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

GARY SCHWARTZ, on behalf of himself and all others similarly situated,	)	**Case No. LALA106300**
Plaintiff,	)	
v.	)	**RULING ON DEFENDANT'S MOTION TO DISMISS**
COMMUNITY 1ST CREDIT UNION,	)	
Defendant.	)	

Defendant's Motion to Dismiss is now before the Court for consideration. The Court has considered the Motion to Dismiss, Plaintiff's Resistance, and Defendant's Reply. The Court enters the following ruling on the pending motion.

Plaintiff's putative Class Action Petition against Community 1st Credit Union alleges that Community 1st breached the parties' contract by assessing overdraft fees on debit card transactions which were authorized by Community 1st because there were sufficient funds to cover the transaction but, because of intervening transactions, there were insufficient funds to cover the transaction when the merchant submitted the transaction to Community 1st for payment. Community 1st charges an overdraft fee if Plaintiff's available balance is insufficient at this later time when the merchant submits the transaction to Community 1st for payment. These types of transactions are known in the industry as Authorized Positive Settle Negative transactions. The issue before Court is really quite simple. The issue is whether this practice by Community 1st breaches the parties' contract.

Instead of a filing a petition with a short and plain description of his claims, Plaintiff's petition goes to great lengths to allege wealth disparities between the parties, references the

amount of revenue allegedly generated by Defendant and other financial institutions and asserts Plaintiffs are financially vulnerable and being deceived. The petition references other contracts by nonparties and position papers by advocacy groups. These are unhelpful. The issue is whether this contract between these parties was breached. Courtrooms are venues to assess facts and the law. They are not forums for policy making.

FACTUAL BACKGROUND

Plaintiff, Gary Schwartz, at all times relevant to this dispute, held an account with Defendant Community 1st Credit Union. Schwartz's account is governed by Community 1st's standard Membership and Account Agreement, which sets out the terms and conditions of use for all of its accounts. As part of the account services Community 1st provides, Schwartz was permitted to engage in debit card transactions drawing on his account balance. Schwartz could swipe his card, issued by Community 1st, at a participating business and so pay for goods or services from that business using funds held by Community 1st in his name. Schwartz took advantage of this service and used his card to conduct a number of transactions drawing on his account.

As part of the exchange for allowing its account holders to make these remote transactions, Community 1st reserved the right to charge a fee to an account holder if that person conducted a transaction from their account when they did not have the money in their account to pay the full value of that transaction. Community 1st imposed one or more of these fees against Schwartz. Schwartz brings the present claim against Community 1st alleging that said fees were improperly charged. Schwartz argues that these fees were improper because, even though they eventually resulted in a negative account balance, Schwartz's account balance was sufficient to pay for the transaction at the time he made the transaction.

This occurred, Schwartz suggests, because of the way a debit card transaction is processed behind the scenes. When an account holder uses their debit card to make a transaction, the merchant initially requests "authorization" from Community 1st to proceed with the transaction. If Community 1st authorizes the transaction, the merchant approves the sale and the account holder goes on with their day. But, the transaction being authorized does not cause the funds to actually be transferred to the merchant. The merchant must later request payment for the transaction. Because of this lag time, intervening transactions may occur which reduce the account balance such that, when the transaction is finally submitted for payment, the transaction results in a negative account balance. Schwartz refers to these transactions as "Authorize Positive, Settle Negative" or "APSN" transactions. Schwartz complains that Community 1st charging overdraft fees on these APSN transactions is a breach of Community 1st's account agreement, and so requests damages for breach of contract. Schwartz also asserts that this conduct violates the implied covenant of good faith and fair dealing. Schwartz argues in the alternative that, if the account agreement is not an enforceable contract, charging these fees has unjustly enriched Community 1st.

Schwartz filed this action in the Iowa District Court in and for Wapello County on July 16, 2021. The case was transferred to the Iowa Business Specialty Court by administrative order filed August 18, 2021, following the parties' joint consent to the same. On August 30, 2021, Community 1st filed the present motion to dismiss. The matter was fully submitted for the Court's consideration on October 12.

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 referenced in Plaintiff's 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 filed this suit alleging that Defendant breached their standard form account agreement with Plaintiff by charging overdraft fees on the APSN transactions discussed above.

> 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 asserts 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). "[U]nless the contract is ambiguous, intent is determined by the plain language of the contract." *Terry v. Dorothy*, 950 N.W.2d 246, 250 (Iowa 2020). "[W]e determine whether an ambiguity exists not by examining clauses seriatim, but by interpreting the [contract] in its entirety." *National Surety Corporation v. Westlake Investments, LLC*, 880 N.W.2d 724, 734 (Iowa 2016).

Turning, then, to the contract, the Court finds that the practice Plaintiff now complains of is explicitly endorsed by the agreement. The contract authorizes Defendant to charge an overdraft fee via the following provision:

> If, on any day, the available balance in your share or deposit account is not sufficient to pay the full amount of a check, draft, transaction, or other item, plus any applicable fee, that is posted to your account, we may return the item or pay it, as described below. … Your account may be subject to a fee for each item regardless of whether we pay or return the item.

(Community 1st CU Membership and Account Agreement, attached as Ex. A to Def.'s Mot. to Dismiss, at 3) (hereinafter "Account Agreement"). So, Defendant may charge a fee if "the available balance in [the] account is not sufficient to pay the full amount" of the item and its associated transaction fees. *Id.* The contract also specifies when Defendant may determine whether this condition has been met: "The Credit Union's determination of an insufficient available account balance may be made at any time between presentation and the Credit Union's midnight deadline with only one review of the account required." *Id.*

Additionally, the contract goes into remarkable detail explaining how a debit card transaction works and how that transaction is managed from Defendant's side—including how overdraft fees are incurred from these transactions. In a section titled "Signature-Based Debit Card Purchase Transactions,"[1] the account agreement states:

> Merchants may seek authorization for these types of transactions. The authorization request places a hold on funds in your account when the authorization is completed. The "authorization hold" will reduce your available balance by the amount authorized but will not affect your actual balance. The transaction is subsequently processed by the merchant and submitted to us for payment. This can happen hours or sometimes days after the transaction, depending on the merchant and its payment processor. These payment requests are received in real time throughout the day and are posted to your account when they are received.
>
> The amount of the authorization hold may differ from the actual payment because the final transaction amount may not yet be known to the merchant when you present your card for payment. For example, if you use your debit card at a restaurant, a hold will be placed in an amount equal to the bill presented to you; but when the transaction posts, it will include any tip that you may have added to the bill. This may also be the case where you present your debit card for payment at

[1] While this part of the account agreement identifies two classes of debit card transactions, only signature-based transactions are capable of generating APSN overdraft fees. Per the contract's descriptions, the alternative type of card transaction—PIN-based transactions—does not follow the same two-step process of authorization followed by a request for final payment. (Account Agreement at 4).

> gas stations, hotels and certain other retail establishments. We cannot control how much a merchant asks us to authorize, or when a merchant submits a transaction for payment.

Id. at 4.

Finally, the following section, "Understanding Your Account Balance," adds: "Pending transactions and holds placed on your account may reduce your available balance and may cause your account to become overdrawn regardless of your actual balance. In such cases, subsequent posting of the pending transactions may further overdraw your account and be subject to additional fees." *Id.* Viewing all of these clauses as elements of a single, cohesive agreement, the contract clearly states that the account balance review for determining whether a transaction justifies an overdraft fee must occur at the later moment of the merchant's request for payment and not at the first instance of the request for authorization.

From the outset, the provisions allowing Defendant to charge an overdraft fee instruct Defendant to determine whether a transaction overdraws an account between a moment referenced as "presentation" and a "midnight deadline" to act on the presented transaction. *Id.* at 3. While the contract does not specifically define "presentation," that word is most naturally read—in this context—as being related to the moment of "posting," since the agreement also specifies that an overdraft fee may only be charged on a transaction "that is posted to your account." *Id.* The contract's subsequent explanation of how a debit card transaction occurs explains that a transaction is "posted" to an account after it is "processed by the merchant and submitted to [Defendant] for payment." *Id.* at 4. This explanation contrasts "posting" with "authorization," which the merchant may request immediately and which precedes posting—sometimes by days. *Id.* All of this shows that the contract is properly understood as showing that

Defendant's determination of whether a transaction overdraws an account must occur at the later moment—when the transaction is paid—rather than the earlier moment of authorization.

This conclusion is strongly bolstered by the second highlighted sentence from "Understanding Your Account Balance," which explicitly states that an overdraft fee may be incurred because an intervening transaction reduces the account holder's available balance—causing the pending transaction to overdraw the account. This very clearly states that the types of fees Plaintiff now complains of will occur, and would be a false assertion if the contract required an overdraft determination to occur only at the time of authorization. When this clause is taken with the detailed explanation of how one-time debit card transactions interact with the account, no reasonable reader could come to an alternative conclusion on whether the contract allows Defendant to charge overdraft fees on APSN transactions. The answer is, of course, that it does.

Plaintiff protests that, regardless of what the contract says may happen, the fact that a "hold" is placed on funds when a transaction is authorized must mean that there are always enough funds in the account to pay the transaction when it is later posted to the account. Plaintiff's argument necessarily suggests that, upon authorization, account funds are set aside into a locked box and cannot be touched until the merchant later requests final payment. But this is clearly not what the contract says when it states that a "hold" will occur. The contract is clear as to the effect of an authorization hold: "The 'authorization hold' will reduce your available balance by the amount authorized but will not affect your actual balance." *Id.* In other words, the authorization hold is only an aspect of Defendant's calculation of an account's available balance—it is not a promise to set aside funds to guarantee payment, and it does not affect the actual amount of money in the account.

Defendant also refutes Plaintiff's argument by pointing to another practical concern stressed by the account agreement: the amount of the authorization hold is not necessarily the amount of the final transaction. Per the language explaining how signature-based debit card transactions are processed, a merchant may request a payment authorization for any amount. *Id.* Because of this, a transaction may authorize into a positive account but later overdraw the account when it is submitted for payment even if there are no intervening transactions which reduce the account balance—the amount of the transaction need only be larger than the amount authorized for this to be possible. It makes little practical sense for Defendant to be required to decide whether to charge an overdraft fee at the moment of authorization if the authorization amount does not necessarily reflect the final value of the transaction.

For these reasons the Court finds that the contract clearly and unambiguously allows Defendant to charge an overdraft fee on a transaction which overdraws an account at the time the transaction is paid by Defendant—even if the transaction was initially authorized into a positive balance. Accordingly, because the contract explicitly authorizes the complained-of practice, Plaintiff's complaint does not state a claim for breach of contract. Such claim must be and accordingly is dismissed.

III. The Implied Covenant of Good Faith and Fair Dealing

Plaintiff next charges Defendant with violating the implied covenant of good faith and fair dealing through imposition of the same overdraft fees on APSN transactions. "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, L.P. v. Local TV Iowa, L.L.C.*, 809 N.W.2d 546, 550 (Iowa Ct. App. 2011)). The Iowa Supreme Court first recognized the implied covenant, in the form articulated in the Restatement (Second) of Contracts § 205, 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*, 809 N.W.2d at 550, and *Bagelmann*, 823 N.W.2d at 34.

There is little Iowa case law discussing the implied covenant of good faith and fair dealing. However, what does exist, taken with persuasive precedent, is sufficient to conclude that the conduct Plaintiff accuses Defendant of does not implicate the rule. As noted above, 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 what the contract explicitly allows does not violate the implied covenant. American Jurisprudence states 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 adds "[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 has 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. In either case there would still be an express

contract term governing the scope of the relationship on this point, and the existence of such a provision is sufficient to cut off recovery for breach of the implied covenant. "An 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)). Furthermore, "[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.

Plaintiff attempts to avoid this conclusion by suggesting that Defendant violated the implied covenant of good faith and fair dealing because Defendant abused its discretion to interpret the contract's terms in a manner which allowed the APSN fee practice. "[A]buse of a power to specify terms" may be 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 grant a party with such a power. Here, that did not occur. Plaintiff has not pointed out, and this Court has not found, anything in the contract providing Defendant with the authority to unilaterally define the terms of the agreement however it wished. Absent such a grant of discretion, Defendant could not have abused it—the issue must be simply whether Defendant breached the contract.

This was the point the Business Specialty Court made in ruling on a motion to dismiss a similar claim in *Welbes v. DuTrac Community Credit Union*, No. LACV110634 (Iowa Bus.

Specialty Ct., Dubuque Cty. Mar. 1, 2021).[2] In that case, this Court noted: "A party acting on their belief regarding the proper interpretation of a contract term is not an exercise of discretion to specify that term." *Id.* at *5. Plaintiff challenges the accuracy of this assertion, but it is plainly supported by the foregoing authorities, especially *Grahek*. *Grahek*, 473 N.W.2d at 34. Abuse of a power to specify terms must mean something more than merely taking a position on what a contract requires or allows, because whether that position is correct is properly resolved on a breach of contract action. The implied covenant is doing none of the work.

Plaintiff's reliance on *Legg v. West Bank*, 873 N.W.2d 763 (Iowa 2016), is also misplaced. 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. The Court found that this sudden decision to reverse its longstanding practice could be a breach of good faith as an abuse of contractual discretion, as the bank "ha[d] discretion with regard to the sequencing order of bank card transactions in its agreements." *Id.* at 773. Because of all of this, *Legg* is a perfect example of a case which did involve the potential abuse of a power to specify terms. The contract in that case left the posting order for transactions as an open question, fully

[2] The ruling is accessible via the "Rulings and Orders" page for the Iowa Business Specialty Court on the Iowa Courts website. *See Pretrial Rulings*, Rulings and Orders, Iowa Judicial Branch, https://www.iowacourts.gov/iowa-courts/district-court/iowa-business-specialty-court/rulings-and-orders/ (last visited Nov. 8, 2021).

within the discretion of the financial institution. So, when the bank decided on a new order for processing transactions the bank was actively "specifying" a term of the contract which was within its discretion to control.

Legg presents a wholly different factual scenario than the present case. In this case, Plaintiff accuses Defendant of bad faith for not holding funds in a locked box to guarantee eventual payment of a transaction once it was authorized. Plaintiff has not been able to point to any piece of the contract which reserves for Defendant discretion on this subject. Furthermore, Plaintiff's allegations come despite the contract explicitly stating that funds are not actually set aside and Defendant—as a practical matter—being unable to predict the final value of the transaction. *Legg* does not dictate a different result here.

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's argument to the contrary seems to suggest that resolution of this matter is inappropriate on a motion to dismiss—that the mere fact that pleading in the alternative is allowed under Iowa's pleading rules should cause this claim to persist. But this misses the point. As is readily apparent from the parties' preliminary filings, the existence of a valid, enforceable contract is uncontested. Thus, whether the unjust enrichment claim may continue in the face of this agreement is purely a question of law, and is appropriate to resolve on a motion to dismiss. 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.

V. Preemption

In addition to their various arguments speaking to the substance of Plaintiff's claims, Defendant argues that many of Plaintiff's claims are preempted by federal regulations under the Truth in Savings Act as challenging the sufficiency of Defendant's fee disclosures. Because the Court has found that all of Plaintiff's claims should be dismissed due to substantive deficiencies, for the reasons set forth herein, it is unnecessary for the Court to address these arguments at length. However, the Court does note that Defendant's preemption argument relies on the assertion that Plaintiff's claims substantively seek to challenge Defendant's fee disclosure practices, but Plaintiff's briefing specifically asserts that they are simply seeking to enforce the contractual agreement. The Court is willing to take the Plaintiff at their word here that they are not challenging the sufficiency of Defendant's fee disclosures and that their stated causes of action are what Plaintiff says they are. However, the Court notes that Plaintiff may have avoided the possibility of their claims being misunderstood by not adding unnecessary statements in their petition impugning Defendant's disclosure practices.

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 the Plaintiff's Petition is dismissed at Plaintiff's cost.

State of Iowa Courts

Case Number	**Case Title**
LALA106300	SCHWARTZ, GARY VS COMMUNITY 1ST CREDIT UNION
Type:	ORDER REGARDING DISMISSAL

So Ordered

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

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