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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA – BILLINGS DIVISION**

BRANDY MORRIS, on behalf of
herself and all others similarly
situated,

Plaintiff,

vs.

WALMART INC., previously known
as Wal-Mart Stores, Inc.,
TELECHECK SERVICES, LLC, and
TELECHECK SERVICES, INC.,

Defendants.

Case No.1:22-cv-00016-SPW-TJC

**AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

CLASS ACTION COMPLAINT

Plaintiff Brandy Morris, on behalf of herself and all persons similarly situated, alleges the following based on personal knowledge as to allegations regarding Plaintiff and on information and belief as to other allegations.

INTRODUCTION

1. Plaintiff brings this action on behalf of herself and a Class of all similarly situated consumers against Defendant Walmart, Inc., previously known as Wal-Mart Stores, Inc. (“Walmart” or “Wal-Mart”), Defendants TeleCheck Services, Inc. and TeleCheck Services, LLC (“TeleCheck”) (together, “Defendants”) arising from their deceptive, unfair and undisclosed practices of repeatedly reprocessing checks returned for insufficient funds—leading to repeated and punishing insufficient funds fees from customer’s banking institutions. Worse, Defendants repeatedly and without authorization attempt to debit a \$25 returned item fee repeatedly from its customers’ accounts. Defendants’ actions ensure that a single bounced check often results in bank fees assessed to its customers of \$180 or more. But Defendants never once disclose this practice to its customers.

2. Consumers who write checks in-store never authorize Walmart to reach into their accounts and—without authorization or any opportunity to dispute or challenge the act—take two or three return fees for a single bounced check.

3. Plaintiff brings this action as a class action, on behalf of a class consisting of all persons and entities from whose bank accounts Defendants have taken or tried to take purported “fees” for re-submitting to their bank account a check that had been returned due to insufficient funds, without their authorization or consent (the “Class” or “Members of the Class”).

4. These practices breach contractual promises; violate the covenant of good faith and fair dealing; and/or result in Defendants being unjustly enriched.

PARTIES, JURISDICTION, AND VENUE

5. Plaintiff resides in Billings, Montana and was a Walmart customer.

6. Defendant Walmart is an American multinational retail corporation formed in Delaware with its principal place of business in Bentonville, Arkansas, that operates a chain of hypermarkets, discount department stores, and grocery stores. As of September 30, 2016, Walmart has 11,573 stores and clubs in 28 countries including several stores in the State of Montana.

7. Defendants TeleCheck Services, Inc. and TeleCheck Services, LLC are check processing services formed in Delaware with their principal place of business located at 1600 Terrell Mill Road, Marietta, Georgia, 300067. TeleCheck serves as Defendant Walmart’s check processing partner and processes returned check fees on Walmart’s behalf.

8. This court has jurisdiction over Defendants pursuant to Rule 4, M.R.Civ.P., because Defendants are subject to personal jurisdiction here, regularly conduct business here, and a substantial part of the conduct giving rise to the claims asserted herein occurred in Montana.

9. Venue is proper in Yellowstone County under MCA § 25-2-118 because Plaintiff resides in Yellowstone County.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

A. Overview of Claim

10. Plaintiff brings this cause of action challenging Defendants' practices of a) repeatedly charging numerous returned check fees for the same check; and b) reprocessing both paper checks and returned check fees as separate items. These practices result in huge amounts of excessive and punitive bank fees assessed to Walmart's customers.

11. Here's how it happens. As an example, on January 2, 2018, Plaintiff wrote a check for \$139.71 at a Walmart store in Montana.

12. That check was returned unpaid by Plaintiff's bank. Plaintiff's bank assessed a \$30 "NSF Fee" as a result.

13. Then, six days later, on January 8, 2018, without any warning or notice to Plaintiff, Defendants attempted to process the same check again. This same check

was again returned unpaid by Plaintiff's bank, and Plaintiff's bank again charged *another* \$30 NSF Fee for it.

14. Then, seemingly out of nowhere and again without any notice to Plaintiff, on January 19, 2018, Defendants attempted to withdraw a \$25 "Return Fee" from Plaintiff's account. Plaintiff's account did not have sufficient funds in it to cover that \$25 Return Fee, and the attempt was returned unpaid and Plaintiff's bank charged her *another* \$30 NSF Fee as a result.

15. So far, Plaintiff had been assessed \$90 in bank fees as a result of her one returned check.

16. But the attempted collection of fees did not stop there. Defendants again sought to deduct another \$25 Return Fee from Plaintiff's account on January 26, 2018—almost a full month after Plaintiff originally wrote her check. Again, Plaintiff's account did not have enough funds in it to cover that \$25 Return Fee, and the attempt was returned unpaid and Plaintiff's bank charged her *another* \$30 NSF Fee as a result.

17. Then yet again, on February 2, 2018, Defendants again attempted to deduct another \$25 Return Fee from Plaintiff's account. Again, Plaintiff's account did not have enough funds in it to cover that \$25 Return Fee, and the attempt was returned unpaid and Plaintiff's bank charged her *another* \$30 NSF Fee as a result.

18. In all, Defendants made *five different debits* on Plaintiff's account for a single returned check. As a result, Plaintiff was assessed \$150 in NSF Fees by her bank as a result of Defendants' reprocessing practices—more than even the original check amount.

B. Because Defendants' Point of Sale Notice Does Not Accurately State its Policy of Collecting Multiple Return Fees for the Same Check, Defendants Breached their Contract with Customers When they Assessed More than One Return Fee on the Same Check

19. The federal Electronic Funds Transfer Act, Regulation E, provides, in relevant part, as follows:

§ 205.3 Coverage:

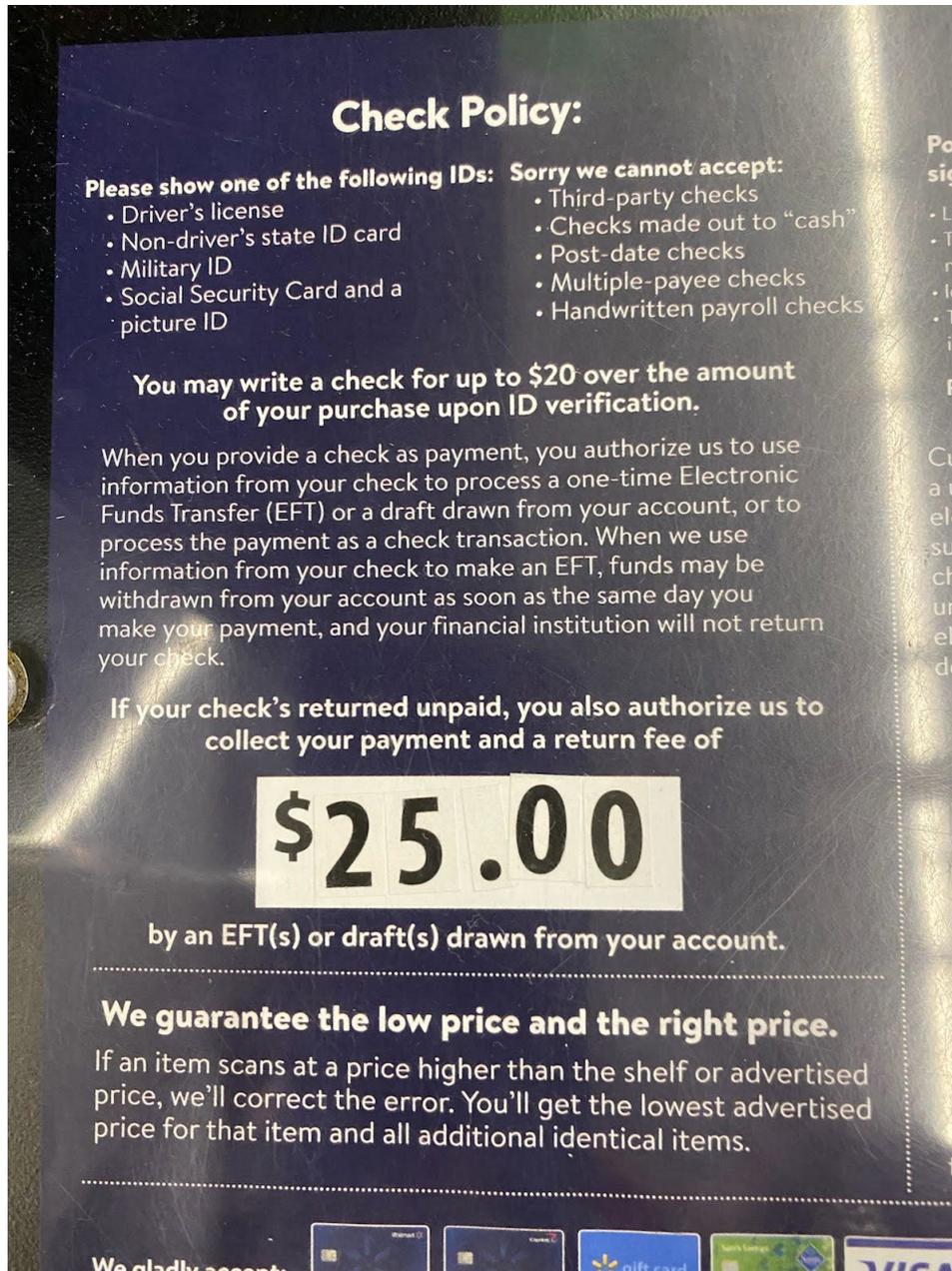
(3) Collection of returned item fees via electronic fund transfer.

(i) General. The person initiating an electronic fund transfer to collect a fee for the return of an electronic fund transfer or a check that is unpaid, including due to insufficient or uncollected funds in the consumer's account, **must obtain the consumer's authorization for each transfer**. A consumer authorizes a one-time electronic fund transfer from his or her account to pay the fee for the returned item or transfer if the person collecting the fee provides notice to the consumer stating that the person may electronically collect the fee, and the consumer goes forward with the underlying transaction. **The notice** must state that the fee will be collected by means of an electronic fund transfer from the consumer's account if the payment is returned unpaid and **must disclose the dollar amount of the fee**. If the fee may vary due to the amount of the transaction or due to other factors, then, except as otherwise provided in paragraph (b)(3)(ii) of this section, the person collecting the fee may disclose, in place of the dollar amount fee, an explanation of how the fee will be determined.

(emphasis added).

20. Accordingly, Defendants were required to notify their customers of their fee and reprocessing practices.

21. Upon information and belief, Defendants failed to do so because Walmart affixed the following notice to checkout aisles at its stores in Montana:



22. The notice expressly states that Defendants are only authorized to process a “one-time” payment when a customer writes a paper check and to collect a single “return fee of \$25.00” if “your check’s returned unpaid.”

23. Defendants violated this promise when they attempted to collect three different “return fees” and made five payment attempts from Plaintiff’s account, not the “one-time” payment they pledged to process. As a result, Plaintiff incurred new NSF Fees from her bank for the four additional debits Walmart made to her account over and above the single debit it promised.

24. Defendants did not comply with Regulation E’s dictates because they did not accurately state their fee and reprocessing policies, and because they did not obtain valid authorization from Plaintiff to make *five separate debits* on her account.

C. Defendants Promised to Assess a Return Fee with a Check Amount, not to Make Two Separate Debits

25. Moreover, Defendants promised to collect a “payment and a return fee of \$25,” not to make two separate check collection attempts plus three more separate return fee collection attempts. By splitting the return fee from the underlying payment amount, Walmart misrepresented its true practice and sidestepped Regulation E.

26. This practice resulted in many more debits to Plaintiff’s checking account, causing many more NSF Fees than warranted.

27. Defendants provide no disclosure of Walmart's true practices, and in so doing, deceive Walmart's check-writing customers.

D. Defendants Breached the Duty of Good Faith and Fair Dealing.

28. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are vested with discretionary power over the other party. In such circumstances, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties' reasonable expectations and means that Defendants are prohibited from exercising discretion to enrich themselves and gouge customers. Indeed, Defendants have a duty to honor transaction requests in a way that is fair to Plaintiff and their other customers and are prohibited from exercising discretion to pile on ever greater penalties. Here—in the notice stickers Defendants foisted on Plaintiff and their other customers—Defendants unilaterally provided themselves with numerous discretionary powers. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, Defendants abuse that discretion by repeatedly debiting customers' accounts even when only a single check is written, contrary to customers' reasonable expectations.

29. By exercising discretion in their own favor—and to the prejudice of Plaintiff and other customers—by repeatedly re-debiting their accounts, Defendants

breach the reasonable expectation of Plaintiff and other customers and in doing so violate the implied covenant to act in good faith.

30. It was bad faith and totally outside Plaintiff's reasonable expectations for Defendants to use discretion to make five separate debits on her account for a single check.

E. Defendants Concealed Their Wrongdoing

31. Because Defendants did not disclose their re-debiting practice, Plaintiff and the Class did not and could not reasonably have discovered Defendants' conduct until recently.

32. The nature of Defendants' conduct is such that Plaintiff, and each member of the Class would be unaware that Defendants were engaging in wrongdoing by re-debiting class members' accounts. Defendants did not provide any direct notice to Plaintiff or class members of their re-debiting practice. And as a regular shopper at Walmart, Plaintiff was unaware, when she saw multiple charges from Walmart on her bank statement over the course of several weeks, that Defendants were re-debiting her account for the same purchase as opposed to for new purchases. Additionally, given that bank statements provide only minimal information about each transaction which resulted in a fee, Plaintiff and class members lacked the knowledge, experience, and training to reasonably ascertain Defendants' re-debiting practices.

33. Defendants were aware of their non-disclosure because of their superior knowledge of their own conduct. Concealment of their conduct and failure to disclose their conduct to Plaintiff and the Class constitutes fraudulent concealment and therefore tolls the statute of limitations for Plaintiff and the Class.

34. Plaintiff did not learn of Defendants' conduct supporting Plaintiff's claims until approximately Summer 2021, after consulting with counsel. Plaintiff was not at fault for failing to discover Defendants' conduct and had no actual or presumptive knowledge of her claims.

CLASS ACTION ALLEGATIONS

35. Plaintiff brings this action on behalf of herself and on behalf of all others similarly situated pursuant to Rule 23, Federal Rules of Civil Procedure. The Class includes:

All persons who, within the applicable statute of limitations period, were charged multiple fees from their banks as a result of Defendants' repeat debit policy.

36. Excluded from the Class are Defendants, Defendants' subsidiaries and affiliates, their officers, directors, and the members of their immediate families, and any entity in which Defendants have a controlling interest, the legal representatives, heirs, successors, or assigns of any such excluded party, the judicial officer(s) to whom this action is assigned, and the members of their immediate families.

37. Plaintiff reserves the right to modify or amend the definition of the proposed Class and/or to add subclass, if necessary, before this Court determines whether certification is appropriate.

38. The questions here are ones of common or general interest such that there is a well-defined community of interest among the members of the Class. These questions predominate over questions that may affect only individual Class members because Defendants have acted on grounds generally applicable to the Class. Such common legal or factual questions include, but are not limited to:

- a) Whether Defendants improperly debited customers' accounts;
- b) Whether any of the conduct enumerated above violates the contract;
- c) Whether any of the conduct enumerated above violates the covenant of good faith and fair dealing;
- d) Whether any of the conduct enumerated above constitutes unjust enrichment; and
- e) The appropriate measure of damages.

39. The parties are numerous such that joinder is impracticable. Upon information and belief, and subject to class discovery, the Class consists of thousands of members or more, the identities of whom are within the exclusive knowledge of and can be ascertained only by resort to Defendants' records. Defendants have the administrative capability through computer systems and other records to identify all members of the Class, and such specific information is not otherwise available to Plaintiff.

40. It is impracticable to bring Class members' individual claims before the Court. Class treatment permits a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort, expense, or the possibility of inconsistent or contradictory judgments that numerous individual actions would engender. The benefits of the class mechanism, including providing injured persons or entities with a method for obtaining redress on claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in the management of this class action.

41. Plaintiff's claims are typical of the claims of the other members of the Class in that they arise out of the same wrongful business practices by Defendants, as described herein.

42. Plaintiff is more than an adequate representative of the Class in that Plaintiff has tendered payments to Defendants and has suffered damages as a result of Defendants' contract violations, Defendants' violations of the covenant of good faith and fair dealing, and Defendants' unjust enrichment. In addition:

- a) Plaintiff is committed to the vigorous prosecution of this action on behalf of herself and all others similarly situated and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers against financial institutions;
- b) There is no conflict of interest between Plaintiff and the unnamed members of the Class;

- c) Plaintiff anticipates no difficulty in the management of this litigation as a class action; and
- d) Plaintiff's legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

43. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its treatment as a class action.

44. Defendants have acted or refused to act on grounds generally applicable to each of the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each Class as a whole.

45. All conditions precedent to bringing this action have been satisfied and/or waived.

CAUSES OF ACTION

COUNT I

BREACH OF CONTRACT

(On Behalf of Plaintiff and the Class)

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

47. Plaintiff and Defendants contracted for the sale and purchase of goods, as embodied in Defendants' checkout counter notice sticker.

48. Defendants mischaracterized in the notice sticker their true return fee and reprocessing practices and breached the express terms.

49. No contract provision authorizes Defendants to charge more than one return fee for the same check, to undertake multiple debits on an account for the same check.

50. Defendants have breached their contracts with Plaintiff and the Class through policies and practices as alleged herein.

51. Plaintiff and members of the putative Class have performed all of their obligations.

52. Plaintiff and members of the putative Class have sustained monetary damages as a result of each of Defendants' breaches.

COUNT II
BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
(On Behalf of Plaintiff and the Class)

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

54. Plaintiff and Defendants contracted for the purchase and sale of goods as set forth in Defendants' checkout counter notice sticker.

55. The checkout counter notice sticker is a contract of adhesion.

56. Implied in the parties' contract under Montana law is a covenant of good faith and fair dealing including an obligation of honesty in fact. This good faith requirement extends to the way a party employs discretion conferred by a

contract. The covenant of good faith and fair dealing constrains Defendants' discretion to abuse self-granted contractual powers.

57. 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.

58. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes its 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. Other 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.

59. Defendants breached the covenant of good faith and fair dealing through their payment policies and practices imposing additional fees on Plaintiff and the Class as explained herein.

60. Each of Defendants' actions were done in bad faith and were arbitrary and capricious.

61. Plaintiff and members of the putative Class have performed all of their obligations.

62. Plaintiff and members of the putative Class have sustained monetary damages as a result of each of Defendants' breaches of the covenant of good faith and fair dealing.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, demands a jury trial on all claims so triable and judgment as follows:

A. Certifying the proposed Class pursuant to Federal Rule of Civil Procedure 23, appointing the Plaintiff as representative of the Class, and appointing counsel for Plaintiff as lead counsel for the Class;

B. Declaring that Defendants' policies and practices as described herein constitute a breach of contract and a breach of the covenant of good faith and fair dealing or unjust enrichment;

C. Enjoining Defendants from the wrongful conduct as described herein;

D. Awarding restitution of all fees at issue paid to Defendants by Plaintiff and the Class as a result of the wrongs alleged herein in an amount to be determined at trial;

E. Compelling disgorgement of the ill-gotten gains derived by Defendants from their misconduct;

F. Awarding actual and/or compensatory damages in an amount according to proof;

G. Awarding pre-judgment interest at the maximum rate permitted by applicable law;

I. Reimbursing all costs, expenses, and disbursements accrued by Plaintiff in connection with this action, including reasonable attorneys' fees, costs, and expenses, pursuant to applicable law and any other basis; and

J. Awarding such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff and all others similarly situated hereby demand trial by jury on all issues in this Class Action Complaint that are so triable.

DATED this 15th day of August, 2023.

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