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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

JUSTIN ROMOHR, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	**JURY DEMAND**
v.	)	**No. 19-1542-BC**
THE TENNESSEE CREDIT UNION,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter came to be heard on May 15, 2020, upon the motion of Defendant The Tennessee Credit Union ("TCU"), made pursuant to Tenn. R. Civ. P. 12.02(6), to dismiss the claims in the complaint filed by Plaintiff Justin Romohr, individually and on behalf of all others similarly situated ("Romohr"). The causes of action in this putative class action matter are for breach of contract and the related duty of good faith and fair dealing, and alternatively, unjust enrichment. Having reviewed the pleadings and relevant caselaw, and having considered the argument of counsel, the Court denies the motion based upon the following analysis.

Rule 12 Motion to Dismiss Legal Standard

A motion pursuant to Tenn. R. Civ. P. 12.02 challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (citing *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009)). The resolution of a Rule 12.02 motion to dismiss is determined by an examination of the pleadings alone. *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn. 2010); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691,

696 (Tenn. 2002). A defendant who files a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but … asserts that the allegations fail to establish a cause of action." *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010) (quoting *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 516 (Tenn. 2005)). In considering a motion to dismiss, courts "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007) (quoting *Trau-Med*, 71 S.W.3d at 696); *Leach v. Taylor*, 124 S.W.3d 87, 92-93 (Tenn. 2004).

Factual Allegations in the Complaint

The Complaint alleges that Romohr is a member of the TCU and, as such, has a checking account governed by TCU's Membership Account Agreement and Fee Schedule ("the Account Agreement" and "the Fee Schedule"). They were attached to the Complaint and thus incorporated therein.

The pertinent terms of the Account Agreement, for the purposes of this motion, are in paragraph 14(a), as follows:

> **a. Payment of Overdrafts**. If, on any day, the available funds in your share or deposit account are not sufficient to pay the full amount of a check, draft, transaction, or other item posted to your account plus any applicable fee ("overdraft"), we may pay or return the overdraft. The Credit Union's determination of an insufficient available account balance may be made at any time between presentation and the Credit Union's midnight deadline with only one (1) review of the account required. We do not have to notify you if your account does not have sufficient available funds to pay an overdraft. Your account may be subject to a charge for each overdraft regardless of whether we pay or return the overdraft. For ATM and one-time debit transactions, you must consent to the Credit Union's overdraft protection plan in order for the transaction amount to be covered under the plan. Without your consent, the Credit Union may not authorize and pay an overdraft resulting from these types of transactions. Services and fees for overdrafts are shown in the document the Credit Union uses to capture the member's opt-in choice for overdraft protection and the Schedule of Fees and Charges.

The pertinent information or language in the Fee Schedule, for the purposes of this motion, is the listing of the Non-sufficient funds, or NSF, fee, of $32 for "all types" of such items.

On June 26, 2019, AT&T attempted an Automated Clearing House ("ACH") charge of $176.64 against Romohr's account. He had insufficient funds in his account and it was rejected, resulting in a $32 NSF charge. On each of June 27 and 28, 2019, AT&T attempted to rerun the ACH. On both occasions the ACH was rejected and TCU issued a $32 NSF charge for each day/attempt. Romohr was unaware of these transactions but, upon review of his account, saw three $32 NSF charges, the second of third of which were coded as "RETRY PYMT". Romohr asserts this breaches the Account Agreement and Fee Schedule, and brings this action on his own behalf, as well as a putative class of "All citizens of Tennessee who, during the applicable statute of limitations, were charged a Non-Sufficient Funds Fee ("a "NSF Fee") by The Tennessee Credit Union on a check, draft, transaction or other item that had previously been charged one or more NSF Fees."

Legal Analysis of Claims

TCU relies on the first sentence of paragraph 14(a) of the Account Agreement to support its position that the imposition of an NSF fee each time the merchant resubmitted the ACH is allowed, as long as it was on a different day. It contends that this interpretation is consistent with the definition of the term overdraft in that sentence. TCU also argues that this is not inconsistent with the language regarding NSF fees in the Fee Schedule.

The parties refer the Court to a number of cases with many different types of account agreement language. Some of the cases involve agreements with express language alerting the consumer the resubmission of items may result in multiple NSF fees. *See e.g., Lambert v. Navy Fed'l Credit Union*, 1:19-cv-103-LO-MSN, 2019 WL 3843064 (E.D.Va. Aug. 14, 2019). Some

of the cases involve agreements without such express language, and/or with accompanying fee schedules unclear regarding the number of potential fee charges. *See, Tisdale v. Wilson Bank and Trust*, Case No. 19-400-BC (Davidson Cty. Ch. Ct., Sept. 30, 2019 hearing transcript). Some of the cases involve agreements with language modifying the definition of item or overdraft with "on any day" or similar language. *See e.g., Saunders v. Y-12 Federal Credit Union*, No. B9LA0120 (Anderson Cty. Tenn. Cir. Ct. Nov. 18, 2019). All of these cases were decided based upon the particulars of the agreements at issue and the outcomes vary. It is difficult to find any one or more of them as instructive to the Court, or authoritative, regarding how it should interpret the language in the Account Agreement and Fee Schedule in this case because they are so specific to the individual subject agreements. These documents stand on their own and must be reviewed based upon the particulars of the language they contain and the facts of the ACH submissions.

In analyzing a claim for breach of contract, the Tennessee Supreme Court stated that

> [w]e first recognize the foundational principles in all of Tennessee contract law. The common thread in all Tennessee contract cases—the cardinal rule upon which all other rules hinge—is that courts must interpret contracts so as to ascertain and give effect to the intent of the contracting parties consistent with legal principles.

Individual Healthcare Specialists, Inc. v. Bluecross Blueshield of Tenn., Inc., 566 S.W.3d 671, 688 (Tenn. 2019) (citing *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886, 899 (Tenn. 2016); *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 659 (Tenn. 2013); *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012); *Allmand v. Pavletic*, 292 S.W.3d 618, 630 (Tenn. 2009); *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006); *Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999)). The court further opined that

> the strong strain of textualism in Tennessee caselaw demonstrates resolve to keep the written words as the lodestar of contract interpretation. Tennessee has rejected firmly any notion that courts are a fallback mechanism for parties to use to "make a new contract" if their written contract purportedly fails to serve their "true" intentions. Tennessee courts "give primacy to the contract terms, because the

> words are the most reliable indicator—and the best evidence—of the parties' agreement when relations were harmonious, and where the parties were not jockeying for advantage in a contract dispute."

Id. at 694 (citations omitted).

Romohr asserts that there are ambiguities in the Account Agreement and Fee Schedule, and that such ambiguities should be construed against TCU because these are adhesion agreements, and TCU is the drafter. *See e.g., Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996) (an adhesion contract is defined as "a standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract."); *Vantage Tech. LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999) ("Any ambiguity is to be construed against the drafter."). Romohr asserts both the terms "overdraft" and "item" are undefined and unclear, and, as in *Tisdale*, the Fee Schedule does not specify the possibility for multiple NSF charges for one "item" or "overdraft."

The Court disagrees that there is no definition of "overdraft." The first sentence of paragraph 14(a) of the Account Agreement defines an overdraft as occurring "if, on any day, the available funds in your share or deposit account are not sufficient to pay the full amount of a check, draft, transaction, or other item posted to your account plus any applicable fee." Hence, the overdraft is the circumstance in which there are insufficient funds to pay a check, draft, transaction, or other item posted to an account holder's account. However, there is no definition of "item" in the Account Agreement or Fee Schedule, and that does lend some ambiguity to the analysis of whether or not an authorized ACH is one item, or is an item each time it is submitted. The Fee

Schedule does not clarify this ambiguity because it just says "Non-Sufficient Funds (NSF): $32 (all types)."

In *Perks v. TD Bank, N.A*, No. 18-CV-11176 (VEC), 2020 WL 1272246 (S.D.N.Y. Mar. 17, 2020), a New York court found the lack of definition of "item" important in its analysis in denying a motion to dismiss:

> The Court finds that the Agreement's definition of "item" is ambiguous. It states in relevant part: "An 'item' includes a[n] . . . ACH transaction . . . and any *other* instruction or order for the payment, transfer, deposit or withdrawal of funds." Ex. A at 7 (emphasis added). In other words, that definition includes both "[an] ACH transaction" and a catch-all phrase that covers "other" orders. Although it is plausible to read "[an] ACH transaction" as referring to the original submission and "any other instruction or order" as referring to any resubmission of an ACH transaction, it is just as plausible to read "*other*" orders as meaning orders that are not one of the previously enumerated types of transaction and thus that "[an] ACH transaction" necessarily refers to both the original submission and any subsequent resubmission of the transaction. Under the latter interpretation, the original transaction and all subsequent resubmissions of the same transaction would be one item, authorizing TD Bank to charge a single NSF fee. TD Bank's suggestion that "any other instruction or order" refers to both the original submission and any resubmission risks reading "ACH transaction" out of the contract. *See Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130, 147 (2d Cir. 2017) ("[T]he contract should be construed so as to give full meaning and effect to all of its provisions." (quotation omitted)).
>
> In short, the definition of "item" is ambiguous with regard to whether a resubmission of an ACH transaction is a separate item or is part of the same initial ACH transaction, and that ambiguity must be read in favor of Plaintiffs at this stage. Because Plaintiffs' proposed construction is a reasonable construction of the Agreement, Plaintiffs have sufficiently alleged a breach resulting from multiple overdraft charges imposed as a result of resubmissions of a single ACH transaction.

Id. at *3 (fn. omitted). Again, although the Account Agreement is different from that in *Perks*, the Court does find the definition of "item" to be key to the question of whether or not an ACH can be resubmitted as a separate "item," and thus the subject of a separate charge. Given the standard applicable to Rule 12.02(6) motions to dismiss, and the subject agreement, with its associated ambiguity, the Court denies TCU's motion to dismiss Romohr's breach of contract claim.

The Court also declines to dismiss Romohr's claim for unjust enrichment. While the Court agrees with TCU that Romohr cannot succeed on both a breach of contract and an unjust enrichment claim, since the latter is a quasi-contract claim assuming the absence of a contract, the Court sees them as pled in the alternative and will allow this second claim to proceed.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that TCU's motion to dismiss is DENIED.

CASE MANAGEMENT

Given the court's ruling on TCU's motion to dismiss, TCU must file an answer so that the pleadings are closed and the Court can proceed with a Rule 16 Conference. TCU's answer shall be due on or before June 2, 2020.

At the Rule 16 Conference the Court will address, among other subjects, the scheduling of a motion for class certification and a discovery schedule. The parties are requested to contact the Calendar Clerk, Megan Broadnax, at 615.862.5720, regarding their availability for a Rule 16 Conference on one of the following dates:

June 17, 2020 at 1:30 p.m.
June 23, 2020 at 1:30 p.m.
June 26, 2020 at 2:30 p.m.

It is anticipated that the Rule 16 Conference will be an in-person proceeding, but the Court will allow out-of-state counsel to participate by video conference.

It is so Ordered.

Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

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