’s uniform policy and practice is to disregard the actual amount of money in the account or whether there is a negative balance and, instead, to assess OD Fees or NSF Fees.

28. By using some other, unspecified calculation—as opposed to the actual money in an accountholder’s account—to determine whether to assess an OD Fee or NSF Fees, Dacotah increases the number of OD Fees and NSF Fees it assesses on its accountholders.

29. This manufactured balance is not the official balance of the account and it is not the balance provided to accountholders in their monthly statements from Dacotah. As such, it is reasonable for Mr. Schultes and accountholders like him to interpret and understand Dacotah’s use of the terms above as referring to the official balance in the account i.e. the actual money in the account. Mr. Schultes and class members could not reasonably have expected that Dacotah would assess OD Fees or NSF Fees in this manner.

B. Examples of Dacotah’s Imposition of OD Fees on Ms. Schultes

30. Dacotah charged Mr. Schultes NSF Fees on items that did not overdraw his

account.

31. For example, on December 17, 2019, Mr. Schultes was assessed a \$25 OD Fee for a withdrawal. This is despite the fact that, according to the bank statement issued by Dacotah, *his account never went negative and always had sufficient funds to cover the item.*

C. Dacotah Abuses Its Discretion

32. To the extent the account documents do not explicitly bar the practice described above, Dacotah exploits contractual discretion to the detriment of accountholders and breaches good faith and fair dealing when it uses these policies.

33. It was bad faith and totally outside Mr. Schultes's reasonable expectations for the credit union to use its discretion to assess NSF Fees for items that did not actually overdraw his account.

34. Additionally, Dacotah grants itself discretion to charge—or not to charge—an OD Fee or NSF Fee on a given item. When it charges an OD Fee or an NSF Fee on items that do not actually overdraw an account, Dacotah engages in bad faith and contradicts reasonable consumer expectations.

35. Dacotah acted in bad faith and outside reasonable consumer expectations when it assessed OD Fees and NSF Fees when there was enough money in accountholders' accounts to cover the items and by using a manufactured account calculation to increase the number of OD Fees or NSF Fees it could assess.

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

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

37. Mr. Schultes and Dacotah have contracted for bank account deposit, checking, ACH, ATM, and debit card services. That contract does not permit Dacotah to charge OD Fees or NSF Fees on items that do not actually overdraw an account.

38. Thus, Dacotah breached the express terms of its contract with Mr. Schultes and the Class by charging OD Fees or NSF Fees on items that do not actually overdraw the account *i.e.* when there were sufficient actual funds in the account to cover the item.

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

40. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes her conduct to be justified. A failure to act in good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing include evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

41. Dacotah has breached the covenant of good faith and fair dealing in its Account Agreement with customers by charging OD Fees and NSF Fees on items that do not actually overdraw the account *i.e.* when there were sufficient actual funds in the account to cover the

items.

42. Mr. Schultes and members of the Class have performed all, or substantially all, of the obligations imposed on them under the contract.

43. Mr. Schultes and members of the Class have sustained damages as a result of Dacotah's breach of the contract.

SECOND CLAIM FOR RELIEF
VIOLATION OF NORTH DAKOTA CONSUMER PROTECTION LAW
N.D. Cent. Code §§ 51-15-01 et seq.
(On behalf of Plaintiffs and the North Dakota Subclass)

44. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Petition as if fully set forth herein

45. Dacotah's practice of charging OD or NSF Fees on transactions that did not overdraw an account violates N.D. Cent. Code §§ 51-15-01 *et seq.*

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

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

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

- a. Dacotah misrepresented material facts, pertaining to the sale and/or furnishing of banking services to Plaintiffs and the Classes by representing and advertising that it would only assess OD Fees on transactions that overdrew a consumer's account; and
- b. Dacotah omitted, suppressed, and concealed the material fact that it would charge multiple fees for a single item and that it would charge OD Fees on transactions that did not overdraw an account.

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

50. Dacotah knowingly engaged in such acts and practices.

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

52. Had Plaintiff known they could be charged OD Fees on transactions that did not overdraw his account, he would have made different payment decisions so as to avoid incurring such fees.

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

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

PRAYER FOR RELIEF

WHEREFORE, Mr. Schultes and members of the Class demand a jury trial on all claims so triable and judgment as follows:

A. Declaring Dacotah's NSF Fee and OD Fee policies and practices to be wrongful, unfair and unconscionable;

B. Restitution of all OD Fees and NSF Fees paid to Dacotah by Mr. Schultes and the Class on items that did not actually overdraw an account i.e. when there were sufficient actual funds in the account to cover the items;

C. For each member of the Class, actual damages in an amount according to proof;

D. An injunction against Dacotah's NSF Fee and OD Fee policies challenged herein;

E. Pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;

F. Costs and disbursements assessed by Mr. Schultes in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and

G. Such other relief as this Court deems just and proper.

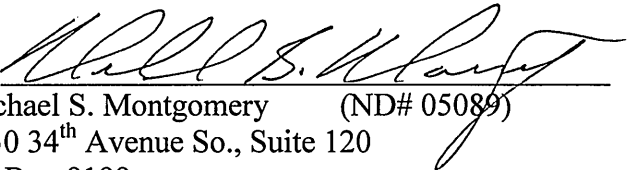
TRIAL BY JURY IS DEMANDED

Plaintiff respectfully demands a trial by jury on all issues so triable.

Dated: February 21, 2020

Respectfully submitted,

MONTGOMERY & PENDER, P.C.

By: 

Michael S. Montgomery (ND# 05089)
5630 34th Avenue So., Suite 120
PO Box 9199
Fargo, ND 58106-9199
Telephone: (701) 281-8001
mike@mplawnd.com

and

KALIEL PLLC
Jeffrey D. Kaliel (*pro hac vice* to be filed)
Sophia G. Gold (admitted *pro hac vice*)
1875 Connecticut Ave. NW 10th Floor
Washington, D.C. 20009
Telephone: (202) 350-4783
jkaliel@kalielllc.com
sgold@kalielllc.com

Counsel for Plaintiff and the Proposed Class