

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.

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CIVIL ACTION NO. 1:18-cv-00034-C

PLAINTIFF'S FIRST AMENDED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), SLIDE FIRE SOLUTIONS, LP ("Slide Fire" or "Plaintiff") files its First Amended Complaint, and in support of which shows as follows:¹

I.
PARTIES

1. Slide Fire is Texas limited partnership with its principal place of business in Moran, Texas.

2. Merrick Bank Corporation ("Merrick") is a corporation organized under the laws of the State of Utah, with its principal place of business located at 10705 South Jordan Gateway, Suite 200, South Jordan, Utah 94095. Merrick is an industrial loan corporation doing business nationally. Merrick has made its initial appearance in this case and may be served with process by serving its counsel of record, or, alternatively serving its agent for service of process, Brian W. Jones, registered

¹ Plaintiff files this First Amended Complaint in response to Banking Defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), or, alternatively, Motion for a More Definite Statement under Federal Rule of Civil Procedure 12(e) in an effort to address issues raised in the Motion. Plaintiff maintains that the claims asserted against the Banking Defendants more than satisfy the fair notice pleading requirements. However, to the extent the Court finds that Plaintiff's live pleading is inadequate, Plaintiff requests an opportunity to seek leave to amend its pleading to address any concerns raised by Banking Defendants.

agent, at 10705 S. Jordan Gateway, Suite 200, South Jordan, Utah 84095.

3. CKC Holdings, Inc. d/b/a Signature Card Services ("Signature") is a California corporation whose address is 8360 Melrose Avenue, Los Angeles, California 90069. Signature has made its initial appearance in this case and may be served with process by serving its counsel of record, or, alternatively, by serving its registered agent, Christine Bednar, 2101 W. Burbank Blvd., Burbank, California 91506.

II. **JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a), because complete diversity of citizenship exists between Slide Fire, on the one hand, and Merrick and Signature (collectively, the "Banking Defendants"), on the other hand, as this dispute is between corporate citizens of different states at all times relevant to this proceeding, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

5. Venue is proper in the United States District Court for the Northern District of Texas, Abilene Division, pursuant to 29 U.S.C. § 1391(a)(2), as a substantial part of the events or omissions giving rise to the claims at issue, including execution and performance under the applicable contract made the subject of this dispute, occurred in Shackelford County, Texas, and the Abilene Division of the United States District Court for the Northern District of Texas covers all disputes pending in Shackelford County, Texas. Defendants acknowledged that venue is proper in this Court in their Notice of Removal.²

III. **STATEMENT OF FACTS**

6. The lawsuit is presented to this court because of the unreasonable and unwarranted conduct of the Banking Defendants. Specifically, Banking Defendants are holding Slide Fire's funds

² Defendants' Notice of Removal, p. 3 [Doc. #1].

hostage in an effort to coerce Plaintiff and its principal, Jeremiah Cottle ("Cottle"), to acquiesce and execute new, expansive and unfavorable obligations and guarantees to the Banking Defendants under the guise of a purported attempt by Banking Defendants to shield themselves from tangential, hypothetical, unviable, and currently non-existent liability in personal injury lawsuits involving Plaintiff. Plaintiff requests that Banking Defendants live up to their obligations under the controlling Agreement (as hereinafter defined) and release the applicable funds immediately.

7. On or about November 18, 2011, Plaintiff submitted a Merchant Application to the Banking Defendants. The Merchant Application was attached to a Merchant Agreement, which was expressly incorporated therein by reference for all purposes. The Merchant Application and Merchant Agreement are collectively referred to herein as the "Agreement."³ Plaintiff and the Banking Defendants were each Parties to the Agreement.

8. The Parties entered into the Agreement to assist Plaintiff with its online retail store. Specifically, Banking Defendants were to provide technical documentation and support to allow Plaintiff too accept and process transactions through its online retail store. As part of the Agreement, Slide Fire maintained a demand deposit account with the Banking Defendants for the processing of charges initiated through the online retail store.

9. The Agreement permits the Banking Defendants to establish a reserve account for indebtedness that may arise under the Agreement such as chargebacks and fees. The Agreement defines a "chargeback" as a transaction that the Banking Defendants return to Plaintiff under the terms of the Agreement. The Agreement allows the Banking Defendants to withhold only a commercially reasonable amount for a maximum of six months.

³ Out of an abundance of caution, Plaintiff has not attached the Agreement due to the possible restrictions contained in Article 28 of the Agreement titled, "Confidentiality." Notably, this is the only contract between the Parties. The Banking Defendants previously filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), wherein they claimed it was unclear what contract was at issue. This is disingenuous at best, as there is only one agreement and the Parties have been in discussion for months attempting to resolve this matter informally rather than being forced to litigate this matter.

10. On October 1, 2017, an incident occurred at the Route 91 Harvest music festival on the Las Vegas Strip in Nevada (hereinafter the "Incident"). Within days, reports surfaced alleging that weapons used by a gunman were allegedly outfitted by products designed, manufactured, and/or sold by Plaintiff. Banking Defendants took the opportunity to take advantage of Plaintiff by withholding funds and demanding greater obligations from Plaintiff in exchange for a release of Plaintiff's funds.

11. Historically, Plaintiff experienced chargebacks or related returns equal to less than 0.5% of their operating account(s). After the tragic shooting, the volume of sales on Slide Fire's website increased. The Banking Defendants explicitly approved the increase and agreed to continue operations under the Agreement. Regardless of the increase in sales, the chargeback and returned ratio actually improved. Specifically, the chargebacks during that period only amounted to 0.3% of total sales.

12. Nonetheless, despite the lower chargeback rate, within two weeks of the Incident, Banking Defendants took steps to wrongfully retain funds in Plaintiff's operating account(s) relying on the Agreement's reserve account provision as purported support for its position. Presently, Banking Defendants are wrongfully withholding an amount representative of nearly 20% of current sales. This is clearly not a commercially reasonable amount. As stated above, Plaintiff's chargebacks have historically been approximately 0.5% and since the Incident the chargebacks have only been 0.3%. While the reserve account provision allows for reasonable funds to be set aside to cover chargebacks from the online retail store, the Agreement does not afford the Banking Defendants with a justifiable basis to withhold the amount of funds currently set aside from Plaintiff's operating account.

13. The Agreement and the governing law for the transaction, imposes a duty on the Banking Defendants to act in good faith with fair dealing. Withholding Plaintiff's funds under these

facts with Plaintiff's chargeback history is completely unreasonable and constitutes bad faith specifically designed to harm Plaintiff.

14. Banking Defendants terminated its relationship with Plaintiff in December of 2017, forcing it to take extensive efforts to procure a new merchant bank to stay in business. For nearly 90 days, Banking Defendant held a significant amount of funds belonging to Plaintiff. This seizure threatened Plaintiff's ability to pay employees, fulfill orders, and pay bills and taxes.

15. After months of patience and reasonable efforts by Plaintiff, Banking Defendants begrudgingly released some funds, but continued to hold \$1,626,330.56. Banking Defendants are now holding these funds hostage and are demanding that Slide Fire's owner, Jeremiah Cottle, execute a more onerous agreement providing new and unreasonably expanded personal guarantees, warranties, covenants, and indemnities to Banking Defendants that far exceed the terms of the original Agreement between the Parties.

16. Banking Defendants have consistently represented that that their sole concern is liability from the "class action suit (pending against Plaintiff)" as a result of the Incident. The argument is nonsensical. By the terms of their Agreement, Banking Defendants can hold funds for a maximum of six months. As of the filing of this Amend Complaint, Plaintiff has not appeared in a single lawsuit stemming from the Incident. As the Banking Defendants are well aware, there is no threat of any judgment being levied against Plaintiff in the next six months. Instead, it has become clear that the Banking Defendant true motivation is to attempt to avoid bad press resulting from their business relationship with Plaintiff. However, this is not a justification for withholding of funds under the Agreement. Rather, the Banking Defendants are acting in bad faith and using the unfortunate Incident to wrongfully hold Plaintiff's funds hostage, collect interest on Plaintiff's funds and wrongfully demand that Plaintiff and its principal execute an overreaching "Release of Merchant Reserve Funds and General Release."

17. The Agreement and Banking Defendants' obligations therein are governed by the laws of the State of Utah.⁴ Banking Defendants' actions have breached the Agreement and Utah law and cause Plaintiff damages.

VI.
CAUSES OF ACTION

COUNT 1: BREACH OF CONTRACT

18. Plaintiff incorporates by reference herein all prior and subsequent allegations in this pleading, as though fully set forth herein.

19. Plaintiff and Banking Defendants executed a valid and enforceable Agreement, as identified in Paragraph 7 above.

20. Banking Defendants' above-described conduct constitutes a material breach of their Agreement. Banking Defendants' breaching conduct includes, but is not limited to:

- a. Banking Defendants' refusal to disperse a reasonable amount of funds to Plaintiff from its merchant operating account and/or over-inflation of a reserve account pursuant to Article 10 of the Agreement;
- b. Banking Defendants' wrongful withholding of applicable funds belonging to Plaintiff; and
- c. Otherwise failing or refusing to comply with the terms and provisions of the Agreement.

21. As a result of Banking Defendants' breach, Plaintiff has been damaged in an amount that exceeds the minimum jurisdictional limits of this Court, as it has been denied access to significant fund it could have used to increase its inventory and generate additional sales.

⁴The choice of law provision is contained in Article 48 of the Agreement.

COUNT 2: PROMISSORY ESTOPPEL

22. Plaintiff incorporates by reference herein all prior and subsequent allegations in this pleading, as though fully set forth herein.

23. In the alternative to Count 1, Banking Defendants made a promise or promises to Plaintiff that Banking Defendants did not keep. These promise(s) included, but are not limited to:

- a. Banking Defendants' represented that they would maintain a "reserve account" designated for all future indebtedness of the Banking Defendants that may arise such as chargebacks and fees. However, despite ineluctably admitting that Banking Defendants were not concerned with any such credit or financial-based risks, Banking Defendant continue to maintain a significant amount of Plaintiff's funds in a reserve account withhold justification, withholding funds owed to Plaintiff;
- b. Banking Defendants represented that they would act in good faith. However, as discussed above, they have repeatedly failed to do so with the specific intent to cause Plaintiff harm; and
- c. Otherwise failing or refusing to comply with parameters of promise(s) and/or representations made to Plaintiff by Banking Defendants.

24. Plaintiff reasonably, substantially and justifiably relied on the representations of the Banking Defendants to its detriment. Banking Defendants knew, or reasonably should have known, the Plaintiff would rely on Banking Defendants' promise to adhere to the Agreement and its obligations through its Agreement time period.

25. An injustice will be avoided by enforcing the Banking Defendants' promise(s).

COUNT 3: MONEY HAD AND RECEIVED

26. Plaintiff incorporates by reference herein all prior and subsequent allegations in this

pleading, as though fully set forth herein.

27. Defendant holds money that, in equity and good conscience, belongs to Plaintiff. Specifically, Banking Defendants have obtained over \$1,600,000 of funds belonging to Plaintiff and maintained these funds, to the exclusion of Plaintiff, in a purported reserve account. Banking Defendants have refused to issue the funds to Plaintiff despite numerous, reasonable demands. Banking Defendants have no justifiable basis for withholding these funds.

28. Plaintiff seeks liquidated damages in the amount of at least \$1,600,000.

COUNT 4: BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

29. Plaintiff incorporates by reference herein all prior and subsequent allegations in this pleading, as though fully set forth herein.

30. Under Utah common law, the covenant of good faith and fair dealing inheres in most, if not all, contractual relationships. Furthermore, under Article 44 of the Agreement, Banking Defendants expressly agreed to "act reasonably and in good faith and fully cooperate" with Plaintiff to facilitate and accomplish the transactions making the basis of the Parties' business relationship.

31. Banking Defendants have failed to comply with their obligations to act in good faith and deal fairly. Banking Defendants' actions include, but are not limited to:

- a. Banking Defendants' refusal to disperse a reasonable amount of funds to Plaintiff from its merchant operating account and/or over-inflation of a reserve account pursuant to Article 10 of the Agreement;
 - i. Despite ineluctably admitting that Banking Defendants were not concerned with any such credit or financial-based risks, which are generally allowable under the Agreement; and
 - ii. While attempting to coerce Plaintiff into execution of additional one-sided and imbalanced contractual and indemnity agreements in

exchange for the release of funds owed to Plaintiff.

- b. Banking Defendants' are withholding funds at 3200% of historical losses and chargebacks;
- c. Using circular and illogical reasoning, Banking Defendants' have made unreasonable and unfounded demands for indemnity to Plaintiff for claims Plaintiff has asserted in this lawsuit; and
- d. Banking Defendants have threatened to offset its attorneys' fees and costs against any funds held in the Reserve.

32. Further, Banking Defendants have failed to act consistently with the Agreement's agreed common purpose and Plaintiff's justified expectations.

33. As a result of Banking Defendants' breach, Plaintiff has been damaged in an amount that exceeds the minimum jurisdictional limits of this Court.

COUNT 5: DECEPTIVE TRADE PRACTICES

34. Plaintiff incorporates by reference herein all prior and subsequent allegations in this pleading, as though fully set forth herein.

35. Plaintiff is a consumer and/or business consumer, as it is a Texas limited partnership with less than \$25 million in assets that sought goods or services as part of its business relationship with Banking Defendants.

36. Plaintiff will show that Banking Defendants engaged in certain false, misleading, and deceptive acts, practices, and/or omissions actionable under the Texas Deceptive Trade Practices, Consumer Protection Act, as alleged herein below.

37. Defendants engaged in an "unconscionable action or course of action" to the detriment of Plaintiff as that term is defined by Section 17.45(5) of the Texas Business and Commerce Code, by taking advantage of the lack of knowledge, ability, experience, or capacity of

Plaintiff to a grossly unfair degree.

38. Defendants violated Section 17.46(b) of the Texas Business & Commerce Code, in that Banking Defendants:

- a. Caused confusion or misunderstanding as to the source, sponsorship, approval, or certification of services;
- b. Failed to disclose information concerning services which was known at the time of the transaction with the intention to induce the consumer (Plaintiff) into a transaction into which the consumer would not have entered had the information been disclosed, to include, but not be limited to representing that the Banking Defendants would act in good faith and withhold only a commercially reasonable amount of funds, which they clearly have failed to do;
- c. Disparaging the goods, services, or business of another by false or misleading representation of facts;
- d. Making false or misleading statements of fact concerning the reasons for, existence of, or amount of value reductions and/or increases; and
- e. Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

39. Plaintiff will show that the following warranties were breached and therefore actionable under Section 17.50(a)(2) of the Texas Business and Commerce Code:

- a. The breach of an express or implied warranty; and/or
- b. Any unconscionable action or course of action by any person.

40. Plaintiff was forced to file this lawsuit against Banking Defendants because of ongoing damages suffered as a result of Banking Defendants' deceptive and fraudulent tactics regarding the excessive and improper withholding of Plaintiff's funds in violation of the Texas Deceptive Trade Practices Act ("DTPA"). The DTPA must be liberally construed and applied to promote its purpose of protecting consumers against false, misleading, or deceptive business practices, unconscionable action, and breaches of warranty. Tex. Bus. & Com. Code § 17.44.

41. Plaintiff, a company that acquired goods and services, qualifies as a consumer within

the scope of the DTPA. Banking Defendants' transfer actions and maintenance of Plaintiff's merchant accounts constituted "services" under the DTPA, which defines services as "work, labor, or service purchased or leased for use, including services in connection with the sale or repair of goods." Tex. Bus. & Com. Code § 17.45(2). The services provided by a bank in connection with a banking account fall within the scope of the DTPA. See *La Sara Grain Co. v. First National Bank of Mercedes*, 673 S.W.2d 558, 564-565 (Tex. 1984) (quoting *Farmer's & Merchants State Bank v. Ferguson*, 605 S.W.2d 320, 324 (Tex. Civ. App. – Fort Worth 1980)). Banking Defendants misrepresented the nature of their services as they relate to the maintenance and handling of Plaintiff's operating account and reserve account, and engaged in false, misleading and deceptive acts in violation of § 17.46(a) of the DTPA. Banking Defendants' action include, but are not limited to, the following:

- a. Falsely misrepresented the nature of their services as the related to the maintenance of the operating account and reserve account, and the distribution of funds from those accounts. Presently, Banking Defendants are wrongfully withholding funds at an amount representative of 3200% of historical losses and chargebacks. This is clearly not a commercially reasonable amount. While the reserve account provision allows for reasonable funds to be set aside to cover chargebacks from the online retail store, the Banking Defendants do not have a justifiable basis to withhold the amount of funds currently set aside from Plaintiff's operating account. As stated, Banking Defendants have alleged characteristics, uses, and benefits to Plaintiff that the services did not.
- b. Banking Defendants have also falsely represented the rights and obligations of the Plaintiff and Banking Defendants. Banking Defendants, while holding Plaintiff's funds hostage, have demanded that Slide Fire's owner, Jeremiah

Cottle, execute a more onerous agreement providing new and unreasonably expanded personal guarantees, warranties, covenants, and indemnities to Banking Defendants while representing that terms were only intended to reinforce the original Agreement between the Parties. Banking Defendants have also represented to Plaintiff that they are owed indemnity for Banking Defendants' own conduct and related to the claims made in this lawsuit while making an unreasonable and unfounded demand for indemnity to Plaintiff for claims Plaintiff has asserted in this lawsuit.

- c. Banking Defendants routinely played "hide the ball" when representing to Plaintiff the party making decisions as to the release of Plaintiff's funds causing confusion and misunderstanding as to the source and approval of the services received and decisions affecting Plaintiff's business and operations;
- d. Banking Defendants have falsely represented that certain services and benefits would be provided to the Plaintiff pursuant to the Agreement; benefits that Banking Defendants never intended or failed to confer; and
- e. Banking Defendants' numerous violations of the DTPA are a producing, direct, and proximate cause of the Plaintiff's legal injuries and warrant remedial measures.

42. Plaintiff will seek an order enjoining such acts or failure to act on the part of Banking Defendant.

43. Plaintiff will show that the acts, practices, and/or omissions complained of were the producing cause of Plaintiff's damages more fully described herein below.

44. Plaintiff will further show that the acts, practices, and/or omissions complained of under Section 17.46(b) of the Texas Business & Commerce Code were relied upon by Plaintiff to

Plaintiff's detriment.

45. After fruitlessly trying to resolve this matter with Banking Defendants, Plaintiff now presents this matter to the Court. Plaintiff will show that it has complied with all conditions precedent to the filing of this lawsuit and recovery of additional damages and attorneys' fees.

COUNT 6: UNJUST ENRICHMENT

46. Plaintiff incorporates by reference herein all prior and subsequent allegations in this pleading, as though fully set forth herein.

47. Banking Defendants have been unjustly enriched by obtaining a benefit from Plaintiff by fraud, duress, or the taking of an undue advantage. Banking Defendants have obtained over \$1,600,000 of funds belonging to Plaintiff and maintained these funds, to the exclusion of Plaintiff, in a purported reserve account. Banking Defendants have refused to issue the funds to Plaintiff despite numerous, reasonable demands in violation of the Parties' Agreement.

48. Banking Defendants has wrongfully secured a benefit and caused Plaintiff damages.

**VII.
DEMAND FOR RELIEF**

MONEY DAMAGES

49. Plaintiff seeks money damages in an amount well-over \$1,600,000. Plaintiff also seeks the following:

- a. Prejudgment and post-judgment interest;
- b. Actual and consequential damages, and/or lost profits;
- c. Reasonable attorneys' fees under Texas Civil Practice & Remedies Code Chapters 37 and 38;
- d. Further, Plaintiff will show that the false, misleading, and deceptive acts, practices, and/or omissions complained of were committed "knowingly" and/or "intentionally" entitling Plaintiff to recover multiple damages as provided by 17.50(b)(1) of the Texas Business & Commerce Code;
- e. Court costs; and

f. All other relief to which Plaintiff is entitled.

SPECIFIC PERFORMANCE

50. Plaintiff requests the Court to order Banking Defendants to specifically perform as required under the terms of the Agreement. Specifically, Plaintiff seeks an Order from this Court directing Banking Defendants to immediately release all monies withheld by the Banking Defendants.

51. Plaintiff has fully complied with all obligations under the Agreement and/or has been ready, willing, and able to perform at relevant times.

VIII.
CONDITIONS PRECEDENT

52. All conditions precedent to Plaintiff's claims for relief has been performed or has occurred.

IX.
JURY DEMAND

53. Pursuant to Federal Rule of Civil Procedure 38, Plaintiff demands trial by jury in this action of all issues so triable.

X.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff Slide Fire Solutions, LP prays that Defendants Merrick Bank Corporation and CKC Holdings, Inc. d/b/a Signature Card Services be cited to appear, answer, specifically perform as required under the Agreement, and that Plaintiff be awarded money damages; prejudgment and post judgment interest; statutory damages; attorneys' fees and recover its costs incurred herein and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

By: /s/ Brian M. Stork

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**ATTORNEYS FOR PLAINTIFF
SLIDE FIRE SOLUTIONS, LP**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed with the Clerk of the Court using the Court's electronic filing system (CM/ECF), on the 6th day of April 2018, which will then send notification of such filing to the following:

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/s/ Brian M. Stork

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