

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DENNIS FALTIS,
on behalf of himself and all others similarly
situated,

Plaintiff,

v.

WINTRUST FINANCIAL CORPORATION
d/b/a TOWN BANK,

Defendant.

Civil Action No. 1:18-cv-07582

CLASS ACTION COMPLAINT

Plaintiff, Dennis Faltis, by counsel, for his Class Action Complaint against Defendant Wintrust Financial Corporation d/b/a Town Bank (“Wintrust”), alleges as follows:

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution, and declaratory relief from Defendant Wintrust, arising from the unfair and unconscionable assessment and collection of \$35 “Overdraft Fees” (“OD Fees”) on accounts that were never actually overdrawn.

2. Besides being deceptive, unfair, and unconscionable, these practices breach contract promises made in Wintrust’s adhesion contracts—specifically, the promise to charge OD Fees only on transactions which actually overdraw an account.

3. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that the Wintrust will only charge OD Fees on transactions with insufficient funds to “pay” a given transaction: “If your account lacks sufficient funds to pay a

check, preauthorized transfer, or other debit activity presented for payment, we may return such item for non-sufficient funds and may charge you a fee as provided in the Disclosures and, if applicable, to any overdraft protection plan you have consented to in writing with us.”

4. As happened to Plaintiff, however, Wintrust charges OD Fees even when the transaction has not overdrawn an account. For example, Plaintiff was charged two OD Fees on May 8, 2018. But, according to the monthly account statement prepared by Wintrust, *Plaintiff's account balance was never negative for those transactions*. By definition, then, there were always funds to “pay” that transaction—yet Wintrust assessed an OD Fee on it anyway.

5. In short, Wintrust 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.

6. Plaintiff and other Wintrust customers have been injured by Wintrust’s practices. On behalf of himself and the putative class, Plaintiff seeks damages, restitution, and injunctive relief for Wintrust’s breach of contract and violation of state consumer protection statutes.

JURISDICTION

7. This Court has subject-matter 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, because Plaintiff brings this action on behalf of proposed classes that are each comprised of over one hundred members, and because at least one of the members of each of the proposed classes is a citizen of a different state than Defendant.

8. This Court has personal jurisdiction over Defendant because Defendant is headquartered in this District.

PARTIES

9. Plaintiff Dennis Faltis (“Plaintiff Faltis”) is a natural person who resides in Lake Geneva, Wisconsin. Plaintiff has a personal checking account with Wintrust Financial Corporation d/b/a Town Bank, which is governed by a Deposit Account Agreement.

10. Defendant Wintrust Financial Corporation is a financial holding company based in Lake Forest, Illinois that owns, operates, controls, and manages 15 chartered community banks in northern Illinois, southern Wisconsin, and northwest Indiana. Wintrust is the second largest banking company in Chicago with nearly \$30 billion in assets.

11. Upon information and belief, Wintrust Financial requires all of the below fifteen wholly owned banking subsidiaries to use its uniform bank policies and account documents and internal processing systems:

- Barrington Bank & Trust Company, N.A. (Hanover Park Community Bank, Hoffman Estates Community Bank, and Palatine Bank & Trust)
- Beverly Bank & Trust Company, N.A. (First National Bank of Evergreen Park, Hyde Park Bank, Oak Lawn Bank & Trust, and Pullman Bank & Trust)
- Crystal Lake Bank & Trust Company, N.A. (Algonquin Bank & Trust, Cary Bank & Trust, McHenry Bank & Trust)
- Hinsdale Bank & Trust Company (Clarendon Hills Bank, Community Bank of Downers Grove, The Community Bank of Western Springs, Community Bank of Willowbrook, Elmhurst Bank & Trust, Proviso Community Bank, and Riverside Bank)
- Lake Forest Bank & Trust Company (Bank of Highwood-Fort Sheridan, Highland Park Bank & Trust, and North Chicago Community Bank)

- Libertyville Bank & Trust Company (Gurnee Community Bank, Mundelein Community Bank, Vernon Hills Bank & Trust, and Wauconda Community Bank)
- Northbrook Bank & Trust Company (Buffalo Grove Bank & Trust, Deerfield Bank & Trust, Glenview Bank & Trust, and Northview Bank & Trust)
- Old Plank Trail Community Bank, N.A. (New Lenox) (Dyer Bank & Trust, First National Bank of Illinois, Joliet Bank & Trust, Orland Park Bank & Trust, Plainfield Bank & Trust, Shorewood Bank & Trust, South Holland Bank & Trust)
- St. Charles Bank & Trust Company (Aurora Bank & Trust, Elgin State Bank, and Geneva Bank & Trust)
- Schaumburg Bank & Trust Company, N.A. (Bloomingdale Bank & Trust, Elk Grove Village Bank & Trust, Roselle Bank & Trust, and Wood Dale Bank & Trust)
- State Bank of the Lakes
- Town Bank
- Village Bank & Trust
- Wheaton Bank & Trust Company (Glen Ellyn Bank & Trust and Naperville Bank & Trust)
- Wintrust Bank (North Shore Community Bank & Trust)

12. All 15 of these banks are branded as Wintrust banks and share executives with Wintrust.

13. Wintrust and its 15 branded banks report their financials on consolidated statements and Wintrust directly financially benefits from the fee practices challenged in this Complaint. In fact, in 2017 alone, those fifteen branded banks accounted for approximately 76% of Wintrust's consolidated net revenues.

14. Wintrust's management monitors each of its fifteen branded bank's operations and profitability.

15. Wintrust uses a deposit account system that spreads a customer's deposit across all of Wintrust's fifteen branded banks.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

16. Plaintiff has a checking account with one of the banks controlled and operated by Wintrust, Town Bank, which has branches in southern Wisconsin.

17. Wintrust 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.

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

A. Wintrust Account Documents

19. Plaintiff's checking account with Wintrust Financial Corporation d/b/a Town Bank was, at all relevant times, governed by Wintrust's standardized contract for deposit accounts, the material terms of which are drafted by Wintrust, amended by Wintrust from time to time at its convenience and complete discretion, and imposed by Wintrust on all of its customers at each of its banks.

20. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that Wintrust will only charge OD Fees on transactions with insufficient funds to “pay” a given transaction:

If your account does not have sufficient funds to pay an item, we may (i) return the item and charge you a returned item fee as outlined in the Special Service Fees Schedule provided to you at account opening; or (ii) pay such item which will create a negative balance in your account and charge you an overdraft paid fee as outlined in the Special Services Fees Schedule provided to you at account opening. ***This negative balance created by the payment of an item when you do not have sufficient funds is called as “Overdraft.”***

(Deposit Account Agreement, Town Bank, A Wintrust Community Bank,

<https://www.townbank.us/personal/resources/online-mobile-banking/online-account-creation/account-agreement-and-disclosure.html>.)

21. This Deposit Account Agreement is the same or similar for all of Wintrust’s wholly owned subsidiary banks. (*See, e.g.*, Deposit Account Agreement, Wintrust Bank, <https://www.wintrustbank.com/personal/resources/online-mobile-banking/online-account-creation/account-agreement-and-disclosure.html>.)

22. Similarly, Wintrust’s fee schedule states:

Overdraft Paid or Returned Check (when ending balance less holds at the end of the business day after all credits and debit have been posted is overdrawn by more than \$10)

\$35 per transaction item.

(TownBank Special Service Fees, <https://www.townbank.us/personal/resources/online-mobile-banking/online-account-creation/current-rates.html>; Wintrust Special Service Fees, <https://www.wintrustbank.com/current-rates.html>.)

23. These disclosures misrepresent Wintrust’s true overdraft policies since Wintrust assesses OD Fees even on transactions that do not overdraw an account.

B. Plaintiff's Experience

24. On May 8, 2018, Plaintiff was assessed two OD Fees on KwikTrip purchases that posted to his account. However, according to the bank statement issued by Wintrust, his account never went negative for such transactions:

+	05/08		OVERDRAFT FEE	-30.00	34.21
+	05/08		OVERDRAFT FEE	-30.00	64.21
+	05/08		AURORA HEALTHCARE, INC	-75.00	94.21
+	05/08		MCDONALD'S F6241	-6.33	169.21
+	05/08		A2A TRSF CREDIT	54.45	175.54
+	05/07		KWIK TRIP INC	-7.81	121.09
+	05/07		KWIK TRIP INC	-2.73	128.90

In short, Plaintiff had sufficient funds to “pay” the transactions that supposedly caused OD Fees and was improperly charged such OD Fees.

CLASS ALLEGATIONS

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

26. The proposed class is defined as:

All Wintrust checking account holders in the United States who, during the applicable statute of limitations through the date of class certification, were charged OD Fees on transactions that did not overdraw their checking accounts (the “National Class”)

The proposed subclass is defined as:

All Wintrust checking account holders in Wisconsin who, during the applicable statute of limitations through the date of class certification, were charged OD Fees on transactions that did not overdraw their checking accounts (the “Wisconsin Subclass”).

27. Plaintiff reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

28. Excluded from the Class are Wintrust, its parents, subsidiaries, affiliates, officers and directors, any entity in which Wintrust 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.

29. The members of the Class are so numerous that joinder is impractical. The Class consist of thousands of members, the identity of whom is within the knowledge of and can be ascertained only by resort to Wintrust's records.

30. The claims of the representative Plaintiff are typical of the claims of the Class in that the representative Plaintiff, like all Class members, was charged OD Fees by Wintrust as a result of charging OD Fees on transactions that did not actually overdraw checking accounts. The representative Plaintiff, like all Class members, has been damaged by Wintrust's misconduct in that they have been assessed overdraft charges that violate the account contract. Furthermore, the factual basis of Wintrust'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 Class.

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

32. Among the questions of law and fact common to the Class are whether Wintrust:

- a. Imposed OD Fees on debit card transactions when those transactions did not overdraw accounts.
- b. Whether Wintrust's imposition of overdraft fees on transactions that did

not overdraw accounts breached its contract with consumers;

c. Whether Wintrust's imposition of overdraft fees on transactions that did not overdraw accounts violated the Wisconsin Consumer Protection Act;

Other questions of law and fact common to the Class include:

d. The proper method or methods by which to measure damages, and

e. The injunctive and declaratory relief to which the Class are entitled.

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

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

35. 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 Wintrust, 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 Wintrust's misconduct will proceed without remedy.

36. 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.

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

37. Plaintiff repeats and realleges each and every allegation contained in all the foregoing paragraphs as if fully set forth herein.

38. Plaintiff and Wintrust have contracted for bank account deposit, checking, ATM, and debit card services.

39. Wintrust breached promises included in the account documents as described herein when it charged overdraft fees on transactions that did not overdraw checking accounts.

40. Under the law of each of the states where Wintrust does business, good faith is an element of every contract pertaining to the assessment of bank fees. Whether by common law or statute, all 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.

41. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. A lack of 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 are 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.

42. Wintrust has breached the covenant of good faith and fair dealing through its overdraft policies as alleged herein.

43. Wintrust uses its contractual discretion to extract OD Fees on transactions that no reasonable consumer would believe could cause OD Fees

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

45. Plaintiff and members of the Class have sustained damages as a result of Wintrust's breach of the contract.

SECOND CLAIM FOR RELIEF
Violation of Wisconsin Deceptive Trade Practices Act, Wis. Stat. §§ 100.18
(On Behalf of the Wisconsin Subclass)

46. Plaintiff repeats and realleges each and every allegation contained in all the foregoing paragraphs as if fully set forth herein.

47. This cause of action is brought pursuant to Wisconsin's Deceptive Trade Practices Act, Wisconsin Statutes § 100.18 (the "DTPA"), which generally prohibits false, deceptive, or misleading representations or statements of fact.

48. Defendant's conduct violates Wis. Stat. § 100.18(1), which provides that no "corporation or association ... with intent to sell, distribute, increase the consumption of ... any ... service... directly or indirectly, to the public for sale ... shall make, publish, disseminate, circulate, or place before the public ... in this state, in a ... notice ... pamphlet ... or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or

representation of any kind to the public ... which ... contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.”

49. Defendant engaged in deceptive and unlawful marketing in violation of Wisconsin law by intending to sell or increase the consumption of its services and representing to the public that it would not charge overdraft fees on transactions that do not overdraw accounts when in fact it does.

50. Defendant’s representations materially induced Plaintiff and Wisconsin Class Members’ pecuniary loss of being assessed overdraft fees on transactions that did not overdraw their accounts.

51. Plaintiff and Wisconsin Class Members “suffer[ed] pecuniary loss because of a violation” of 100.18(1) and are entitled to damages, costs, including reasonable attorney fees and other relief which the court deems proper. Wis. Stat. § 100.18(11)(b)(2).

JURY TRIAL DEMANDED

Plaintiff and all others similarly situated hereby demand trial by jury on all issues in this complaint that are triable as a matter of right.

PRAYER FOR RELIEF

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

1. Declaring Wintrust’s OD Fee policies and practices to be wrongful, unfair, and unconscionable;
2. Restitution of all OD Fees paid to Wintrust by Plaintiff and the Class, as a result of the wrongs alleged herein in an amount to be determined at trial;
3. Actual damages in an amount according to proof;

4. Pre-judgment interest at the maximum rate permitted by applicable law;
 5. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law;
 6. For attorneys' fees under the common fund doctrine, and all other applicable law;
- and
7. Such other relief as this Court deems just and proper.

Dated: November 15, 2018

Respectfully submitted,

s/Lynn A. Toops
Richard E. Shevitz (*pro hac* forthcoming)
Vess A. Miller (*pro hac* forthcoming)
Lynn A. Toops
COHEN & MALAD, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204
Telephone: (317) 636-6481
Fax: (317) 636-2593
rshevitz@cohenandmalad.com
vmiller@cohenandmalad.com
ltoops@cohenandmalad.com

Jeffrey Kaliel (*pro hac* forthcoming)
Sophia Gold (*pro hac* forthcoming)
KALIEL PLLC
1875 Connecticut Ave. NW 10th Floor
Washington, D.C. 20009
(202) 350-4783
jkaliel@kalielpllc.com
sgold@kalielpllc.com

Counsel for Plaintiff and the Proposed Class