IN THE IOWA DISTRICT COURT IN AND FOR DUBUQUE COUNTY
IOWA BUSINESS SPECIALTY COURT

BEVERLY MASON, individually and on behalf of all others similarly situated, **Plaintiff,** v. **DUBUQUE BANK AND TRUST COMPANY,** **Defendant.**	)))))))))))	**Case No. LACV111838** **RULING ON DEFENDANT'S MOTION TO DISMISS**

On August 9, 2021, Defendant's Pre-Answer Motion to Dismiss came before the Court. The parties agreed to an extended briefing schedule, and the final brief was submitted October 1, 2021. Plaintiff is represented by Attorneys Roxanne Conlin and James Stranch IV. Defendant is represented by Attorneys Angel West, Juli Lund, Thomas Goodhue, Ryan Scarborough, and Jesse Smallwood. After having considered Defendant's Motion to Dismiss, Plaintiff's Resistance to the same, Defendant's Reply, and the applicable law, the Court enters the following ruling on the pending motion.

FACTUAL BACKGROUND

Plaintiff Beverly Mason is an accountholder of Defendant Dubuque Bank and Trust Company ("DBT"). DBT allows their accountholders to make transactions with third parties using funds held in the account through a debit card, and Mason took advantage of this right. However, in the event that one of these transactions would reduce an account's balance below $0—referred to as an "overdraft," DBT reserves the right to charge certain fees on the account. Mason incurred some such fees, and now challenges a portion of those fees as violating DBT's account agreement—the contractual arrangement between DBT and each of its accountholders.

Specifically, Mason challenges fees being imposed for (1) transactions which were initially authorized by DBT at a time when they would not result in an overdraft, but did create an overdraft when the third party later requested payment of the funds from the account, and (2) transactions which were rejected because they would result in an overdraft, but which are resubmitted by the third party at a later time—resulting in a second fee.

The first of these issues can occur because of the way debit card transactions are conducted, which is generally a two-step process. First, an accountholder attempts to use their debit card to engage in a transaction with a third party. At this moment, the financial institution decides whether to authorize that transaction, notifying the store that the institution will pay the requested amount. However, the funds for the transaction are not immediately sent to the third party. Later on, the third party will submit a formal request for payment. This second incident is sometimes referred to as "settlement." This two-step process occasionally creates problems because a transaction may look like it will not result in a negative account balance when it is authorized, but the transaction later overdraws the account at the time of settlement due to intervening transactions. Mason specifically alleges that this should not actually constitute an overdraft under DBT's contract because DBT promises to "hold" funds for authorized transactions to guarantee payment at a later time.

Mason field her petition challenging the APSN practice on March 17, 2021. The case was transferred to the Iowa Business Specialty Court on July 1, and Mason filed her amended petition on July 9—adding her claim attacking the multiple-fee practice. DBT now moves for dismissal.

ANALYSIS

I. Motion to Dismiss Standards

A pre-answer motion to dismiss under Iowa Rule of Civil Procedure 1.421(1)(f) should be granted "when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claims asserted." *Pennsylvania Life Insurance Co. v. Simoni*, 641 N.W.2d 807, 810 (Iowa 2002). "A court should grant a motion to dismiss 'only if the petition on its face shows no right of recovery under any state of facts.'" *Young v. HealthPort Technologies, Inc.*, 877 N.W.2d 124, 127 (Iowa 2016) (quoting *Tate v. Derifield*, 510 N.W.2d 885, 887 (Iowa 1994)). "A motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions." *Kingsway Cathedral v. Iowa Department of Transportation*, 711 N.W.2d 6, 8 (Iowa 2006). "Under our notice-pleading standards, nearly every case will survive a motion to dismiss for failure to state a claim upon which any relief may be granted." *Young*, 877 N.W.2d at 127. "In ruling on a motion to dismiss, a court construes the petition in the light most favorable to the plaintiff and resolves any doubts in the plaintiff's favor." *Id.* at 128.

When evaluating a motion to dismiss, the Court may consider any documents attached to the Petition or incorporated by reference therein. *See Karon v. Elliott Aviation*, 937 N.W.2d 334, 347-48 (Iowa 2020); *King v. State*, 818 N.W.2d 1, 6 n.1 (Iowa 2012). In this case, the documents which make up the contractual agreement between the parties were attached to Plaintiff's Amended Petition, and thus may properly be considered as part of this motion. "Construction and interpretation of contracts are to be resolved by the court as a matter of law." *McKenzie v. Eastern Iowa Tire, Inc.*, 448 N.W.2d 464, 466 (Iowa 1989). Accordingly, contract interpretation is generally within the scope of the Court's authority in resolving a motion to dismiss.

II. Breach of Contract

Plaintiff's complaint primarily rests on two claims for breach of contract. The first claim alleges that Defendant breached their contract with Plaintiff by charging overdraft fees on the APSN transactions described above. The second claim alleges a breach of contract due to a claim that Defendant, on two occasions, charged multiple fees to Plaintiff's account for one transaction—either multiple insufficient funds fees or one insufficient funds fee followed by an overdraft fee.

> Generally, to establish a claim for a breach of contract, [a plaintiff] must show "(1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach."

Iowa Arboretum, Inc. v. Iowa 4-H Foundation, 886 N.W.2d 695, 706 (Iowa 2016) (quoting *Iowa Mortgage Ctr., L.L.C. v. Baccam*, 841 N.W.2d 107, 110-11 (Iowa 2013)). Defendant suggests that Plaintiff's complaint is deficient on the fourth of these elements, arguing that the contract specifically authorized the fees charged and so the alleged conduct was not a breach of the contract. "The interpretation of a written contract is a question of law, unless the contract is ambiguous." *Margeson v. Artis*, 776 N.W.2d 652 (Iowa 2009). As such, the Court may determine the proper interpretation of the contract at this stage of proceedings unless there is an ambiguity in the contract which requires evidence extrinsic to the contract to resolve. *Rick v. Sprague*, 706 N.W.2d 717, 723 (Iowa 2005). "The primary goal of contract interpretation is to determine the parties' intentions at the time they executed the contract." *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001).

A. Overdraft Fees on APSN Transactions

Count I of Plaintiff's amended petition charges Defendant with breaching the contract for charging overdraft fees on APSN transactions. The parties agree that the contract allows Defendant to charge overdraft fees in general, but disagree as to the timing of when an overdraft is determined—with Plaintiff arguing that an overdraft determination may only occur at the time an account holder swipes their debit card and Defendant arguing that the overdraft determination may occur when they ultimately transfer the funds from the account. The contract itself contains a section devoted to defining when an overdraft is determined—appropriately titled "Determining Overdrafts." (Account Agreement, Ex. A to Pl.'s Am. Pet. at 10) [hereinafter "Account Agreement"]. This section reads as follows:

> We may determine the funds available in your Account in connection with determining whether payment of an Item will create an Overdraft at any time between the time we receive the Item and the deadline for us to take action on the Item. We are not required to make this determination more than one (1) time during this period. You should note that sometimes we authorize a transaction at a time when you have enough available funds to cover it, but because other transactions post before it and reduce your Available Balance, the transaction creates an Overdraft when we post it to your Account. If we get a batch or multiple batches of Items in a day, and if one, some or all of them would overdraw your Account if paid, we will generally post Items in accordance with the procedures described in the "Posting" section. This may result in larger dollar Items being processed before small dollar Items, even though this would have the effect of reducing your Available Balance more quickly.

Id. at 10-11. The contract instructs that the overdraft determination will occur "at any time between the time [Defendant] receive[s] the Item and the deadline for [Defendant] to take action on the Item." *Id.* at 10. So, the triggering condition for Defendant to make an overdraft determination is Defendant receiving an "Item."

The contract defines "Item" as:

> (i) all orders and instructions for payment, transfer or withdrawal of funds from your Account (whether issued or unissued); (ii) all deposits to your Account, even

> if returned unpaid; (iii) any Holds or restrictions we put on your Account; and (iv) any other Debits or Credits to your Account. This includes without limitation checks or substitute checks and purported substitute checks; drafts and demand drafts; remotely created checks and items; image replacement documents; Electronic Fund Transfers and preauthorized electronic transactions; in-person withdrawals and transfers; withdrawal slips; any applicable Account fees; and any written document created or authorized in your name that would be a check or draft but for the fact that is [sic] has not been signed; deposit adjustments; and any photocopy or image of any of the foregoing.

Id. at 1-2. This definition is quite broad, and it unambiguously includes "instructions for payment, transfer or withdrawal of funds from [the] Account." *Id.* This clearly shows that the Defendant must conduct an overdraft determination at the time a merchant later seeks payment of the funds due on a transaction which has already been authorized. The Defendant receiving notice and a request for authorization at the time an account holder initiates a debit transaction with a merchant is not an "instruction for payment." On the facts alleged, the merchant must later submit a separate request to have the funds actually transferred. Accordingly, the initial request for authorization cannot be an "instruction for payment" because no payment necessarily follows from the request. Instead, if the initial transaction is authorized, the "instruction for payment" would come when the merchant submits their second request—this time for transfer of funds. As such, the contract unambiguously authorizes Defendant to make an overdraft determination at a later point than the moment of authorization, as claimed by Plaintiff—any point, in fact, between Defendant's receipt of the merchant's fund transfer request and Defendant's deadline for acting on that request. *Id.* at 10.

Though the plain and unambiguous language already discussed demands this result, this conclusion is strongly reinforced by the next sentence of the "Determining Overdrafts" section of the contract: "You should note that sometimes we authorize a transaction at a time when you have enough available funds to cover it, but because other transactions post before it and reduce

your Available Balance, the transaction creates an Overdraft when we post it to your Account." (Account Agreement at 10). This language makes it abundantly clear that the practice Plaintiff complains of may occur. Plaintiff attempts to inject ambiguity into this language by arguing that it is unclear which transaction this sentence suggests will generate an overdraft—the original transaction or the intervening one. The Court disagrees. The sentence clearly refers back to the original transaction as generating the overdraft fee when it refers to "the transaction" as a singular object. In contrast, the intervening transactions are referred to in the plural form—"other transactions." Furthermore, the full context and structure of the sentence show that the word "but" and the placement of the commas are used to connect the separate idea of the original clause—that a transaction may be authorized on a positive balance—through a second warning clause—that intervening transactions may reduce the available balance—to the conclusion which the explanation provokes—that the original transaction, though initially authorized on a positive balance, creates an overdraft. This is the only reasonable reading which a sentence structured in this manner permits. So, the Court finds that this clause clearly and unambiguously discloses that the overdraft determination will occur at the later point in time suggested by Defendant—after the merchant submits the final request for payment. The fact that the contract explicitly warns account holders of the practice now complained-of cuts sharply against finding that the practice breaches the agreement.

Plaintiff argues against this reading of the contract by asserting that the agreement requires Defendant to place a "debit hold" on the funds in an account which are necessary to pay an authorized transaction. So, Plaintiff suggests, it is impossible for a transaction, once authorized on a positive account balance, to result in an overdraft. Thus, any overdraft fee being issued is a breach of the account agreement. The contract does state that Defendant will put a

"hold" on funds when a transaction is authorized. *See* (Account Agreement at 3) (noting that an account's "Available Balance" is reduced by "Holds," and indicating that "Holds" may be placed "on deposits you have made to your Account and pending transactions that we have authorized but not yet posted to your Account"). However, the contract defines "hold" as follows:

> "Hold" means that we put a Hold on (or "freeze") some or all of the funds in your account, meaning that we may refuse to: (i) allow withdrawals from the Account; (ii) pay Items drawn against your Account or process other Debit transactions to your Account; and (iii) refuse to accept deposits to your Account or process other Credit transactions to your Account.

Id. This definition does not actually state that Defendant will hold funds in abeyance to guarantee that the transaction will not overdraw the account. It says that Defendant may do so, by granting Defendant discretion to refuse to allow withdrawals or pay Items which would not reduce the actual account balance below $0, but would reduce it below the "hold" amount. If Defendant chooses not to use this discretion for some reason—say, for instance, because an account holder is participating in the "Overdraft Privilege" program set out in the agreement[1]—the funds will not have actually been set aside for the transaction which was previously approved, and the transaction will, actually, overdraw the account when the merchant eventually requests the transaction be paid unless the account holder adds funds to the account to make up for the amount lost by the intervening transaction. Because the transaction then overdraws the account, it does not breach the account agreement for Defendant to charge an overdraft fee.

To hold otherwise would be to require Defendant to ignore reality. As the definitions in the account agreement regarding held funds have shown, the money subject to a hold does not get stored away in some locked box in the back of the bank only to be used for that specific transaction. When Plaintiff—or any other account holder—engages in another transaction after

[1] The "Overdraft Privilege" program allows an account holder to guarantee that Defendant will pay "Items" which overdraw the account up to a certain value. *See* (Account Agreement at 11-12).

the initial transaction is authorized, but before the third party requests payment of the transaction, the only way the account balance would not be reduced is if Defendant rejects the later transaction altogether. The Court notes that Plaintiff does not seem to raise any objections about Defendant's decision to accept these intervening transactions—indeed, Plaintiff may well have been worse off if Defendant had done so. But the consequence of paying these additional transactions is that Plaintiff's balance was reduced—and this reduction caused the account to be overdrawn when the previously-authorized transaction finally settled.

The Court recognizes that this reality when paired with the fact that an overdraft is determined based on the account's available balance—which is reduced by the amount of the hold—can easily lead to a chain of overdraft fees being incurred after the first incident of overdraft as every pending transaction with funds "held" to cover that transaction cascades into another overdraft when it is presented for payment. However, it is not the Court's role to rewrite the contract to achieve some abstract objective of justice.

> It is not within the province, function, duty, or power of the court to alter, revise, modify, extend, rewrite, or remake a contract by construction, or to make a new, or different, contract for the parties, whether in the guise of construction or otherwise; its duty is confined to the construction or interpretation of the one which they have made for themselves …
>
> The court may not rewrite the contract for the purpose of accomplishing that which, in its opinion, may appear proper, or, on general principles of abstract justice, or under the rule of liberal construction, make for the parties a contract which they did not make for themselves, or make for them a better contract than they chose, or saw fit, to make for themselves, or remake a contract, under the guise of construction, because it later appears that a different agreement should have been consummated in the first instance, or in order to meet special circumstances or contingencies against which the parties have not protected themselves.
>
> Likewise, the court may not alter a contract for the benefit of one party and to the detriment of the other or others, or make a new contract at the instance of one of the parties, or, by a process of interpretation, relieve one of the parties from the terms to which he voluntarily consented, or, because of equitable considerations, obviate objections which might have been foreseen and guarded against, … .

Smith v. Stowell, 125 N.W.2d 795, 799 (Iowa 1964) (quoting 17A C.J.S. *Contracts* § 296(3) (1963)) (internal quotation marks omitted) (alterations in original). The express contract language is with Defendant. To the extent Plaintiff seeks to use an allegation of breach of contract to correct some generalized injustice based on this possibility of a chain of overdraft fees occurring, Plaintiff asks this Court to exceed its proper role. The Court will not do so.

By way of closing, the Court also notes that, in Plaintiff's initial petition to the Court, Plaintiff—at the time mistakenly believing the terms and conditions of a different financial institution formed Defendant's account agreement—criticized Defendant for not following a general trend among financial institutions and including language in the contract expressly stating that this practice will occur. In support to this criticism, Plaintiff cited three other financial institutions' account agreements favorably for expressly disclosing the practice of charging overdraft fees on APSN transactions using the following language: (1) "The amount being held is not applied to the debit card transaction. … If other account activity has caused the funds available in your account to drop below zero before the debit card transaction is paid, you may no longer have sufficient funds to pay the merchant," (2) "Available balance at the time transactions are posted (not when they are authorized) may be used to determine when your account is overdrawn," and (3) "Other intervening transactions that occur while authorized debit card transactions are pending may create overdrafts on your account." (Pet. ¶¶ 49-51) (quoting account agreements from Bank of America, Canvas Credit Union, and Capital One, respectively). However, as noted above, Defendant does expressly disclose this practice in their account agreement. While the Court will not hold Plaintiff to the position that such language makes the practice acceptable as a matter of judicial estoppel,[2] the Court does find it telling that

[2] Plaintiff's prior position did not specifically assert that the fee practice was acceptable if disclosed, and Plaintiff cannot be said to have "successfully" asserted that position. *See Winnebago Industries, Inc. v. Haverly*, 727 N.W.2d

Plaintiff seemed to acquiesce to the fee practice when expressly disclosed until it was revealed that Defendant did, in fact, disclose it.

B. Multiple Fees on a Single Transaction

In Count II, Plaintiff alleges that Defendant breached the contract by charging multiple fees on a single transaction—by being presented with a particular transaction by a merchant, returning the transaction unpaid and charging an insufficient funds fee to Plaintiff, then being presented the same transaction by the merchant again and charging another overdraft or insufficient funds fee for the second presentation of that transaction. Defendant raises two arguments in response: (1) that Plaintiff's claim on this Count is barred by the statute of limitations, and (2) that this practice is explicitly authorized by the contract language.

1. The Statute of Limitations

Defendant first argues that this claim is barred by the seven-year statute of limitations for contract-based claims against State banks. *See* Iowa Code § 524.221(2) (2021). Defendant asserts that Plaintiff points to only two incidents where this allegedly occurred—once on May 5, 2014, and once on June 2, 2014. So, Defendant suggests, because these claims were first raised in Plaintiff's amended petition, which was filed July 9, 2021, this claim is time-barred. Plaintiff does not contest that the seven-year statute of limitations applies, or that their only multiple-fee claims are for incidents which occurred more than seven years before the amended petition was filed. However, Plaintiff argues that the statute of limitations does not bar their claim for two

567, 573 (Iowa 2006) ("[T]he doctrine of judicial estoppel prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding. It is a common sense rule, designed to protect the integrity of the judicial process by preventing deliberately inconsistent—and potentially misleading—assertions from being successfully urged in succeeding tribunals. The doctrine is properly limited in its application to cases involving privity with, or prejudice to, the party invoking the doctrine. Another fundamental feature of the doctrine is the requirement of proof that the inconsistent position has been successfully asserted in the prior tribunal. Without such proof, application of the rule is unwarranted because no risk of inconsistent, misleading results exists.") (internal quotation marks and alterations in original omitted).

reasons: (1) the filing of this claim should relate back to the filing of their original petition on March 17, 2021, so the complained-of incidents occurred within the seven-year limitations period and (2) Defendant was responsible for any delay in bringing this claim past the date of the original petition, so Defendant should be estopped from raising the statute of limitations as a defense. For the reasons that follow, the Court finds that this claim is time-barred.

Whether a particular amended pleading relates back to the date of a previous pleading is governed by Iowa Rule of Civil Procedure 1.402(5). The Rule states: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Iowa R. Civ. P. 1.402(5) (2021). Plaintiff argues that this claim falls within the scope of the relation-back rule because the claim is premised on the same contractual agreement and, like the breach of express contract claim in the original petition, challenges the imposition of a fee on Plaintiff's account. Defendant asserts that the multiple-fee claim raises a substantively different claim by relying on a totally different factual theory of breach, and indeed involves the definition of a different prospective class of plaintiffs. In support of their position, Defendant primarily relies on *In re Estate of Glaser*, 959 N.W.2d 379, 383-85 (Iowa 2021). Plaintiff, for their part, attempts to distinguish *Estate of Glaser* and instead relies solely on *Elms v. Armstrong Bank*, No. CJ-2020-350 (Muskogee Cnty., Okla. July 7, 2021)—a trial court opinion from the State of Oklahoma, presumably applying Oklahoma law, which this Court has been unable to locate. Ultimately, the Court agrees that this claim does not relate back to the date of the original filing principally because it asserts an entirely new theory of breach.

In *Estate of Glaser*, the Estate sought to claw back property transferred by the decedent to a close friend before his death. 959 N.W.2d at 380. The Estate filed a motion to set aside a

transfer of three lots—identified as "Lots 11, 12, and 13"—which occurred on November 19, 2012. *Id.* at 381. A bench trial was held on the matter and, at the close of evidence, the Estate sought to verbally amend the motion to include clawbacks of two other transfers. *Id.* at 380. These transfers involved "farm property" which was conveyed by the decedent to the same transferee for the same purpose—defrauding creditors—though the transfers occurred in September, 2011, and September, 2012, respectively. *Id.* at 382. The Estate argued that the amendment was proper—notwithstanding the statute of limitations—because it should relate back to the original motion filing, since these transfers of farm property were part of a general "series of transactions" with the same wrongful intent. *Id.* at 383. The Court disagreed. *Id.* at 383-84. The Court found no reference in the motion which could have pointed to the Estate challenging fraudulent transfers generally, instead finding that the original motion was a specific challenge to the transfer of Lots 11, 12, and 13. *Id.* The Court concluded:

> In closing, it is important to observe what this case is not. This is not a case of a mistake in the original pleading where a party has been misnamed or left out or where property has been misdescribed. This is not a case of a previously unpled theory arising out of the same facts alleged in the original pleadings. Instead, we have a proposed amendment attacking the transfer of a property that is nowhere mentioned in the original pleading. Although there may be similarities in the claims or even an overlap of evidence, the transaction involving the farm property in September 2011 arose from different "conduct, transaction, or occurrence" than the transfers that occurred a year later with respect to the real property in Maquoketa. As a result, under Iowa Rule of Civil Procedure 1.402(5), the proposed amendment does not relate back to the filing of the administrator's original motion.

Id. at 384-85.

Plaintiff seeks to distinguish *Estate of Glaser*, arguing only:

> In *Matter of Est. of Glaser*, 959 N.W.2d 379, 384 (Iowa 2021), *reh'g denied* (June 7, 2021), the Court found that taxing authority's action regarding the transfer of farm property to a third party did not relate back to claims regarding the fraudulent transfer of non-farm property because defendant was not on notice of the new claim. Here, DB&T has been on notice that Plaintiff challenges DB&T's fee assessment practices since the filing of the original petition.

(Pl.'s Br. in Resistance to Def.'s Mot. To Dismiss at 26). This argument misses the point. Whether the original petition actually challenges Defendant's fee practices generally or specifically challenges Defendant's practice of charging overdraft fees on APSN transactions is precisely the fighting issue here. If the original petition only challenged Defendant's fee practices with regard to APSN transactions, the logic of *Estate of Glaser* wholly applies. And, despite Plaintiff's conclusory statement to the contrary, Plaintiff has not convinced the Court that the original petition does implicate Defendant's fee practices beyond the APSN context.

The very first paragraph of Plaintiff's original petition states: "This is a civil action seeking monetary damages, restitution, injunctive, and declaratory relief from DB&T over the improper assessment and collection of $35 Overdraft Fees on transactions that did not actually overdraw the account." (Pet. at 1). But, the multiple fees claim actually challenges the imposition of insufficient funds fees, not overdraft fees—Plaintiff takes issue with the fact that Defendant charged a second fee after charging an initial insufficient funds fee for action on a particular transaction when the merchant later resubmits it for payment. Furthermore, reading the petition through makes it abundantly clear that Plaintiff was solely concerned with Defendant charging overdraft fees on APSN transactions. There is nothing in the original petition which suggests Defendant should have been on notice of a broader challenge to Defendant's imposition of any other account fees. Accordingly, the Court finds the logic of *Estate of Glaser* is directly on point. The factual basis for the multiple fee claim is fundamentally different from the facts underlying the APSN fee claim. As such, the multiple fee breach of contract claim does not relate back to the filing date of the original petition and is presumptively time-barred.

Plaintiff's second argument that equitable estoppel prevents application of the statute of limitations to this claim is also unconvincing.

> [E]quitable estoppel can be asserted to avoid the statute of limitations defense in Iowa Code section 524.221(1). This is because "even when a party has knowledge of a prima facie case," the defendant's misrepresentations that he "knows or should have known would lull the [plaintiff] into inaction may provide a vehicle to toll the running of the filing limitation under the equitable estoppel doctrine."

Benskin, Inc. v. West Bank, 952 N.W.2d 292, 304 (Iowa 2020).

> A party asserting equitable estoppel must demonstrate the following by clear and convincing evidence:
> "(1) The defendant has made a false representation or has concealed material facts; (2) the plaintiff lacks knowledge of the true facts; (3) the defendant intended the plaintiff to act upon such representations; and (4) the plaintiff did in fact rely on such representations to his prejudice."

Boehme v. Fareway Stores, Inc., 762 N.W.2d 142, 146-47 (Iowa 2009) (citations omitted).

"Equitable estoppel embraces the fundamental rule of equity that a party should not be able to profit from its own wrongdoing." *Mormann v. Iowa Workforce Development*, 913 N.W.2d 554, 572 (Iowa 2018).

Plaintiff relies on three alleged factual bases for their claim of equitable estoppel: (1) Defendant misrepresented that the only contract document which existed was Plaintiff's signature card, and only produced the real remaining contract documents two weeks before the limitations period would expire, (2) Plaintiff requested a complete set of bank statements and fee notices from Defendant roughly five months prior, but Defendant did not provide the documents until the day the limitations period ran, and (3) Defendant did not provide Plaintiff with a complete set of their fee schedules—which were requested at the same time as the bank statements—until over a month after the limitations period expired. Defendant resists these assertions on two grounds. First, Defendant argues that the second and third of Plaintiff's arguments—regarding Defendant's failure to provide requested documents—is best understood as a failure to disclose, which cannot serve as a basis for asserting equitable estoppel under *Mormann*. Second, Defendant asserts that Plaintiff's petition shows on its face that Plaintiff did

not actually rely on Defendant's assertion that the signature card was the only contract document.[3] The Court agrees with Defendant that equitable estoppel does not apply to this claim.

The Court proceeds with Plaintiff's assertions regarding Defendant's failure to quickly disclose certain documents first. Defendant, in opposing these bases for asserting equitable estoppel, relies primarily on *Mormann v. Iowa Workforce Development*, 913 N.W.2d at 572-75, 577-58. In *Mormann*, the Iowa Supreme Court was highly skeptical of invoking an "omission" theory of equitable estoppel in the context of an age discrimination lawsuit. *Id.* Echoing concerns articulated by the United States Seventh Circuit Court of Appeals in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), the *Mormann* Court rejected a plaintiff's argument that equitable estoppel should allow the plaintiff to proceed with their age discrimination suit—though filed after the limitations period had run—because the employer had "concealed" their discriminatory motive by telling the plaintiff they were being terminated for another reason. *Mormann*, 913 N.W.2d at 577-78. The Court held that "in order to state a claim for equitable estoppel in the context of a filing limitation, the plaintiff must show an affirmative misrepresentation that the employer knew or should have known would delay the filing of a timely claim." *Id.* at 578.

While this suggests that Plaintiff cannot rely on Defendant merely dragging their feet handing over requested documents as a basis for equitable estoppel, *Mormann* does not completely resolve this question. The analysis employed by the Supreme Court leaves it an open question whether the rule of *Mormann* was meant to apply to equitable estoppel cases generally,

[3] Defendant also argues that Plaintiff cannot rely on the doctrine of equitable estoppel in this case because Plaintiff failed to prosecute this case with reasonable diligence. While the Court recognizes that this is a requirement of invoking the doctrine of equitable estoppel to avoid a statute of limitations, see *Benskin*, 952 N.W.2d at 304-06, Defendant's argument on this point relies on information which goes beyond the scope of what the Court may consider in evaluating a motion to dismiss. As such, the Court declines to offer an opinion on this point.

or specifically to the employment law context. However, other cases show that *Mormann* is in line with a general rule that a plaintiff must show some kind of affirmative act on the part of a defendant before equitable estoppel will allow the plaintiff to escape the limitations period. For instance, in *Christy v. Miulli*, 692 N.W.2d 694 (Iowa 2005), the Court wrote that, to prove the first element of equitable estoppel, "a party relying on the doctrine of fraudulent concealment must prove the defendant did some affirmative act to conceal the plaintiff's cause of action independent of and subsequent to the liability-producing conduct." *Id.* at 702. This rule was clearly reaffirmed in *Skadburg v. Gately*, 911 N.W.2d 786, 798 (Iowa 2018). Furthermore, in *Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d 163 (Iowa 2006), the Court decided that a tax assessor's failure to communicate the details of an assessment to a taxpayer "does not establish 'a false representation or concealment of material facts'" as required to trigger equitable estoppel. *Id.* at 180. The pattern established by the case law clearly shows that equitable estoppel will not lie from a mere passive failure to provide documents to a person who requests them.

However, Plaintiff asserts one affirmative act of Defendant as a basis to support equitable estoppel—that Defendant misrepresented that Plaintiff's signature card was the only contract document they had. Defendant's answer to this allegation is that Plaintiff did not actually rely on this misstatement. The Court agrees. As a threshold matter, the Court notes that whether Plaintiff in fact relied on this misrepresentation—assuming arguendo that it did occur—is a fact question generally inappropriate for resolution on a motion to dismiss. However, "a plaintiff may plead himself out of court by alleging facts that provide … a bulletproof defense and foreclose application of equitable tolling." *Mormann*, 913 N.W.2d at 575; *Benskin*, 952 N.W.2d at 306 (citing *Mormann* for this proposition). Plaintiff has done so here, principally by attaching a document to their petition which Plaintiff alleged was Defendant's account agreement and which

was not Plaintiff's signature card. If Plaintiff believed Defendant's assertion that the signature card was the only contract document which existed, Plaintiff would not have searched for, found, attached, and argued their petition from the document which they believed constituted the terms and conditions of the account agreement because this document was not Plaintiff's signature card. So, Plaintiff's petition clearly displays the lack of reliance here. Equitable estoppel may not be invoked based on this alleged misrepresentation to avoid the statute of limitations on this claim. Because Plaintiff has not displayed that any basis for bypassing the limitations period applies to this case, Plaintiff's claim is time-barred.

2. The Merits

Further, even if Plaintiff's claim was not barred by the statute of limitations, this multiple fee claim would fail on its merits. The account agreement allows Defendant to assess a "service charge … on any Item that will overdraw your Account, regardless of whether we pay or return the Item. This is referred to as an 'Overdraft fee' if we pay the Item and a 'returned Item fee' if we return the Item." (Account Agreement at 11). Because Defendant is authorized to charge a fee on each "Item" which is submitted against the account, the relevant inquiry is whether a merchant resubmitting a request for payment of a transaction which has already been rejected constitutes a new "Item." On the plain language of the contract, the answer is clearly yes.

The contract defines "Item" to include, in part, "all orders and instructions for the payment, transfer or withdrawal of funds from your Account." (Account Agreement at 1). A merchant submitting a request for payment from an account is clearly an "order" or "instruction" to Defendant to forward funds from the account to the merchant. But, the merchant resubmitting that request if it was initially rejected constitutes a totally different "order" or "instruction." The second submission is a second act by the merchant, and the words "order" and "instruction" tie

the definition of "Item" directly to the merchant's acts—an "order" or "instruction" cannot exist unless someone gives it. Accordingly, on its face, the definition of "Item" shows that each submission qualifies as a different "Item." Further, as Defendant is permitted to assess a fee on each "Item," it would not violate the account agreement for Defendant to charge multiple fees on one transaction should a merchant submit that transaction for payment multiple times.

Plaintiff's argument to the contrary is unconvincing. Plaintiff asserts that this meaning cannot follow because an "order" or "instruction" under the definition of "Item" must originate from the account holder, and so a merchant's second request for payment is actually the second submission of a single "Item." However, this limitation does not appear in the language of the contract. Quite the opposite, the contract specifies that "*all* orders and instructions" qualify as "Items." (Account Agreement at 1) (emphasis added). The account agreement foregoes the limitation suggested by Plaintiff in favor of this language broadly encompassing "all" directions Defendant receives. The Court gives this term its proper scope, and finds that the multiple-fee practice Plaintiff alleges is a breach of contract is instead explicitly authorized by the agreement. Dismissal of this claim is appropriate.

III. The Implied Covenant of Good Faith and Fair Dealing

Plaintiff next presents two claims for breach of the implied covenant of good faith and fair dealing—one arising out of Defendant's practice of charging overdraft fees on APSN transactions and another due to Defendant charging multiple fees on transactions which are resubmitted by the merchant after being returned for insufficient funds. For the reasons that follow, the Court finds that dismissal of these claims is appropriate as well.

"An implied covenant of good faith and fair dealing is recognized in all contracts." *Bagelmann v. First National Bank*, 823 N.W.2d 18, 34 (Iowa 2012). "But the covenant does not

'give rise to new substantive terms that do not otherwise exist in the contract.'" *Id.* "The underlying principle is that there is an implied covenant that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Alta Vista Properties, LLC v. Mauer Vision Center, PC*, 855 N.W.2d 722, 730 (Iowa 2014) (quoting *American Tower*, 809 N.W.2d at 550). The implied covenant, in its current form, is a relatively new rule in Iowa jurisprudence. The Iowa Supreme Court first recognized the rule, as articulated in the Restatement (Second) of Contracts § 205, that contracts generally create an implied duty of good faith and fair dealing in dicta in *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 n.4 (Iowa 2001). This was formally recognized and adopted as a rule of law in *American Tower, L.P. v. Local TV Iowa, L.L.C.*, 809 N.W.2d 546, 550 (Iowa Ct. App. 2011), and *Bagelmann*, 823 N.W.2d at 34.

As a recent addition to Iowa's jurisprudence, there is little case law discussing the implied covenant of good faith and fair dealing specifically. However, there is enough to show that the conduct Plaintiff accuses Defendant of does not implicate the rule. The Court begins with the fact that, as discussed *supra*, the account agreement explicitly authorized Defendant to assess the complained-of fees. Though Iowa's appellate courts have not addressed the matter, persuasive precedent strongly indicates that a party to the contract doing precisely what the contract explicitly allows them to do does not violate the implied covenant. For instance, American Jurisprudence maintains that "[g]ood faith is … not an invitation for a court to decide whether one party to a contract ought to have exercised privileges expressly reserved in the document." 17A Am. Jur. 2d *Contracts* § 362 (Aug. 2021). Corpus Juris Secundum notes that "[t]he implied covenant of good faith and fair dealing cannot contradict, modify, negate, or override the express terms of a contract." 17A C.J.S. *Contracts* § 454 (Oct. 2021). And the

Alaska Supreme Court addressed the matter quite clearly when it decided that "the covenant of good faith and fair dealing cannot add terms to a contract *or prohibit what a contract explicitly permits*." *Casey v. Semco Energy, Inc.*, 92 P.3d 379, 384 (Alaska 2004) (emphasis added).

But, even if the contract did not explicitly allow this practice, it would still not violate the implied covenant of good faith and fair dealing. This is because, even if the Court were inclined to think the contract was ambiguous or the language disallowed these fees, there would still be an express contract term governing the scope of the relationship on this point. As the Iowa Supreme Court has noted, "[a]n express contract and an implied contract cannot coexist with respect to the same subject matter, and the former supersedes the latter." *Benskin*, 952 N.W.2d at 301 (quoting *Legg v. West Bank*, 873 N.W.2d 763, 771 (Iowa 2016)). In a decision which predated Iowa's recognition of the implied covenant—and which explicitly reserved decision on that point—the Court also recognized that "[i]n order for an action for breach of implied covenant of good faith and fair dealing to lie, there must be, virtually by definition, an act of bad faith. Mere breach of contract, by itself, is not enough." *Grahek v. Voluntary Hospital Cooperative Association of Iowa, Inc.*, 473 N.W.2d 31, 34 (Iowa 1991). In other words, when the contract provides a term arranging the parties' responsibilities on a particular point, the implied covenant will not replace that term. The issue simply becomes whether there was a breach of the express language of the contract.[4]

Plaintiff suggests that the implied covenant of good faith and fair dealing is implicated in this case because Defendant abused its discretion to interpret the contract's terms in a manner which allowed this practice. The Court is cognizant of the fact that the Second Restatement

[4] The Court stresses that this analysis applies in cases such as this where there is an express contract term, other than an open-ended grant of discretion, dealing with the precise conduct the plaintiff claims violates the implied covenant of good faith and fair dealing. When there is an express contract, but the contract is silent or provides discretion to one party regarding the complained-of conduct, a different analysis would be necessary.

maintains "abuse of a power to specify terms" is a violation of the implied covenant of good faith and fair dealing. Restatement (Second) of Contracts § 205, cmt. d. (1981). However, in order for such abuse to occur, the contract must first actually afford a party with such a power. Here, that did not occur. So, the present situation is fundamentally different from cases where the implied covenant is implicated under this concept. To show why this is true, the Court turns now to *Legg v. West Bank*, 873 N.W.2d 763 (Iowa 2016).

In *Legg*, the Iowa Supreme Court found that the duty of good faith—an express duty, in the contract at issue in that case—was implicated by the defendant financial institution's decision to reverse the order in which they processed transactions being posted to their customers' accounts. *Id.* at 773. The Court relied on two factors to indicate that a reasonable jury could find this decision was an act of bad faith: (1) the decision suddenly reversed a longstanding practice of the bank—switching from ordering transactions from low-value to high-value, and minimizing potential account fees, to ordering transactions from high-value to low-value, and (2) the bank made this change without notifying its account holders. *Id.* at 766-67, 773. However, there was another important foundational element of this decision—the bank "ha[d] discretion with regard to the sequencing order of bank card transactions in its agreements." *Id.* at 773. In other words, the contract allowed the bank to decide which order they would process transactions in, and permitted the bank to change that order on a whim. The implied covenant of good faith and fair dealing is appropriately implicated in such circumstances because one party is extended open-ended discretion, and may use that discretion in bad faith to the significant detriment of the other contract parties.

This case, in contrast, does not implicate the same discretionary concerns as those at issue in *Legg*. The conduct Plaintiff complains violates the implied covenant of good faith and fair

dealing lies in (1) charging overdraft fees on transactions which authorize into a positive account balance, even though the transaction later settles into a negative balance, and (2) charging multiple insufficient funds fees when a merchant resubmits a transaction which was previously rejected for insufficient funds. Plaintiff does not explain how the contract affords Defendant with any discretion in these matters other than the discretion to completely forego their right to charge the fee.[5] This is because the contract does not actually extend any discretion on this subject to Defendant other than the ability to engage in forbearance. Whether an "Item" would overdraw an account, under this contract, is an objective determination based on specifically-defined terms. If Defendant charged a fee in violation of those terms, it would not be a breach of their obligation to act in good faith—it would simply be a breach of contract. Accordingly, for all these reasons, the Court finds that Plaintiff's claims for breach of the implied covenant of good faith and fair dealing should be dismissed.

IV. Unjust Enrichment

Finally, Plaintiff presents a claim for unjust enrichment based on the same conduct Plaintiff complains of with regard to their breach of contract claims. A claim for unjust enrichment will not lie where there is an enforceable, express contract concerning the same subject matter. *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 807-08 (Iowa 2018). Such is the case here, so Plaintiff's unjust enrichment claim must be dismissed. Plaintiff attempts to circumvent this conclusion by arguing that pleading in the alternative is permissible, and that

[5] With regard to APSN overdraft fees broadly, the Court notes that Defendant does have discretion as to one other aspect of the fee: Defendant could have actually held funds in abeyance to ensure future payment of the authorized transaction would not overdraw the account. However, this discretion is not implicated in this case because Plaintiff's arguments do not actually take issue with Defendant's decision to pay the intervening transactions which resulted in any overdrafts. Defendant exercising their discretion to hold funds aside would, under the language of the account agreement, require Defendant to reject any intervening transactions which would result in an overdraft. Plaintiff does not charge Defendant with bad faith for failing to reject these transactions, and so Defendant's discretion to do so is not at issue in this case. *See supra* Part II.A, at 7-8.

was what occurred here—that this claim would only come into effect if the account agreement was found to be unenforceable. Plaintiff is generally correct regarding pleading in the alternative being allowed; however, this argument misses the fact that no party has taken the position that the account agreement is anything other than an enforceable contract. Because all parties agree there is an enforceable contract concerning the subject matter of Plaintiff's complaints, the claim for unjust enrichment must be dismissed on the pleadings.

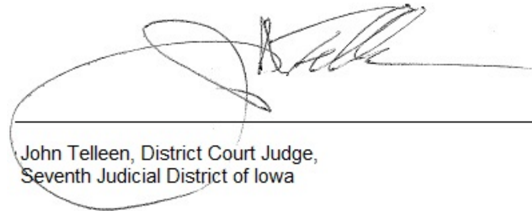
RULING

For all of the above-stated reasons, it is the ruling of the Court that the Defendant's Motion to Dismiss is GRANTED and Plaintiff's Amended Petition is dismissed at Plaintiff's cost.

State of Iowa Courts

Case Number	**Case Title**
LACV111838	BEVERLY MASON ET AL VS DUBUQUE BANK AND TRUST COMPANY
Type:	DISMISSED PER COURT

So Ordered



John Telleen, District Court Judge,
Seventh Judicial District of Iowa

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