IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

SLIDE FIRE SOLUTIONS, LP, Plaintiff, V. MERRICK BANK CORPORATION and CKC HOLDINGS, INC. d/b/a SIGNATURE CARD SERVICES, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. 1:18-cv-00034-C

PLAINTIFF'S RESPONSE AND BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

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SLIDE FIRE SOLUTIONS, LP ("Slide Fire" or "Plaintiff") files this Response and Brief in Opposition to Defendants Merrick Bank Corporation ("Merrick") and CKC Holdings, Inc. d/b/a Signature Card Services' ("Signature") (collectively, the "Banking Defendants") Motion to Dismiss Plaintiff's First Amended Complaint Under Fed. R. Civ. P. 12(b)(6)(the "Motion to Dismiss"), and respectfully states as follows:

I.
INTRODUCTION

1. Banking Defendants' Motion to Dismiss is nothing more than another attempt to delay providing Plaintiff with its money. Banking Defendants continue to search for a purported legitimate justification for their refusal to release the applicable funds. Initially, Banking Defendants feigned ignorance and claimed they were unable to identify what contract was in dispute. Now, Banking Defendants have wholly abandoned this argument and readily acknowledge they are aware of a single contract entered into between the parties. Instead, Banking Defendants now attempt to ignore the clear intent of the contract that requires the parties to act in good faith and, instead, advocate application of misguided reasoning in an effort to justify their wrongful withholding of more than $1.6 million properly belonging to Plaintiff.

2. Banking Defendants' alleged basis for withholding Plaintiff's funds is the claimed financial risk associated with chargebacks and fees stemming from customers wishing to return items purchased via credit card on Plaintiff's website. Importantly, Banking Defendants ceased processing credit card transactions for Plaintiff in December 2017. Therefore, at this point, any prospective chargebacks or fees would stem from a customer contacting his/her credit card provider to dispute a charge that occurred more than four months ago, *i.e.*, on or before December 2017. Credit card providers only allow customers a limited period of time to dispute charges. In connection with the charges in question, this time window has largely lapsed. Therefore, the risk of

Banking Defendants incurring significant chargebacks and fees is extremely remote and continues to decrease with each successive passing month. Indeed, there is virtually no financial risk whatsoever. By way of example, Plaintiff incurred a single chargeback in April for less than $200. Nonetheless, despite this nominal chargeback, Banking Defendants somehow claim that withholding more than $1.6 million in Plaintiff's funds represents a commercially reasonable amount held in good faith strictly as a means to mitigate against Plaintiff's alleged credit risk. This is total fiction and has no basis in reason or fact. Rather, the facts clearly show no credit risk exists. Instead, Banking Defendants' decision to withhold such funds represents clear bad faith and breach of the terms of the parties' contract.

3. Banking Defendants' Motion to Dismiss takes a shotgun approach. They claim that Plaintiff failed to state direct allegations in support of each element for every cause of action asserted in its First Amended Complaint. While Banking Defendants refer to their filing as a Motion to Dismiss in name, they essentially request the Court to require that Plaintiff present proof in support of each element of the asserted claims rather than merely plead facts establishing its colorable right to assert each respective cause of action. Banking Defendants also ignore Plaintiff's right to plead alternative causes of action. This does not comport with the fair notice pleading requirements. Nonetheless, despite Banking Defendants' misplaced efforts to apply a more onerous standard than applicable to a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), Plaintiff contends that its First Amended Complaint more than adequately provides Banking Defendants with fair notice of the causes of action asserted in this lawsuit. Accordingly, Plaintiff requests that the Court deny Banking Defendants' Motion to Dismiss in its entirety.

4. Alternatively, in the unlikely event the Court finds that any of Plaintiff's causes of action fail to state the nature of the claim with sufficient detail to meet the fair notice pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S.

544, 555-56 (2007), Plaintiff requests that the Court provide it with an opportunity to amend its live pleading in an effort to address such issue(s) prior to dismissing the claims asserted in the above-styled cause.

II.
PROCEDURAL HISTORY

5. On or about February 12, 2018, Plaintiff filed its Original Petition in a case styled as, Cause No. 2018-014; *Slide Fire Solutions, LP v. Merrick Bank Corporation and CKC Holdings, Inc. d/b/a Signature Card Services*, in the 259th Judicial District Court of Shackelford County, Texas.[1]

6. On or about March 12, 2018, Banking Defendants filed a Notice of Removal and removed this case to this Court on the basis of diversity of jurisdiction under 28 U.S.C. §§ 1332 and 1441.[2]

7. On or about March 19, 2018, Banking Defendants filed their first Motion to Dismiss.[3] This Motion to Dismiss was based on Plaintiff's initial filing in State Court, prior to Plaintiff having notice that this case would be removed to federal court and/or needed to satisfy the criteria set forth in the *Iqbal* and *Twombly* decisions.

8. On or about April 6, 2018, Plaintiff filed its First Amended Complaint.[4]

9. On or about April 9, 2018, Plaintiff filed its Response and Brief in Opposition to Banking Defendants' Motion to Dismiss.[5]

10. On or about April 11, 2018, the Court entered an Order denying Defendants' first Motion to Dismiss.[6]

11. On or about April 24, 2018, Banking Defendants' filed their Motion to Dismiss

[1] *See* Banking Defendants' Index to Notice of Removal, Exhibit "B" [Doc. 1].
[2] [Doc. 1].
[3] [Docs. 4, 5].
[4] [Doc. 6].
[5] [Doc. 8].
[6] [Doc. 9].

Plaintiff's First Amended Complaint Under Fed. R. Civ. P. 12(b)(6) and Brief in Support.[7]

III.
MATERIAL BACKGROUND FACTS

12. Plaintiff operates an online retail store where it sells various products. On or about November 18, 2011, Plaintiff submitted a Merchant Application to Banking Defendants.[8] The Merchant Application was attached to a Merchant Agreement, which was expressly incorporated therein by reference for all purposes.[9] The Merchant Application and Merchant Agreement are collectively referred to herein as the "Agreement." Plaintiff and the Banking Defendants were each parties to the Agreement.[10]

13. Banking Defendants provided technical documentation and support that allowed Plaintiff to accept and process transactions through its online retail store.[11] Plaintiff maintained a demand deposit account with the Banking Defendants for the processing of charges initiated through its online store.[12] Under the terms of the Agreement, Banking Defendants were entitled to establish a reserve account to withhold only a commercially reasonable amount of funds for a maximum of six months in connection with potential "chargebacks" and fees associated with transactions entered into as part of Plaintiff's business operations.[13] However, Banking Defendants were required to act in good faith in operating the reserve account.[14] They were not allowed to arbitrarily withhold an excessive amount in the reserve account without a legitimate business purpose. Rather, any funds withheld under the Agreement were to be withheld based on Plaintiff's business history and past course of dealings.

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[7] [Docs. 11 and 12].
[8] Plaintiff's First Amended Complaint, ¶7.
[9] *Id.*
[10] *Id.*
[11] *Id.*, ¶8.
[12] *Id.*
[13] *Id.*, ¶9.
[14] *Id*, ¶30; *see* Section 44 of the Agreement, attached as Exhibit "1" to Banking Defendants' Motion to Dismiss.

14. Banking Defendants are currently withholding $1,626,330.56 of Plaintiff's funds in the reserve account.[15] When reviewing the history of the parties' business relationship, by all definitions, this is not a commercially reasonable amount.[16] Historically, Plaintiff experienced chargebacks or related returns equal to less than 0.5% of its operating account(s).[17] On October 1, 2017, a shooting incident occurred in Las Vegas, Nevada.[18] Within a matter of days, reports surfaced alleging that weapons used by a gunman were allegedly outfitted by products designed, manufactured and/or sold by Plaintiff. Banking Defendants have consistently used this incident as an alleged justification for withholding a significant additional amount of Plaintiff's funds.[19] However, after such incident, the chargebacks related to the sale of Plaintiff's products actually decreased and only amounted to 0.3% of total sales.[20] In other words, Banking Defendants have had even less financial risk associated with processing transactions on behalf of Plaintiff, since such incident occurred. Nonetheless, despite such decreased financial risk, Banking Defendants insist on wrongfully withholding an amount representative of nearly 20% of Plaintiff's current sales.[21]

15. Plaintiff recently announced it plans to cease taking orders on its website on May 20, 2018. In addition to the incident in Las Vegas, Banking Defendants also claim that Plaintiff's plan to shut down its website also provides a claimed justification for withholding the applicable funds. However, again, this is an effort to distract the Court from the pertinent facts. Banking Defendants ceased processing transactions from Plaintiff's retail store in December 2017. Consequently, Plaintiff's prospective activities related to any litigation stemming from the incident and/or the closing of the business have zero impact on any risk of financial harm to Banking Defendants.

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[15] *Id.* at ¶15.
[16] *Id.* at ¶¶11, 12.
[17] *Id.*
[18] *Id.* at ¶10.
[19] *Id.*
[20] *Id.* at ¶11
[21] *Id.* at ¶12.

Rather, any risk to Banking Defendants relates to transactions that occurred months ago.

16. The only current risk to Banking Defendants relates to a customer who purchased a product on Plaintiff's website on or before December 2017, challenging such charge with his/her credit card provider. Customers have a limited time window to challenge such charges, generally ninety (90) to one hundred eighty (180) days from the date of purchase. The more time that passes between the date of purchase, the less likely a customer will be able to successfully challenge a charge resulting in a chargeback. Put differently, each passing month, Banking Defendants' risk of incurring chargebacks decreases. By way of example, in April, *i.e.*, approximately four months after Banking Defendants ceased processing transactions on Plaintiff's retail store, Plaintiff incurred a single chargeback for less than $200. Plaintiff anticipates that this trend will continue moving forward. Consequently, based on the history of Plaintiff's business dealings, Banking Defendants' alleged fear of significant chargebacks is without merit and, instead, a fictional attempted justification for the wrongful withholding of more than $1.6 million in Plaintiff's funds.

17. Plaintiff brought this suit to obtain access to its funds. The demand for Plaintiff's products has recently reached an all-time high. By definition, Banking Defendants wrongful withholding such funds over the course of the last several months has caused Plaintiff damages. These damages are a direct result of Banking Defendants' failure and refusal to act in good faith and abide by the terms of the Agreement.

IV.
ARGUMENTS AND AUTHORITIES/BRIEF IN OPPOSITION

A. Legal Standard

18. In reviewing a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6), the court "must accept all well-pleaded facts as true, and view them in the light most

favorable to the plaintiff."[22] In a Rule 12(b)(6) motion to dismiss, the defendant admits the facts as alleged by the plaintiff, but claims that the plaintiff has no right to any relief based on the facts asserted.[23] "A motion to dismiss for failure to state a claim under Rule 12(b)(6) is disfavored in the law and rarely granted."[24] A court will only dismiss a complaint if "it appears beyond doubt that the claimant can prove no set of facts in support of its claim that would entitle it to relief."[25] Banking Defendants have wholly failed to meet such standard so as to warrant the harsh requested remedy of the dismissal of Plaintiff's claims asserted in the above-styled cause.

19. Pursuant to Federal Rule of Civil Procedure 8(d)(2), a party may set out two or more statements of a claim alternatively or hypothetically, in separate counts, such that if a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. In the instant case, Plaintiff asserted several alternative theories of relief. These alternative theories of relief do not serve to contradict Plaintiff's requested relief as asserted by Banking Defendants. Banking Defendants' arguments about purported contradicting, alternative claims, *e.g.*, tort based claims versus a claim for breach of contract, are not the proper subject of a Motion to Dismiss under Rule 12(b)(6). Banking Defendants essentially requests that the Court rule on the merits of Plaintiff's claims rather than if Plaintiff provided fair notice of the claims asserted.

B. <u>Plaintiff's Breach Of Contract Cause Of Action Plainly States A Claim Upon Which Relief Can Be Granted And Meets The Fair Notice Pleading Standard</u>

20. Plaintiff contends that under the choice of law provision in the Agreement, Utah law governs any dispute related to the Agreement.[26] Under Utah law, in order to establish a breach of contract claim, the moving party must show that there is: (a) a contract; (b) it performed under the

[22] *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992).
[23] *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995)
[24] *Delhomme v. Caremark Rx Inc.,* 232 F.R.D. 573, 577 (N.D. Tex. 2005).
[25] *Id.*
[26] Plaintiff's First Amended Complaint, ¶17 [Doc. 6].

contract; (c) the nonmoving party breached the contract; and (d) the moving party suffered damages as a result of such breach.[27] As discussed below, Plaintiff's First Amended Complaint provides fair notice as to each of the elements necessary to support a cause of action for breach of contract.

21. As reflected repeatedly throughout Banking Defendants' Motion to Dismiss, in reference to each claim asserted by Plaintiff in its First Amended Complaint, Banking Defendants look only to the language contained in each separately identified section of the pleading dedicated to the individual causes of action. However, this approach ignores Plaintiff's express incorporation of the "Statement of Facts" contained in Paragraphs 6-17 of the First Amended Complaint. Banking Defendants apparently would have Plaintiff restate all facts under each cause of action heading in order to meet the fair notice pleading standard. This simply is not correct and would represent an inefficient pleading style. Rather, the First Amended Complaint must be read as a whole to determine if a colorable claim has been asserted when accepting all facts pled by Plaintiff as being true. Plaintiff has more than met such standard.

22. Banking Defendants contend Plaintiff's pleading failed to identify the specific breaches of the Agreement resulting from Banking Defendants' misconduct.[28] However, a plain reading of Plaintiff's First Amended Complaint makes it clear that Plaintiff claims Banking Defendants breached Section 10 of the Agreement by wrongfully withholding an excessive amount of funds in the reserve account that has no commercially reasonable justification.[29] Plaintiff, further, claims that Banking Defendants failed to act reasonably and in good faith and fully cooperate with Plaintiff so as to fulfill the intent of the Agreement.[30] This provided Banking Defendants with notice of the breach of contract claim and the facts asserted in support of same. This is more than

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[27] *Bair v. Axiom Design, L.L.C.*, 20 P.3d 388, 392 (Utah 2001).
[28] Banking Defendants' Brief in Support of Motion to Dismiss, ¶11 [Doc. 5].
[29] Plaintiff's First Amended Complaint, ¶¶9, 12, 13, 15, 16 and 20 [Doc. 6].
[30] *Id.* at ¶30; *see also* Section 44 of the Agreement, attached as Exhibit "1" to Banking Defendants' Motion to Dismiss.

sufficient to meet the fair notice pleading requirements. Banking Defendants attempt to create an ambiguity where no such ambiguity exists.

23. Banking Defendants next claim that Plaintiff allegedly failed to plead how Banking Defendants breached the Agreement. Banking Defendants allege that Plaintiff's breach of contract claim is not ripe for adjudication. However, Banking Defendants misstate Plaintiff's argument. Plaintiff acknowledges that Banking Defendants were permitted to establish a reserve account to hold a *commercially reasonable* amount of funds relative to chargebacks and other fees. Plaintiff's claims asserted in this lawsuit relate to Banking Defendants' arbitrary decision to wrongfully withhold a grossly excessive amount of funds that does not represent a commercially reasonable amount and has no basis in reason or fact. Plaintiff contends that Banking Defendants' continued failure and refusal to release funds despite the lack of any substantive credit risk, as discussed above, represents a breach of Banking Defendants' duties to act reasonably and in good faith as required under the terms of the Agreement.

24. Banking Defendants' reference to their interpretation of the six month time window allegedly applicable to the withholding of funds has no relevance to Plaintiff's breach of contract claim. Instead, this is yet another attempt by Banking Defendants to distract from the actual claims asserted by Plaintiff in its First Amended Complaint. Under Banking Defendants' reasoning, they could withhold all of Plaintiff's funds related to retail sales in the reserve account for six months regardless of whether that represented a commercially reasonable amount. That simply is a misreading of the duties and obligations of the parties under the Agreement, and forms the basis of why Plaintiff was required to file suit in order to obtain its funds currently being wrongfully withheld by Banking Defendants. Plaintiff's claims do not relate to Banking Defendants' general ability to withhold funds but, instead, Banking Defendants' failure to act reasonably and exercise good faith when electing to withhold more than $1.6 million currently in the reserve account.

25. Banking Defendants also claim that Plaintiff's live pleading fails to state how Plaintiff has been damaged as a result of Banking Defendants' misconduct.[31] It is unclear how Banking Defendants could arrive at this conclusion based on a plain reading of Plaintiff's allegations and the parties' recent course of dealings. In its First Amended Complaint, Plaintiff specifically indicated that it has been deprived of the use of $1.6 million dollars as a result of Banking Defendants' refusal to honor the terms of the Agreement.[32] The failure to release the applicable funds has deprived Plaintiff from being able to use such funds when demand for its products has increased substantially. The lack of access to funds threatened Plaintiff's ability to pay employees, fulfill orders and pay bills and taxes.[33] As a result of Banking Defendants' wrongful withholding of funds, Plaintiff has struggled to keep up with the demand for its product. It has suffered loss of sales and profits directly because of Banking Defendants' failure to act in good faith and perform as required under the terms of the Agreement. Plaintiff's First Amended Complaint clearly articulates its claim for damages resulting from such lost sales and profits in an amount to be determined at the time of trial.

26. For the above-stated reasons, Plaintiff has provided fair notice of its claim for breach of contract, and Banking Defendants' Motion to Dismiss in connection with such claim should be denied.

C. Plaintiff's Promissory Estoppel Cause Of Action Plainly States A Claim Upon Which Relief Can Be Granted And Meets The Fair Notice Pleading Standard

27. Plaintiff also asserted an alternative claim for promissory estoppel.[34] This claim is asserted should the Court find that the Agreement does not represent a binding contract between the parties and/or apply to all facts in dispute. In their Motion to Dismiss, Banking Defendants

[31] Banking Defendants' Brief in Support of Motion to Dismiss, ¶12 [Doc. 5].
[32] Plaintiff's First Amended Complaint, ¶15 [Doc. 6].
[33] *Id.* at ¶14.
[34] Plaintiff's First Amended Complaint, ¶¶ 22-25 [Doc. 6].

effectively would prohibit asserting alternative theories of recovery and require the Court to make a determination of the scope and application of the Agreement rather than evaluate whether a colorable cause of action has been asserted. This goes beyond the scope of a 12(b)(6) motion for failure to state a claim upon which relief could be granted.

28. In order to bring a promissory estoppel claim under Utah law, beyond Banking Defendants making a promise, Plaintiff must establish: (a) that Plaintiff acted with prudence and in reasonable reliance; (b) Banking Defendants knew that Plaintiff had relied on the promise which Banking Defendants should reasonably expect to induce action or forbearance on the part of Plaintiff or a third person; (c) Banking Defendants were aware of all material facts; and (d) Plaintiff relied on the promise and the reliance resulting in a loss to Plaintiff.[35] Alternatively, should Texas law apply to this cause of action, in order to bring a claim for promissory estoppel under Texas law, Plaintiff must show that: (a) Banking Defendants made a promise to Plaintiff; (b) Plaintiff reasonably and substantially relied on the promise to its detriment; (c) Plaintiff's reliance was foreseeable by Banking Defendants; and (d) injustice can be avoided only by enforcing Banking Defendants' promise.[36] Plaintiff's pleadings are more than sufficient to meet the fair notice pleading requirements necessary to assert a claim for promissory estoppel.

29. Banking Defendants first claim that Plaintiff failed to sufficiently identify the specific promise(s) that Banking Defendants made in forming the basis of Plaintiff's promissory estoppel cause of action.[37] However, a plain reading of Plaintiff's First Amended Complaint shows this to be incorrect. In support of its promissory estoppel claim, Plaintiff references that Banking Defendants promised they were going to provide certain services, but they have repeatedly failed and refused to

[35] *Nunley v. Westates Casing Servs., Inc.*, 989 P.2d 1077, 1088 (Utah 1999).
[36] *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 (Tex. 2002).
[37] Banking Defendants' Brief in Support of Motion to Dismiss, ¶12 [Doc. 5].

provide the services as promised.[38] Specifically, as part of the Agreement and regular communications throughout the parties' business relationship, Banking Defendants represented that they would maintain a "reserve account" limited to a *commercially reasonable* amount of funds strictly designed to protect Banking Defendants against chargebacks from Plaintiff's customers.[39] However, rather than fulfill such promise, Banking Defendants have elected to hold back a grossly excessive amount of funds that has no relationship to the volume of chargebacks associated with operating Plaintiff's online retail store.

30. Banking Defendants have insisted on withholding more than $1.6 million in the reserve account. This amount is representative of 3,200% of historical losses and chargebacks.[40] Plaintiff has historically experienced chargebacks or related returns equal to less than .05% of their operating account(s).[41] Since the time of the incident allegedly forming the basis for Banking Defendants' decision to withhold significantly greater funds, the chargeback rate has actually decreased to the amount of 0.3% of total sales.[42] Consequently, the withheld amount clearly does not represent a commercially reasonable amount based on Plaintiff's business history.

31. Plaintiff justifiably relied on Banking Defendants' promise to only withhold a commercially reasonable amount of funds in the reserve account. Banking Defendants reasonably knew or should have known that Plaintiff would rely on such promise in electing to use their services. Banking Defendants have failed to fulfill such promise by way of their actions in withholding grossly excessive sums. Plaintiff has been forced to bring this lawsuit as a result of Banking Defendants' failure to fulfill such promise.

32. In further support of its promissory estoppel claim, as stated in its First Amended

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[38] *Id.* at ¶23.
[39] *Id.*
[40] *Id.* at ¶¶11-12, 31.
[41] *Id.*
[42] *Id.*

Complaint, Plaintiff also contends that Banking Defendants promised to act in good faith.[43] This promise was made as part of the terms of the Agreement, as well as on multiple occasions during the course of the parties' business relationship. Plaintiff contends that Banking Defendants' refusal to provide Plaintiff with access to its funds, as described in its First Amended Complaint, constitutes bad faith and a failure by Banking Defendants to live up to their earlier promises.[44] Plaintiff contends that it was foreseeable to Banking Defendants that Plaintiff would justifiably rely on their promise to act in good faith.[45]

33. Banking Defendants also contend that Plaintiff has failed to sufficiently plead how it allegedly suffered damages as a result of their misconduct.[46] However, as noted above, Plaintiff clearly pled that Banking Defendants' actions wrongfully restricted it from gaining access to in excess of $1.6 million for potential use as part of its business operations. This is more than adequate notice of Plaintiff's claimed damages resulting from Banking Defendants' misconduct in an amount to be proven at the time of the trial.

34. Finally, Banking Defendants point to the merger and integration clause in the Agreement and claim that this prevents Plaintiff from asserting a claim for promissory estoppel (or other tort based claims). However, the merger and integration clause, as drafted, does not waive Plaintiff's right to claim that Banking Defendants made misrepresentations and promises that they have failed to keep. Specifically, the merger and integration clause does not contain clear and unequivocal language related to waiver of reliance on any representations made by Banking Defendants to Plaintiff.[47] Without such clear and unequivocal language, the merger and integration

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[43] *Id.* at ¶23.
[44] *Id.*
[45] *Id.* at ¶24.
[46] Banking Defendants' Brief in Support of Motion to Dismiss, ¶20 [Doc. 5].
[47] *See Italian Cowboy Partners, Ltd. v. Prudential Insurance Co. of America*, 341 S.W.3d 323, 334-335 (Tex. 2011) (holding that, "Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement have never had the effect of precluding claims for fraudulent inducement." This same analysis

clause is not sufficient to waive or disclaim Plaintiff's promissory estoppel claim. Therefore, while Plaintiff acknowledges the existence of the merger and acquisition clause in the Agreement, such clause does not bar Plaintiff's promissory estoppel claim (or other asserted claims), and has no application to the facts in dispute.

35. Accordingly, the facts as pled in Plaintiff's First Amended Complaint meet the fair notice pleading requirements necessary to support a claim for promissory estoppel, and Banking Defendants' Motion to Dismiss in connection with such claim is without merit and should be denied.

D. Plaintiff's Money Had And Received Cause Of Action Plainly States A Claim Upon Which Relief Can Be Granted And Meets The Fair Notice Pleading Standard

36. Under Utah law, in order to assert an equitable claim for money had and received, Plaintiff must show that Banking Defendants received money which "in equity and good conscience" belongs to Plaintiff.[48] Alternatively, in order to establish a claim for money had and received under Texas law, Plaintiff must show: (a) Banking Defendants hold money; and (b) the money belongs to Plaintiff under equity and good conscience.[49] Plaintiff's pleadings are more than sufficient to meet the fair notice pleading requirements necessary to assert a claim for money had and received.

37. Plaintiff asserted a claim for money had and received in the alternative to its breach of contract claim. As noted above in connection with Plaintiff's promissory estoppel claim (and apparently any claim outside of a breach of contract claim that Banking Defendants were allegedly not even able to identify as part of their initial Motion to Dismiss), Banking Defendants essentially

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applies to Plaintiff's promissory estoppel claim. The applicable merger and integration clause in the Agreement lacks any disclaimer of reliance on representations made by Banking Defendants. Therefore, nothing in the Agreement waives or disclaims Plaintiff's ability to assert a promissory estoppel cause of action.)

[48] *Jones v. Mackey Price & Ostler*, 355 P.3d 100, 1014 (Utah 2015).

[49] *Staats v. Miller*, 243 S.W.2d 686, 687-88 (Tex. 1951); *L'Arte de la Mode, Inc. v. Neiman Marcus Grp.*, 395 S.W.3d 291, 296 (Tex. App.—Dallas 2013, no pet.)

allege that Plaintiff is not permitted to assert alternative claims for relief. This is not correct and a misreading of the law. Plaintiff is permitted to assert equitable claims related to Banking Defendants' wrongful withholding of funds properly belonging to Plaintiff to the extent the Court finds that no express contract exists related to the handling of such funds.

38. Banking Defendants also contend that Plaintiff states nothing beyond conclusory statements in support of its cause of action for money had and received.[50] However, this argument ignores the totality of Plaintiff's First Amended Complaint. Rather, Plaintiff clearly claims that Banking Defendants are impermissibly holding in excess of $1.6 million in their reserve account.[51] These funds were generated from Plaintiff's online sales and belong to Plaintiff. Banking Defendants are not permitted to simply withhold the funds without a commercially reasonable justification. Plaintiff contends that no such justification exists. Rather, Banking Defendants are acting in bad faith in an effort to damage Plaintiff's business.

39. Banking Defendants apparently interpret the Agreement to state that they can withhold as many funds as they want regardless of whether there is any legitimate basis for doing so. Plaintiff contends that this is an incorrect reading of the Agreement, and it has a *present* right to its *own* funds. The funds are Plaintiff's property, not that of Banking Defendants. Banking Defendants are wrongfully and impermissibly withholding such funds. This is more than sufficient to assert a viable cause of action for money had and received. Consequently, Plaintiff's First Amended Complaint satisfies the fair notice pleading requirements, and Banking Defendants' Motion to Dismiss in connection with Plaintiff's money had and received cause of action should be denied.

[50] Banking Defendants' Brief in Support of Motion to Dismiss, ¶25 [Doc. 5].
[51] Plaintiff's First Amended Complaint, ¶27 [Doc. 6].

E. Plaintiff's Breach Of The Duty Of Good Faith And Fair Dealing Cause of Action Plainly States A Claim Upon Which Relief Can Be Granted And Meets The Fair Notice Pleading Standard

40. Under Utah law, virtually every contract imposes upon each party a duty of good faith and fair dealing.[52] The Agreement also contains a cooperation clause that states, "In their dealings with one another, each party agrees to act reasonably and in good faith and to fully cooperate with each other in order to facilitate and accomplish the transactions contemplated hereby."[53] Consequently, there can be no dispute that Banking Defendants owed Plaintiff a duty of good faith and fair dealing.

41. Plaintiff contends that Banking Defendants are only permitted to withhold a commercially reasonable amount of funds in the reserve account. In other words, Banking Defendants must have some good faith, legitimate business reason to substantiate the amount of funds being withheld. They cannot simply withhold funds for the sake of withholding them. To do so is not to exercise the duty of good faith and fair dealing as required under Utah law.

42. Banking Defendants argue that they are purportedly entitled to withhold more than $1.6 million in Plaintiff's funds regardless of whether there is any legitimate business reason for doing so. The very position stated in their Motion to Dismiss forms the basis of Plaintiff's claim for breach of the duty of good faith and fair dealing. Banking Defendants initially claimed that they were withholding additional funds due to credit or financial-based risks associated with certain increased chargebacks after recent events.[54] Since such time, it has become clear that this stated position is not based on fact, as there have been no such financial-based risks.[55] Rather, the chargebacks associated with Plaintiff's sales have actually decreased. As noted above, there was a

[52] *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Centers, Inc.*, 889 P.2d 445, 450 (Utah Ct. App. 1994)
[53] *Id.*
[54] *Id.*
[55] *Id.*

single chargeback in April. Nonetheless, Banking Defendants continue to seek to withhold substantial funds at 3,200% of Plaintiff's historical losses and chargebacks.[56] In doing so, Banking Defendants are not acting in good faith as required under common law and the terms of the Agreement. Instead, Banking Defendants are acting in bad faith and harming Plaintiff's business without any reasonable justification for withholding the funds in question.

43. Furthermore, as stated in the First Amended Complaint, rather than acknowledge Plaintiff's position that Banking Defendants are in breach of the Agreement, Banking Defendants now claim that Plaintiff somehow owes them defense and indemnity in connection with the claims made the basis of this lawsuit.[57] Put another way, Banking Defendants claim that Plaintiff should indemnify them in connection with Plaintiff's claim that they have failed to perform as required under the Agreement.[58] Essentially, Banking Defendants seek to be insulated from any potential breach of contract cause of action. Banking Defendants claim they can withhold as many funds as they want without any legitimate justification and, if Plaintiff brings a claim to attempt obtain possession of such funds that are being held in bad faith, Plaintiff should indemnify Banking Defendants from claims resulting from their own misconduct. This is a nonsensical, circular argument that defeats the purpose of an indemnity provision, and further underscores Banking Defendants' bad faith efforts to bully Plaintiff into amending the terms of the Agreement.[59]

44. Finally, similar to their arguments in connection with Plaintiff's other asserted causes of action, Banking Defendants claim that Plaintiff has failed to state how it has been damaged as a result of their bad faith.[60] However, as stated repeatedly by Plaintiff, Banking Defendants' refusal to permit Plaintiff to access the more than $1.6 million in their reserve account held by Banking

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Banking Defendants' Brief in Support of Motion to Dismiss, ¶29 [Doc. 5].

Defendants has prevented Plaintiff from keeping up with the demand for its products and resulted in lost sales and revenue in an amount to be proven at the time of trial.[61]

45. Plaintiff has met the fair notice requirements to assert a cause of action for the breach of the duty of good faith and fair dealing, and Banking Defendants' Motion to Dismiss on such claims should be denied.

F. Plaintiff's Cause Of Action For Violation Of The Texas Deceptive Trade Practices Act Plainly States A Claim Upon Which Relief Can Be Granted And Meets The Fair Notice Pleading Standard

46. In order to bring a claim for violation of the Texas Deceptive Trade Practices Act ("DTPA"), Plaintiff must establish that: (a) Plaintiff is a consumer as defined under the statute; (b) Banking Defendants can be sued under the DTPA; (c) Banking Defendants committed one or more of the following acts: (i) a false, misleading, deceptive act or practice that is enumerated in the "laundry list" found in Texas Business & Commerce Code § 17.46(b) and that was relied upon by Plaintiff to Plaintiffs' detriment; (ii) breach of an express or implied warranty; (iii) any unconscionable action or course of action; (iv) the use or employment of an act or practice in violation of Texas Insurance Code, Chapter 541; or (v) a violation of one of the "tie-in" consumer statutes as authorized by Texas Business & Commerce Code §17.50(h); and (d) Banking Defendants' action(s) were a producing cause of Plaintiff's damages.[62]

47. Banking Defendants claim that Plaintiff failed to plead how they can be sued under the DTPA.[63] The DTPA allows a plaintiff to bring a cause of action against any person who uses or employs false, misleading, or deceptive practices or acts.[64] The DTPA defines a "person" as an

[61] Plaintiff's First Amended Complaint, ¶¶14-16, 33.
[62] *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 640 (Tex. 1969); *see* TEX. BUS & COM. CODE §§ 17.41-17.63.
[63] Banking Defendants' Brief in Support of Motion to Dismiss, ¶32 [Doc. 5].
[64] TEX. BUS. & COM. CODE § 17.50(a)(1); *Miller v. Keyser*, 90 S.W.3d 712, 715 (Tex. 2002).

individual, partnership, corporation, association or other group, however organized.[65] As stated in Plaintiff's First Amended Complaint, Banking Defendants are corporations under the laws of the State of Utah, Merrick, and the State of California, Signature, respectfully.[66] Further, as discussed in greater detail below, Plaintiff clearly claims that Banking Defendants engaged in false, misleading and deceptive acts.[67]

48. In Plaintiff's First Amended Complaint, it identified a host of practices and acts on the part of Banking Defendants that violated the "laundry list" of the DTPA contained in Texas Business & Commerce Code § 17.46.[68] These deceptive practices and acts include: (1) misrepresenting the nature of Banking Defendants' services by way of improperly withholding funds in the reserve account and failing to act in a commercially reasonable manner to release funds that are being unreasonably withheld; (2) attempting to rewrite the terms of the Agreement and requiring Plaintiff and its principal, Jeremiah Cottle, to execute new and more onerous contractual terms in order to obtain access to funds properly belonging to Plaintiff; and (3) consistently and routinely changing the parameters surrounding providing Plaintiff access to its funds without any reasonable or justifiable business purpose.[69]

49. Plaintiff claims that Banking Defendants represented that they would only withhold a commercially reasonable amount of funds in the reserve account to protect against chargebacks and service fees. However, it is become clear that the funds currently being withheld by Banking Defendants in the reserve account have no connection with any financial risk to Banking Defendants associated with chargebacks and fees. Rather, Banking Defendants induced Plaintiff to enter into the Agreement under false and misleading pretenses. They now claim to have unfettered

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[65] TEX. BUS. & COM. CODE § 17.45(3); *Miller v. Keyser*, 90 S.W.3d at 715.
[66] Plaintiff's First Amended Complaint, ¶¶2, 3 [Doc. 6].
[67] *Id.* at ¶36.
[68] *Id.* at ¶¶38, 41.
[69] *Id.*

ability to withhold Plaintiff's funds in the reserve account even when there is no legitimate business reason for undertaking such action. This is the specific type of conduct the DTPA was designed to protect against. Accordingly, Plaintiff has clearly provided Banking Defendants with fair notice of the basis of the claim that Banking Defendants engaged in multiple violations of the "laundry list" enumerate under Texas Business & Commerce Code § 17.46.

50. Banking Defendants also claim that Plaintiff did not seek to acquire goods or services from them. Rather, they claim that they merely held funds in an account on behalf of Plaintiff and this is insufficient to constitute a good or service necessary for Plaintiff to qualify as a consumer under the DTPA. However, this is a drastic oversimplification of the services Banking Defendants provided to Plaintiff. Banking Defendants provided services to process credit card transactions on Plaintiff's retail website. The demand deposit account opened by Plaintiff was ancillary to providing such services. Put differently, it was necessary for Plaintiff to open an account so that it could process credit card transactions. The provision of services by a bank in connection with an account is within the scope of the DTPA. *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 564-565 (*quoting Farmer's & Merchants State Bank v. Ferguson*, 605 S.W.2d 320. 324 (Tex. Civ. App.—Fort Worth 1980), *aff'd on other grounds*, 617 S.W.2d 918 (Tex. 1981)).

51. In the section of the Motion to Dismiss addressing Plaintiff's DTPA claim, Banking Defendants again misconstrue the true nature of Plaintiff's allegations. Plaintiff does not claim that Banking Defendants have no right to establish a reserve account. Rather, Plaintiff contends that Banking Defendants may only withhold a commercially reasonable amount of funds in the bank account based on a legitimate business purpose. It is not the mere act of withholding funds that constitutes a violation of the DTPA. Instead, it is Banking Defendants' decision to withhold more than $1.6 million when there is no basis for withholding such a large amount based on Plaintiff's past course of dealings and the fact that Banking Defendants ceased processing credit card

transactions in December 2017.

52. Finally, similar to their arguments in connection with Plaintiff's other asserted causes of action, Banking Defendants claim that Plaintiff has failed to state how it has been damaged as a result of their deceptive, misleading and false practice and/or acts.[70] However, as stated repeatedly by Plaintiff, Banking Defendants' refusal to permit Plaintiff to access the more than $1.6 million in their reserve account held by Banking Defendants has prevented Plaintiff from keeping up with demand for its products and resulted in lost sales and revenue in an amount to be proven at the time of trial.[71]

53. Therefore, Plaintiff has more than met the fair notice requirements to assert a cause of action for violation of the DTPA, and Banking Defendants' Motion to Dismiss on such claims should be denied.

G. Plaintiff's Unjust Enrichment Cause Of Action Plainly States A Claim Upon Which Relief Can Be Granted And Meets The Fair Notice Pleading Standard

54. Pleading in the alternative, Plaintiff asserted an unjust enrichment claim against Banking Defendants concerning Banking Defendants' improper withholding of certain funds discussed throughout the First Amended Complaint and this Response.[72] Unjust enrichment is an equitable theory of recovery holding that one who receives benefits unjustly should make restitution for those benefits, and is not dependent on the existence of a wrong.[73] A person is unjustly enriched when he obtains a "benefit from another by fraud, duress, or the taking of an undue advantage."[74] It occurs when a person sought to be charged has wrongfully secured a benefit or has passively received a benefit which would be unconscionable to retain.[75] Unjust enrichment characterizes the

[70] Banking Defendants' Brief in Support of Motion to Dismiss, ¶29 [Doc. 5].
[71] Plaintiff's First Amended Complaint, ¶¶14-16, 33.
[72] *Id.* at ¶¶46-48.
[73] *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied).
[74] *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex.1992).
[75] *City of Corpus v. S.S. Smith & Sons Masonry, Inc.*, 736 S.W.2d 247, 250 (Tex. App.—Corpus Christi 1987, writ denied).

result or failure to make restitution of benefits received under such circumstances as to give rise to implied or quasi-contract to repay.[76]

55. In the First Amended Complaint, Plaintiff claims Banking Defendants obtained the more than $1.6 million currently held in a reserve account by fraud, duress, or taking undue advantage of Plaintiff.[77] Specifically, Banking Defendants represented that they would only withhold a commercially reasonable amount of funds in the reserve account. The amount currently withheld in the reserve account is not commercially reasonable. Plaintiff would not have agreed to use Banking Defendants' services but for their promise to act in good faith and to only withhold funds as necessary to protect against potential fees and chargebacks. That is not what Banking Defendants are doing at this point in time. Rather, Banking Defendants are unreasonably, and in contradiction to their prior representations, withholding a grossly excessive amount of Plaintiff's funds. Consequently, as stated in the First Amended Complaint, Plaintiff has met the fair notice requirements to assert a cause of action for unjust enrichment, and Banking Defendants' Motion to Dismiss on such claim should be denied.

H. Plaintiff's Request For Specific Performance Plainly States A Claim Upon Which Relief Can Be Granted And Meets The Fair Notice Pleading Standard

56. As an alternative remedy, Plaintiff requests the Court to order Banking Defendants to specifically perform as required under the Agreement and release Plaintiff's funds currently held in the reserve account.[78] The determination of whether Plaintiff has another adequate remedy at law outside of specific performance is not properly within the scope of the 12(b)(6) Motion to Dismiss and requires the Court to consider facts to evaluate all potential available remedies. Therefore, Plaintiff claims that this issue is not properly before the Court. However, irrespective of such issue,

[76] *Allen v. Berrey*, 645 S.W.2d 550, 553 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).
[77] Plaintiff's First Amended Complaint, ¶47 [Doc. 6].
[78] *Id.* at ¶¶50, 51.

Plaintiff has fully performed under the terms of the Agreement and fulfilled all necessary conditions precedent. Plaintiff simply requests the Court to release the funds that properly belong to it and are being wrongfully withheld by Banking Defendants. As stated in the First Amended Complaint, Plaintiff has met the fair notice requirements necessary to assert a claim for specific performance, and Banking Defendants' Motion to Dismiss on such claim should be denied.

V.
CONCLUSION

57. For each of the above-stated reasons, Plaintiff prays that this Court deny Banking Defendants' Motion to Dismiss First Amended Complaint Under Fed. R. Civ. P. 12(b)(6), that Plaintiff recover its reasonable and necessary attorneys' fees and costs incurred in opposition to the Motion to Dismiss, and that Plaintiff have such other and further relief to which it may show itself to be justly entitled at law or in equity. In the alternative, if the Court finds that any cause of action asserted by Plaintiff does not meet the fair notice requirements, which Plaintiff denies, Plaintiff prays that it be provided an opportunity to seek leave to amend its live pleading to address such issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served, via the Court's electronic filing system, on the 15th day of May 2018, as follows:

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