

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

LEA SANTELLO, On Behalf Of Herself And All Others  
Similarly Situated,

Plaintiff,

-against-

FIRST NIAGARA FINANCIAL GROUP, INC., and  
FIRST NIAGARA BANK, N.A.,

Defendants.

Civil Action No.:

November 7, 2011

**CLASS ACTION COMPLAINT**

Plaintiff, through her undersigned counsel, on behalf of herself and all others similarly situated, alleges the following based on personal knowledge as to allegations regarding her and on information and belief as to other allegations.

**INTRODUCTION**

1. This is a civil action seeking monetary damages, restitution, and injunctive relief from Defendants First Niagara Financial Group, Inc. and First Niagara Bank N.A. (collectively herein, "First Niagara"), arising out of their unfair, deceptive, and unconscionable assessment and collection of excessive overdraft fees.

2. First Niagara provides debit cards and/or ATM cards (collectively herein, "check cards") to its checking account customers, which include individual consumer and small business depositors. Through those check cards, customers may engage in transactions using funds directly from their accounts or may withdraw money from their accounts at automatic teller machines. These are called "point of sale" ("POS") or "debit" transactions.

3. If, according to First Niagara's accounting practices detailed below, a customer does not have sufficient funds in the account, the transaction is considered an "overdraft." First Niagara may honor or allow a transaction to proceed despite the lack of funds in the account. If First Niagara allows such a POS or debit transaction to proceed, First Niagara charges the customer's account \$35 for each separate overdraft. These fees are known as "overdraft fees."

4. Before check cards existed, banks at times extended the courtesy of honoring paper checks written on overdrafted or otherwise deficient accounts for customers who were typically in good standing. Banks extended this courtesy largely because the vendor involved in a sales transaction allowed the customer to purchase goods or services with a check, with the expectation that funds would be available and that the check would clear. For example, if a customer used a check to purchase groceries, the grocery store would know if the check cleared only after the groceries had been purchased. By extending the courtesy, banks eliminated risk to vendors that payment would be dishonored.

5. The same considerations are not present when the transaction is one with a check card. First Niagara could simply decline to honor debit or POS transactions made with check cards where there are insufficient funds in the account. Retail and service transactions would simply not proceed if the consumer was unable to present an alternative form of payment. In the alternative, First Niagara could provide a warning that there were insufficient funds and that an overdraft fee would be incurred if the customer elected to proceed, thereby providing the customer with notice and an option. In fact, until a few years ago, most banks simply declined debit and/or POS transactions that would overdraw an account.

6. However, instead of declining debit and/or POS transactions when there are insufficient funds, or warning the customer that an overdraft fee will be assessed if he or she

proceeds with the transaction, First Niagara routinely processes such transactions in order to charge its customers an overdraft fee of \$35, even when the transaction is for only a few dollars. This automatic fee-based overdraft scheme is designed and intended solely to increase overdraft fee revenue.

7. Although it is possible to do so, First Niagara does not alert its check card customers at the time a POS transaction or ATM withdrawal is made that the transaction will overdraft their account and cause them to incur fees.

8. Because First Niagara's check card customers are not notified of the potential overdraft and are not given the option to decline the transaction or to provide another form of payment, the customers incur monetary damages in the form of overdraft fees.

9. First Niagara seeks to maximize the number of overdraft fees it charges check card customers because overdraft fees are a primary source of revenue for First Niagara.

10. On August 9, 2009, an article was published in the *Financial Times* that stated that United States banks "stand to collect a record \$38.5 [billion] in fees for customer overdrafts this year," and that "fees are nearly double those reported in 2000." The article further stated that "[o]verdraft fees accounted for more than three-quarters of service fees charged on customer deposits."

11. First Niagara's overdraft fees can cost the account holders hundreds of dollars in a matter of days, or even hours, when they may be overdrawn by a few dollars only. Even more egregious, a customer's account may not actually be overdrawn at the time the overdraft fee is charged or at the time of the POS transaction (as in the case of the Plaintiff here).

12. Upon information and belief, First Niagara manipulates and reorders debits from highest to lowest during the course of a day, in order to cause as many overdrafts as possible.

13. Upon information and belief, First Niagara has a computer-automated overdraft system programmed to maximize the number of overdrafts, and thus the amount of fees charged, per customer.

14. As a result of First Niagara's manipulation of customers' transactions, funds in a customer's account are depleted more rapidly and more overdraft fees are likely to be charged for multiple smaller transactions. Indeed, overdraft charges are likely to occur at times when, but for the manipulation, there would be adequate funds in the account and no overdraft would occur. For example, if a customer has an account with a \$50 balance and makes four transactions of \$10 and one later transaction of \$100 the same day, First Niagara debits the transactions from the account largest-to-smallest, thus subjecting the customer to five overdraft fees. Conversely, if the \$100 transaction were debited last (in the order it was made), the customer would be subject to one overdraft fee only. *See* FDIC Study of Bank Overdraft Programs, November 2008, available at <http://www.fdic.gov/bank/analytical/overdraft/>, at p. 11, n.12.

15. Thus, it is through manipulation of customers' transaction records that First Niagara maximizes overdraft penalties.

16. As described below, First Niagara reorders transactions for no reason other than to increase the number of exorbitant overdraft fees it can charge. This practice is a violation of Connecticut, New York, Massachusetts, and Pennsylvania's consumer protection laws and the implied covenant of good faith and fair dealing in First Niagara's Personal Deposit Account Contract.

17. Prior to July 1, 2010, banks like First Niagara could automatically enroll consumers in their standard overdraft practices for all types of transactions when a customer

opened an account. Pursuant to new Federal Reserve System rules enacted last year, however, for new accounts opened after July 1, 2010, customers were required to opt-in to receive overdraft protection. Similarly, customers with existing accounts with overdraft protection who did not affirmatively opt-in to overdraft protection by August 15, 2010 ceased receiving such protection. The opt-in requirement applies to all accounts covered by Regulation E, including payroll card accounts, but not to check transactions, recurring debits, or ACH transactions.

18. Thus, prior to the middle of last year, it was not clearly disclosed to check card customers that they have the right to “opt out” of First Niagara’s overdraft scheme. Moreover, after the new Federal Reserve System rules went into effect, customers still were not given a meaningful opportunity to “opt in,” as the nature of First Niagara’s wrongful overdraft practices was not clearly disclosed to customers, as alleged in greater detail herein.

### **JURISDICTION AND VENUE**

19. This Court has original jurisdiction of this action under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has original jurisdiction because the aggregate claims of the putative Class members exceed \$5 million, exclusive of interest and costs, and Plaintiff is a resident of a different state than First Niagara.

20. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because First Niagara is subject to personal jurisdiction here and regularly conducts business in the District of Connecticut, and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred and continue to occur in this district.

### **THE PARTIES**

21. Plaintiff Lea Santello is, and at all relevant times has been, a citizen of the State of Connecticut.

22. Defendant First Niagara Financial Group, Inc., which maintains its principal executive offices at 726 Exchange Street, Suite 618, Buffalo, NY 14210, provides a wide range of retail and commercial banking as well as other financial services through its wholly-owned bank subsidiary, First Niagara Bank, N.A.

23. Defendant First Niagara Bank, N.A. is a multi-state community-oriented nationally chartered bank providing financial services to individuals, families and businesses. First Niagara Bank, N.A. is a wholly owned subsidiary of First Niagara Financial Group, Inc.

24. Mrs. Santello was a customer of NewAlliance Bancshares, Inc. and then a customer of First Niagara who was charged improper overdraft fees. On August 19, 2010, First Niagara and NewAlliance Bancshares, Inc., the parent company of NewAlliance Bank and headquartered in New Haven, Connecticut, jointly announced a definitive merger agreement under which NewAlliance merged into First Niagara

### **CLASS ACTION ALLEGATIONS**

25. Plaintiff brings this action as a class action pursuant to Fed. R. Civ. P. 23 on behalf of herself and all others similarly situated. The proposed class is defined as:

All First Niagara customers in the United States who, within the applicable statute of limitations preceding the filing of this action to the date of class certification, incurred an overdraft fee as a result of First Niagara's practice of re-sequencing debit card transactions from highest to lowest ("Class").

All First Niagara customers having accounts at branches in the states of Connecticut, New York, Massachusetts, and Pennsylvania for the purpose of asserting claims under their respective state consumer protection statutes (the "State Subclasses").

The Class and the State Subclasses are collectively referred to as the "Classes."

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

27. Excluded from the Classes are Defendants and their parents, subsidiaries, affiliates, officers and directors, any entity in which Defendants have 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.

28. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of her claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

(a) **Numerosity**: The Classes are so numerous that joinder of all members, whether otherwise required or permitted, is impracticable. Plaintiff is informed and believes that there are at least many thousands of First Niagara customers who have been damaged by First Niagara's unfair, deceptive, and illegal conduct alleged herein.

(b) **Commonality**: There are questions of law or fact common to the Classes which predominate over any questions affecting only individual members. This action involves common questions of law and fact, including, but not limited to, whether First Niagara:

- Does not clearly disclose and/or refuses to allow its customers to opt out of its overdraft "protection" program;
- Does not obtain affirmative consent from its customers prior to processing transactions that will result in overdraft fees;
- Does not alert its customers that a debit card transaction will trigger an overdraft fee, and does not provide its customers with an opportunity to cancel such transactions;
- Manipulates and reorders transactions so that it can increase the number of overdraft fees it imposes;
- Manipulates and reorders debits from highest to lowest in order to maximize the number of overdrafts and, consequently, the amount of overdraft fees;

- Imposes overdrafts and overdraft fees when, but for reordering transactions, there would otherwise be sufficient funds in the account;
- Does not clearly disclose to its customers its policies and practices pertaining to the reordering of debit transactions;
- Fails to provide customers with accurate balance information;
- Delays posting of transactions by customers using debit cards so that customers are charged overdraft fees on transactions, even though the customers had sufficient funds in their accounts to cover the transactions upon execution;
- Charges exorbitant overdraft fees that bear no relationship to the actual costs and risks of covering insufficient funds transactions;
- Breaches its covenant of good faith and fair dealing with Plaintiff and the other members of the Classes through its overdraft policies and practices;
- Converts money belonging to Plaintiff and the other members of the Classes through its overdraft policies and practices;
- Requires its customers to enter into standardized account agreements which include unconscionable provisions;
- Is unjustly enriched through its overdraft policies and practices;
- Violates the consumer protection acts of certain states through its overdraft policies and practices; and
- Continues to commit wrongdoing through its overdraft policies and practices.

(c) **Typicality**: The claims or defenses of the representative party are typical of the claims or defenses of the Classes. Plaintiff, like all members of the Classes, has been subject to First Niagara's overdraft charge policies and practices and was damaged by First

Niagara's misconduct in that she incurred unlawful overdraft charges. Furthermore, the factual bases of First Niagara's misconduct are common to all members of the Classes and represent a common thread of unconscionable, unfair and/or deceptive misconduct resulting in injury to all members of the Classes.

(d) **Adequacy of Representation**: The representative party will fairly and adequately protect the interests of the Classes. Plaintiff is committed to the vigorous prosecution of this action and Plaintiff's interests are coincident with and not antagonistic to those of the other class members she seeks to represent. Plaintiff has retained competent counsel experienced in the prosecution of class actions to represent her and the Classes.

(e) **Superiority**: A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Questions of law common to the members of the Classes predominate over any questions affecting only individual members with respect to some or all issues presented in this Complaint. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Individual litigation of the claims of all class members is impracticable because the cost of litigation would be prohibitively expensive for each class member and would impose an immense burden upon the courts. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same complex factual and legal issues. By contrast, the conduct of this action as a class action, with respect to some or all of the issues presented in this Complaint, presents fewer management difficulties, conserves the resources of the parties and of the court system, and is the only means to protect the rights of all class members.

## **SUBSTANTIVE ALLEGATIONS**

### **First Niagara**

29. First Niagara maintains its principal executive office in Buffalo, New York.

30. First Niagara is a national bank subject to the National Bank Act, 12 U.S.C. § 1, *et seq.*, and OCC regulations.

## **ALLEGATIONS SPECIFIC TO PLAINTIFF**

### **Lea Santello**

31. Plaintiff is a current checking account customer of First Niagara. She was issued a check card when she opened her account.

32. During her time as a checking account customer of First Niagara, Ms. Santello has been charged with overdraft fees when there were sufficient funds in her account to cover the transaction at issue.

33. Defendants charged Plaintiff multiple overdraft fees.

34. If Defendants had not manipulated and reordered Plaintiff's transactions, Plaintiff would not have incurred overdraft fees.

35. For example, on August 17<sup>th</sup> and 18<sup>th</sup>, 2011, Plaintiff was charged with eight (8) overdraft charges in the amount of \$35 each for a total of \$280.

36. At all relevant times, First Niagara did not reasonably provide Plaintiff with notice that she could opt out of First Niagara's overdraft program.

37. First Niagara has never notified Plaintiff at the time she made check card transactions, including POS transactions, that her checking account was overdrawn or that it would charge her an overdraft fee as a result of the transaction.

## First Niagara's Customer Documents Regarding Overdrafts

38. The terms of First Niagara's checking accounts (Section III of the Personal Deposit Account Contract) are contained in a written standard account holder agreement, which was drafted and imposed by First Niagara and presented to its customers on a "take it or leave it" basis.

39. The Personal Deposit Account Contract states:

**Insufficient Funds and Returned Items.** If there is not enough money in your account or if there is not enough money available in your account when a check, preauthorized withdrawal, point-of-sale transaction, Visa Debit Card transaction, or any debit or withdrawal request is presented for payment, we may, at our option, do two things: (a) we may pay the item or allow the transaction, and your account will be overdrawn or (b) the item may be returned or the transaction refused without paying it. It is solely in our discretion whether to pay or return the item. In either case, your account may be assessed an overdraft fee. Federal regulations prohibit the Bank from assessing an overdraft fee for paying an ATM withdrawal or a one-time debit card transaction that overdraws your account unless we obtain your affirmative consent (i.e., opt-in) to your payment of ATM and one-time debit card transaction that will result in the imposition of an overdraft fee. You agree to repay the overdraft amount as well as any associated fee. You will be subject to a returned check fee for any check deposited to your account which is not honored and is returned to us. We will generally redeposit one time any check deposited to your account which is returned to us. The overdraft, uncollected, and returned item charges are listed in our *Schedule of Personal Deposit Account Terms and Charges*.

Personal Deposit Account Contract (emphasis in original).

40. The Personal Deposit Account Contract also states:

**Payment of Items.** We may pay checks or other items charged against your account, including those payable to us, in any order we determine (for example, we may pay checks from largest to smallest, but may pay them before or after electronic debits to your account). We may pay items in any order, even if paying a particular item results in an insufficient balance in your account to pay other items that could have been paid.

Personal Deposit Account Contract.

41. The Personal Deposit Account Contract does not set forth the dollar amount of fees that will be charged for purported overdrafts. Instead, a separate document, the “Schedule of Personal Deposit Account Terms and Charges[,]” lists the dollar amount of fees that will be charged for purported overdrafts, in a chart entitled “Miscellaneous.” In small print, the chart states:

Overdraft Fees  
Overdraft Fees for Insufficient or Unavailable Funds . . . . . \$33.

42. First Niagara’s Schedule of Personal Deposit Account Terms and Charges indicates an overdraft charge of \$33; however, Plaintiff’s account statement indicates an overdraft charge of \$35.

**First Niagara’s Re-Ordering of Checking Account Transactions**

43. In an effort to maximize overdraft revenue, First Niagara manipulates and reorders debits from highest to lowest during given periods of time. First Niagara reorders transactions for no reason other than to increase the number of exorbitant overdraft fees it can charge.

44. First Niagara misleads its customers regarding its reordering practices. Instead of unequivocally telling its customers that it will reorder debits from highest to lowest, First Niagara states in its Personal Deposit Account Contract that “we may pay checks from largest to smallest, but may pay them before or after electronic debits to your account.” This statement is deceptive and/or unfair because it is, in fact, First Niagara’s practice to reorder debits from highest to lowest, and because (upon information and belief) First Niagara groups together POS transactions that occurred on subsequent days with POS transactions that occurred on earlier days, and reorders them so that higher debits that occurred on subsequent days are posted to its

customers' accounts before lower debits that occurred on earlier days, contrary to the terms of the Personal Deposit Account Contract and its customers' reasonable expectations.

45. In addition, the Schedule of Personal Deposit Account Terms and Charges also fails to disclose how transactions are reordered from highest to lowest.

46. Transactions involving debit cards used by First Niagara's customers, including the withdrawal of cash from ATM machines and POS transactions with vendors, are processed electronically. As a result, First Niagara is notified instantaneously when the customer's debit card is swiped, and has the option to accept or decline these transactions.

47. Notwithstanding the instantaneous nature of these electronic debit card transactions, under First Niagara's posting system, it fails to post charges in the order in which they are incurred or received. First Niagara developed a policy and employs a practice whereby account charges and debits are posted to its customers' accounts out of chronological order for the sole purpose of maximizing the number of overdraft transactions and, therefore, the amount of overdraft fees charged to its customers.

48. Instead of processing such transactions in chronological order, First Niagara processes them starting with the largest debit and ending with the smallest debit, so as to generate the largest possible number of overdrafts and the greatest possible amount of overdraft fees.

49. Upon information and belief, First Niagara refrains from immediately posting charges to a customer's account as it receives them – sometimes for multiple business days. By holding charges rather than posting them immediately to an account, First Niagara is able to amass a number of charges on the account. Upon information and belief, First Niagara subsequently posts all of the amassed charges on a single date. When the group of charges is

eventually posted to the customer's account, First Niagara posts them in order of largest to smallest – not in the order in which they were received or in the order in which they were charged. This delayed posting results in the imposition of multiple overdraft fees that would not otherwise be imposed. The delayed posting also prevents customers from ascertaining the accurate balances in their accounts.

50. First Niagara's policy and practice of posting charges from largest to smallest, rather than chronologically, or from smallest to largest, is specifically designed to maximize the generation of overdraft fees by triggering overdraft fees for account charges that would not otherwise result in such fees.

51. First Niagara enforces an unconscionable policy whereby charges incurred are posted to customers' accounts in a non-chronological order, from highest to lowest, and are held for multiple days and then batched together, to maximize the number of overdraft transactions and fees. First Niagara's processing practices substantially increase the likelihood that customers' smaller charges will result in multiple overdraft fees. The practices provide First Niagara with substantially higher service fee revenues than it would otherwise achieve absent these practices.

52. As a result, Plaintiff and members of the Classes have been assessed overdraft fees for transactions which occurred when they actually had sufficient funds in their accounts to cover those transactions.

**First Niagara Fails to Notify Customers of  
Overdrafts or Advise Customers of Right to Opt Out**

53. At the time that First Niagara's check card is used, for example at a POS or at an ATM, First Niagara is able to determine almost instantaneously whether there are sufficient funds in a customer's account to cover that particular transaction. First Niagara has the

technological capability to decline transactions or notify customers at that very moment that the particular check card transaction would result in an overdraft. First Niagara could give customers the option to decline the transaction to avoid incurring the overdraft fee, but it does not do this because it seeks to maximize its overdraft fees.

54. Notwithstanding its technological capabilities and actual knowledge, First Niagara fails to provide notice to customers that a particular debit card transaction will result in an overdraft and, hence, an overdraft fee. Because First Niagara's customers are not notified of the potential overdraft, and are not given the option of declining the debit card transaction or providing another form of payment, the customers incur monetary damages in the form of overdraft fees.

55. The Personal Deposit Account Contract fails to clearly or reasonably disclose to depositors that they have the option to "opt out" of First Niagara's overdraft scheme.

**First Niagara's Overdraft Policies and Practices Are Contrary to Best Practices**

56. According to rules proposed by the Board of Governors of the Federal Reserve System, the Office of Thrift Supervision, Treasury, and the National Credit Union Administration (the "Agencies"): "Injury [caused by overdraft charges] is not outweighed by countervailing benefits. . . . This is particularly the case for ATM withdrawals and POS debit card transactions where, but for the overdraft service, the transaction would typically be denied and the consumer would be given the opportunity to provide other forms of payment without incurring any fee." 73 F.R. 28904-01, 28929 (May 19, 2008).

57. First Niagara's overdraft policies make it difficult for a customer to avoid injury even if the customer carefully tracks the balance in his or her account. In fact, the Agencies have stated that "injury" resulting from such policies "is not reasonably avoid[able]" by the consumer. 73 F.R. 28904-01, 28929 ("It appears that consumers cannot reasonably avoid this injury if they

are automatically enrolled in an institution's overdraft service without having an opportunity to opt out. Although consumers can reduce the risk of overdrawing their accounts by carefully tracking their credits and debits, consumers often lack sufficient information about key aspects of their account. For example, a consumer cannot know with any degree of certainty when funds from a deposit or a credit for a returned purchase will be made available.”).

58. Prior to when the new Federal Reserve System rules went into effect, First Niagara did not follow the list of “best practices” with respect to overdraft programs set forth in the “Joint Guidance on Overdraft Protection Programs” (herein “Joint Guidance”), issued by the United States Department of the Treasury, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the National Credit Union Administration. These “best practices” include: “Provide election or opt-out of service. Obtain affirmative consent of consumers to receive overdraft protection. Alternatively, where overdraft protection is automatically provided, permit consumers to ‘opt out’ of the overdraft program and provide a clear consumer disclosure of this option.” 70 F.R. 9127-01, 9132.

59. Even after those rules went into effect, First Niagara still does not follow the Joint Guidance's “best practices.” The “best practices” listed in the Joint Guidance also advise banks to “[a]lert customers before a transaction triggers any fees. When consumers attempt to withdraw or transfer funds made available through an overdraft protection program, provide a specific consumer notice, where feasible, that completing the withdrawal may trigger the overdraft fees.” 70 F.R.D. 9127, 9132. The “best practices” go on to advise that “[t]his notice should be presented in a manner that permits consumers to cancel the attempted withdrawal or transfer after receiving the notice.” *Id.*

60. The list of “best practices” set forth in the “Overdraft Protection: A Guide For Bankers” issued by the American Bankers Association includes offering customers the option of “opting out” of any overdraft programs, and informing customers, before they access funds, that a particular POS or ATM transaction will cause them to incur overdraft fees.

61. First Niagara did not clearly or reasonably disclose to its customers that they have the right to opt out of First Niagara’s overdraft scheme, nor did they clearly or reasonably disclose such scheme when customers began to opt-in as required by the new Federal Reserve System’s new rules. First Niagara also fails to notify consumers when use of a check card, such as an ATM or POS transaction, will cause an overdraft fee.

62. First Niagara’s lack of reasonable disclosure regarding the ability to opt out of the overdraft scheme and its failure to notify customers when the use of a check card, such as an ATM or POS transaction, will cause an overdraft fee, is a violation of Connecticut, New York, Massachusetts, and Pennsylvania’s consumer protection laws and the implied covenant of good faith and fair dealing in First Niagara’s “Personal Deposit Account Contract” – the agreement which governs its checking accounts.

### **FIRST CAUSE OF ACTION**

#### **Breach of the Covenant of Good Faith and Fair Dealing** **(On Behalf of the Classes)**

63. Plaintiff repeats paragraphs 1 through 62 above.

64. Plaintiff and First Niagara have contracted for bank account deposit, checking, ATM and debit card services, as embodied in First Niagara’s Personal Deposit Account Contract, pursuant to which Plaintiff reasonably expected to receive certain benefits.

65. Under the laws of the states where First Niagara does business, every contract (including contracts pertaining to the assessment of overdraft fees) carries an implied covenant

of good faith and fair dealing. Whether by common law or statute, the duty implicit in all contracts requires that neither party do anything that will injure the rights of the other to receive the benefits of the agreement.

66. 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, and to act in a manner consistent with the justified expectations of the other party.

67. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his 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.

68. First Niagara has breached the covenant of good faith and fair dealing in the Personal Deposit Account Contract through its overdraft policies and practices as alleged herein, which conduct injured the rights of Plaintiff and the Classes to receive benefits they reasonably expected to receive under the Contract, and which conduct was undertaken in bad faith.

69. Plaintiff and the Classes have performed all, or substantially all, of the obligations imposed on them under the Personal Deposit Account Contract.

70. Plaintiff and members of the Classes have sustained damages as a result of First Niagara's breach of the covenant of good faith and fair dealing.

## **SECOND CAUSE OF ACTION**

### **Breach of Contract** **(On Behalf of the Classes)**

71. Plaintiff repeats paragraphs 1 through 62 above.

72. First Niagara's overdraft policies and practices are substantively and procedurally unconscionable in the following respects, among others:

(a) First Niagara does not disclose or reasonably disclose to customers that they have the option to "opt out" of First Niagara's overdraft scheme;

(b) First Niagara does not obtain affirmative consent from checking account customers prior to processing a transaction that will overdraw the account and result in an overdraft fee;

(c) First Niagara does not alert its customers that a debit card transaction will trigger an overdraft, and does not provide the customer the opportunity to cancel that transaction, before assessing an overdraft fee;

(d) The Personal Deposit Account Contract and related documents, including the Schedule of Personal Deposit Account Terms and Charges, are contracts of adhesion in that they are standardized forms, imposed and drafted by First Niagara, which is a party of vastly superior bargaining strength, and relegates to the customer the opportunity to adhere to them or reject the agreement in its entirety;

(e) The amount of overdraft fees is disclosed in an ineffective, ambiguous, misleading, and unfair manner, since it is not contained in the Personal Deposit Account Contract, but rather in a different and separate document, the Schedule of Personal Deposit Account Terms and Charges, which is not signed by the depositor; and

(f) The Personal Deposit Account Contract provided to customers is ineffective, ambiguous, deceptive, unfair, and misleading in that it does not unambiguously state that First Niagara always reorders debits from high to low, even though First Niagara reorders transactions in this way for customers in order to maximize overdrafts and overdraft fee revenues for First Niagara.

73. Considering the great business acumen and experience of First Niagara in relation to Plaintiff and the Classes, the great disparity in the parties' relative bargaining power, the inconspicuousness and incomprehensibility of the contract language at issue, the oppressiveness of the terms, the commercial unreasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns, these provisions are unconscionable and, therefore, unenforceable as a matter of law.

74. The imposition of overdraft charges which exceed the amount overdrawn (*e.g.*, the imposition of a \$35 charge on an overdraft) is itself unconscionable. Such charges are not reasonably related to First Niagara's cost of covering the overdraft and/or its risk of nonpayment (where First Niagara pays the overdraft), or to First Niagara's cost of returning the item unpaid (where First Niagara does not pay the overdraft).

75. Plaintiff and members of the Classes have sustained damages as a result of First Niagara's unconscionable policies and practices as alleged herein.

### **THIRD CAUSE OF ACTION**

#### **Conversion** **(On Behalf of the Classes)**

76. Plaintiff repeats paragraphs 1 through 62 above.

77. First Niagara had and continues to have a duty to maintain and preserve its customers' checking accounts and to prevent their diminishment through its own wrongful acts.

78. First Niagara has wrongfully collected overdraft fees from Plaintiff and the members of the Classes, and has taken specific and readily identifiable funds from their accounts in payment of these fees in order to satisfy them.

79. First Niagara has, without proper authorization, assumed and exercised the right of ownership over these funds, in hostility to the rights of Plaintiff and the members of the Class, without legal justification.

80. First Niagara continues to retain these funds unlawfully without the consent of Plaintiff or members of the Classes.

81. First Niagara intends to permanently deprive Plaintiff and the members of the Classes of these funds and has denied Plaintiff and the Classes interest on those funds and has denied Plaintiff and the Classes the loss of use of these funds.

82. These funds are properly owned by Plaintiff and the members of the Classes, not First Niagara, which now claims that it is entitled to their ownership, contrary to the rights of Plaintiff and the members of the Classes.

83. Plaintiff and the members of the Classes are entitled to the immediate possession of these funds.

84. First Niagara has wrongfully converted these specific and readily identifiable funds.

85. First Niagara's wrongful conduct is continuing.

86. As a direct and proximate result of this wrongful conversion, Plaintiff and the members of the Classes have suffered and continue to suffer damages.

87. By reason of the foregoing, Plaintiff and the members of the Classes are entitled to recover from First Niagara all damages, interest, and costs permitted by law, including all amounts that First Niagara has wrongfully converted.

#### **FOURTH CAUSE OF ACTION**

##### **Unjust Enrichment** **(On Behalf of the Classes)**

88. Plaintiff repeats paragraphs 1 through 62 above.

89. Plaintiff, on behalf of herself and the Classes, asserts a common law claim for unjust enrichment.

90. By means of First Niagara's wrongful conduct alleged herein, First Niagara knowingly provides banking services to Plaintiff and members of the Classes that are unfair, unconscionable, and oppressive.

91. First Niagara knowingly received and retained wrongful benefits and funds from Plaintiff and members of the Classes. In so doing, First Niagara acted with conscious disregard for the rights of Plaintiff and members of the Classes.

92. As a result of First Niagara's wrongful conduct as alleged herein, First Niagara has been unjustly enriched at the expense of, and to the detriment of, Plaintiff and members of the Classes.

93. First Niagara's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

94. Under the common law doctrine of unjust enrichment, it is inequitable for First Niagara to be permitted to retain the benefits it received, and continues to receive, without justification, from the imposition of overdraft fees on Plaintiff and members of the Classes in an

unfair, unconscionable, and oppressive manner. First Niagara's retention of such funds under circumstances making it inequitable to do so constitutes unjust enrichment.

95. The financial benefits derived by First Niagara rightfully belong to Plaintiff and members of the Classes. First Niagara should be compelled to disgorge in a common fund for the benefit of Plaintiff and members of the Classes all wrongful or inequitable proceeds received by them. A constructive trust should be imposed upon all wrongful or inequitable sums received by First Niagara traceable to Plaintiff and the members of the Classes.

96. Plaintiff and members of the Classes have no adequate remedy at law.

### **FIFTH CLAIM FOR RELIEF**

#### **Violations of State Unfair Trade Practice Laws (On Behalf of the State Subclasses)**

97. Plaintiff repeats paragraphs 1 through 62 above.

98. This claim is asserted on behalf of the members of each State Subclass under their respective consumer protection statutes.

99. First Niagara engages in unfair or deceptive business practices relating to the imposition of overdraft fees on consumers, in violation of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a, *et seq.*, ("CUTPA"), as follows:

(a) Defendants' aforementioned conduct was undertaken in the course of its trade and business;

(b) While engaging in such business, the aforementioned conduct of Defendants constituted unfair or deceptive acts or practices in the conduct of trade or commerce within the meaning of CUTPA in that said conduct violates or offends public policy, is immoral, unethical or unscrupulous, or is substantially injurious to consumers;

(c) Defendants' conduct, in causing monetary injury to consumers and other business persons, resulted in injury that is substantial, could not reasonably have been avoided and is not outweighed by any countervailing benefit to consumers or other business persons;

(d) As a direct and proximate result of Defendants' violations of CUTPA, Plaintiff and each member of the State Subclass has suffered an ascertainable loss of money; and

(e) Pursuant to Conn. Gen. Stat. § 42-110g(c), copies of this Complaint have been or will be mailed to the Attorney General of the State of Connecticut and the Commissioner of Consumer Protection of the State of Connecticut.

100. First Niagara engages in deceptive and misleading business practices relating to the imposition of overdraft fees on consumers, in violation of New York General Business Law § 349 as follows:

(a) the conduct of Defendants is consumer-oriented;

(b) Defendants are engaging in an act or practice that is deceptive or misleading in a material way; and

(c) Plaintiff has been injured by reason thereof.

101. First Niagara engages in deceptive and misleading business practices relating to the imposition of overdraft fees on consumers, in violation of Massachusetts General Laws. c. 93A §§ 2, 11 as follows:

(a) Defendants' practice is within at least the penumbra of some common-law, statutory or other established concept of unfairness;

(b) Defendants' practice is immoral, unethical, oppressive, or unscrupulous;  
and

(c) Defendants' practice causes substantial injury to consumers.

102. First Niagara engages in deceptive and misleading business practices relating to the imposition of overdraft fees on consumers, in violation of the Pennsylvania Unfair Trade Practices Act and Consumer Protection Law, 73 Pa. Stat. Ann. § 201–1, *et seq.* as follows:

(a) Defendants made misrepresentations;

(b) Defendants' misrepresentations were material to the transaction;

(c) Defendants' misrepresentations were made falsely;

(d) Defendants' misrepresentations were made with the intent of misleading another to rely on them;

(e) Plaintiff and the State Subclass relied on the misrepresentations, and

(f) Plaintiff and the State Subclass's injury was proximately caused by the reliance.

103. As redress for First Niagara's repeated and ongoing violations of these consumer protection statutes, Plaintiff and the State Subclasses are entitled to, *inter alia*, damages, interest, costs, penalties, punitive damages, declaratory relief, and injunctive relief requiring First Niagara to immediately cease the practices alleged in this Complaint.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff, on behalf of herself and the members of the Classes, demands a jury trial and judgment as follows:

A. Injunctive relief enjoining First Niagara from charging overdraft fees under its current policies and from engaging in the wrongful, unfair, and unconscionable practices alleged herein.

B. Restitution of all overdraft fees paid to First Niagara by Plaintiff and the Classes, as a result of the wrongs alleged herein, within the applicable statutes of limitations, in an amount to be determined at trial;

C. Disgorgement of the ill-gotten gains derived by First Niagara from its misconduct;

D. Actual damages in an amount according to proof;

E. Punitive and exemplary damages;

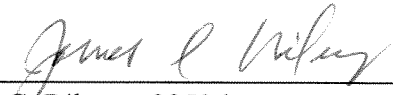
F. Pre-judgment interest at the maximum rate permitted by applicable law;

G. Costs and disbursements incurred by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and

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

Dated: November 7, 2011

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