

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA**

ELLEN S. ESSIG, Individually and On Behalf
Of All Others Similarly Situated,

Plaintiff,

vs.

PNC BANK, NA, a wholly-owned subsidiary of
PNC FINANCIAL SERVICES GROUP, INC,

Defendant.

Case No. 2:10-cv-1738-WLS

CLASS ACTION COMPLAINT

JURY TRIAL DEMAND

Plaintiff Ellen S. Essig, by her undersigned attorneys, brings this class action complaint against PNC Bank, NA (“Lender”), a wholly-owned subsidiary of PNC Financial Services Group, Inc. (“PNC”). Plaintiff’s allegations are based upon knowledge as to her own acts and upon information and belief as to all other matters. Plaintiff’s information and belief is based upon, among other things, the investigation undertaken by her attorneys, which included, without limitation: (a) interviews of witnesses; (b) review of PNC’s published materials and information available on the internet; and (c) analysis of public records and documents. Plaintiff believes that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This is a class action against PNC for breach of contract, breach of the duty of good faith and fair dealing and unjust enrichment. Each claim is based upon PNC’s conduct in overcharging and/or improperly charging the Plaintiff and a class of similarly situated individuals (the “Class”), fees charged under a subordination clause contained within their Home

Equity Line of Credit (“HELOC”) Agreement (“HELOC Agreement”) between December 24, 2004, through and including the present (the “Class Period”).

2. A HELOC is a loan in which the lender agrees to lend a sum of money on certain payment and interest terms where the collateral is the borrower’s equity in his/her house. By agreement, HELOC loans are typically subordinate to the primary (and often secondary) home mortgages.

3. Prior to and throughout the Class Period, PNC improperly collected subordination fees under the HELOC Agreement when: (a) the subordination clause is ambiguous and unenforceable on its face; or (b) if enforceable, collected in instances they should not be imposed and/or collected in amounts in excess of those allowable under the HELOC Agreement.

4. The subordination clause in the HELOC Agreement, executed by Plaintiff and members of the Class, specifically authorizes the Lender to “charge [the borrower] a fee of \$100.00 each time [the borrower] request[s] and [PNC] agree[s] to subordinate [its] lien position to that of *another creditor*.”¹ See HELOC Agreement, annexed hereto as Exhibit A (emphasis added).

5. As drafted, the subordination clause is a vague, indefinite and uncertain because it is unclear on its face what “another creditor” means. Indeed, the undefined term could refer to a creditor who PNC had not already agreed to subordinate its lien position to or any creditor, other than PNC (regardless of whether PNC had already agreed to assume a subordinate lien position to), but implicated because PNC’s subordinate lien position becomes subject to a subsequent refinancing event. Or, perhaps the phrase “another creditor” has yet another meaning not expressed here and not readily ascertainable from a plain reading of the subordination clause.

¹ Some HELOC Agreements may provide for a fee greater than \$100 but this does not change the nature of the claims alleged herein.

6. Because the phrase “another creditor” is an essential term of the subordination clause its vagueness prevents the creation of an enforceable provision of the HELOC Agreement. Further, to the extent there exists any ambiguity in the contract language, the issue should be resolved in Plaintiffs’ favor under to the doctrine of *contra proferentem*.

7. Even if a contract was formed and the subordination clause is enforceable as written (whatever that meaning is), PNC necessarily is limited to collect from borrowers only such fees permitted under the HELOC Agreement. PNC breached and continues to breach the HELOC Agreement and/or is unjustly enriched by charging borrowers fees not authorized under that provision and/or charging fees over and above those allowable.

8. Plaintiff, on her own behalf, and as a representative of a Class of similarly situated individuals, seeks to recover compensatory damages in the amount of subordination fees improperly collected by PNC pursuant to the HELOC Agreement.

9. Plaintiff also seeks injunctive relief ordering cessation of the offending practices and revision of the language of the HELOC Agreement making its terms clear to unwitting borrowers.

JURISDICTION AND VENUE

10. This Court has diversity subject-matter jurisdiction over this class action pursuant to the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (“CAFA”), which, *inter alia*, amends 28 U.S.C. §1332, at new subsection (d), conferring federal jurisdiction over class actions where, as here: (a) there are 100 or more members in the proposed Class; (b) at least some members of the proposed Class have a different citizenship from PNC; and (c) the claims of the proposed Class members exceed the sum or value of five million dollars (\$5,000,000) in the aggregate. *See* 28 U.S.C. §1332(d)(2) and (6).

11. This Court has personal jurisdiction over the parties because Plaintiff submits to the jurisdiction of the Court, PNC is incorporated in the State of Pennsylvania, and by virtue of the facts that PNC's executive offices are located in the State and PNC systematically and continually conducts business throughout the State.

12. Venue is proper because PNC is incorporated in this District, conducts substantial business in this District, has its executive offices in this District, and because certain of the violations affecting Class members residing in Pennsylvania occurred in this District. Further, the HELOC Agreement at issue provides that "substantive terms and provisions shall be governed by and construed in accordance with the laws of Pennsylvania."

PARTIES

13. Plaintiff Ellen Essig, a resident of Ohio, is party to a HELOC Agreement with PNC.

14. PNC is a Pennsylvania Corporation that maintains its principal place of business at One PNC Plaza, 249 Fifth Avenue, Pittsburgh, Pennsylvania.

CLASS ACTION ALLEGATIONS

15. Plaintiff brings this class action on her own behalf and on behalf of all similarly situated individuals who were: (a) party to a PNC HELOC Agreement with a subordination clause the same or substantially similar to that contained in Exhibit A; and (b) paid subordination fees improperly levied under that agreement.

16. This action is properly maintainable as a class action.

17. The Class is so numerous that joinder of all members is impracticable. Based on the Company's most recent Form 10-Q filed with the Securities and Exchange Commission on November 9, 2010, PNC's outstanding home equity lines of credit and installment loans totaled

\$35.0 billion with likely tens of thousands of borrowers throughout the nation.

18. The number and identities of borrowers who have executed HELOC Agreements with PNC can easily be determined from records maintained by PNC and/or its agents. The disposition of their claims in a class action will be of benefit to the parties and to the Court.

19. A class action is superior to other methods for the fair and efficient adjudication of the claims herein asserted, and no unusual difficulties are likely to be encountered in the management of this action as a class action. The likelihood of individual Class members prosecuting separate claims is remote due to the nominal amount of damages suffered by any individual member of the Class.

20. There is a well-defined community of interest in the questions of law and fact involved affecting members of the Class. Among the questions of law and fact which are common to the Class, and which predominate over questions affecting any individual Class member are, *inter alia*, the following:

- a. Whether the subordination clause contained within the HELOC Agreement is ambiguous and unenforceable as written under Pennsylvania law;
- b. Whether the doctrine of *contra proferentem* applies to the subordination clause under Pennsylvania law;
- c. Whether PNC improperly imposed subordination fees on the members of the Class based on an unenforceable provision under Pennsylvania law;
- d. Whether PNC improperly imposed subordination fees on members of the Class in excess of the allowable amount under Pennsylvania law; and
- e. Whether, and to what extent, Plaintiff and the members of the Class have been damaged by PNC's unjust enrichment and/or breach of the HELOC Agreement

under Pennsylvania law, and the proper measure of damages.

21. Plaintiff is a member of the Class and is committed to prosecuting this action. Plaintiff has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other members of the Class in that she is seeking compensatory damages for PNC's unjust enrichment and/or breach of contract by virtue of subordination fees improperly collected under the HELOC Agreement. Plaintiff does not have interests antagonistic to or in conflict with those she seeks to represent. Plaintiff is, therefore, an adequate representative of the Class.

22. The likelihood of individual Class members prosecuting separate individual actions is remote due to the relatively small loss suffered by each Class member as compared to the burden and expense of prosecuting litigation of this nature and magnitude. Absent a class action, PNC is likely to avoid liability for its wrongdoing, and the Class members are unlikely to obtain redress for the wrongs alleged herein.

23. Adjudication of this case on a class-wide basis is manageable by this Court. The standard form HELOC Agreement issued to Plaintiff and to other members of the Class throughout the United States and its possessions are the same or so similar as to be legally and factually indistinguishable in all material respects, and the laws of the various states which may be applied to Plaintiff's unjust enrichment and breach of contract claim on behalf of the Class are largely identical or can otherwise be grouped into a small number of subsets based on any variations that may be deemed to be relevant to the Court. As a result, it will not be difficult for the Court or the jury to determine whether PNC has breached its contracts for each of the members of the Class. This Court is an appropriate forum for this dispute.

SUBSTANTIVE ALLEGATIONS

24. At all times relevant hereto, the note on Plaintiff's home mortgage was held by Third Federal Savings and Loan Association of Cleveland ("Third Federal"), located at 7007 Broadway Ave., Cleveland, OH 44105.

25. Subsequently, on February 6, 2006, Plaintiff executed the HELOC Agreement, (annexed hereto as Exhibit A) with PNC whereby PNC assumed a subordinate lien position to Third Federal.

26. The HELOC Agreement, a standard PNC form contract, is comparable in all material aspects and is substantially similar to the form HELOC Agreement used by PNC nationwide. The HELOC Agreement evidences the debt owed by the borrower to the lender and is the basic contractual instrument in securing a home equity line of credit at PNC.

27. The Agreement is a contract of adhesion, in that Plaintiff and the other members of the Class were not given any opportunity to negotiate any of its terms or conditions. Indeed, the Agreement was offered to Plaintiff and other members of the Class on a "take it or leave it" basis.

28. The Agreement sets forth the following provision pertaining to fees charged relating to a request for subordination:

Subordination Fee. Unless prohibited by applicable law, we will charge you a fee of \$100.00 each time you request and we agree to subordinate our lien position to that of another creditor.

29. In September of 2010, Plaintiff refinanced her home mortgage with Third Federal, the same lender she had been with up to that date and the same lender to which PNC had agreed previously to take a subordinate lien position.

30. In October of 2010, Plaintiff received a statement from PNC on her HELOC.

Included in the statement was an extra, non-specific charge of \$135.00. When Plaintiff called and inquired about this charge, she was informed it was a subordination fee arising out of her recent refinancing. Understandably, Plaintiff was both confused by the amount and the nature of the fee.

31. Despite being the central component of PNC's right under the HELOC Agreement to charge a subordination fee, the phrase "another creditor" is undefined and so vague that its meaning cannot be reasonably discerned from plain language of the HELOC Agreement.

32. Indeed, "another creditor" could be construed as a creditor to which PNC had not already agreed to take a subordinate lien position, or any creditor (regardless of whether PNC had previously agreed to take a subordinate lien position to it), or still some other meaning not readily understandable from the plain language of the HELOC Agreement.

33. The vagueness, indefiniteness and uncertainty of the phrase "another creditor," as an essential term of the subordination clause, prevents the creation of an enforceable provision of the Agreement under Pennsylvania law.

34. Under the doctrine of *contra proferentem*, any ambiguity must be construed against the drafter and in accordance with the reasonable expectations of the borrower when he or she entered into the contract. This doctrine is particularly applicable in situations where, such as here, a sophisticated lending institution, which frequently engages in lending transactions, enters into a standardized contract of adhesion with a less sophisticated borrower.

35. There was no meeting of the minds between the parties at the time the contract was formed as to an essential term of the subordination clause. Yet, Plaintiff and other members of the Class were indeed charged and paid fees pursuant to a subordination clause they neither

understood nor agreed to at the time they executed the HELOC Agreement.

36. Because the subordination clause is vague and not reasonably understandable, it cannot be enforced. Accordingly, Plaintiff and members of the Class who were charged and paid subordination fees are entitled to full restitution of any and all amounts tendered.

37. Whether or not the subordination clause is deemed enforceable as written, Plaintiff and members of the Class suffered doubly in many instances because: (a) they were forced to pay the fee in instances where they should not have been forced to do so; and/or (b) they were forced to pay *more* than PNC was entitled to under the HELOC Agreement.

38. Assuming "another creditor" means a creditor that PNC did not already agree to take a subordinate lien position to, then PNC should not impose the fee where, as in cases like the Plaintiff's, the creditor was the same entity (*i.e.*, Third Federal) to which PNC already agreed to subordinate its lien position. Any Class member falling into this category, including the Plaintiff, is entitled to full reimbursement of the subordination fee.

39. Assuming "another creditor" means any creditor other than PNC (regardless of whether PNC had already agreed to subordinate its lien position to such creditor), then PNC is necessarily limited to the maximum fee indicated in the subordination clause. In the Plaintiff's case, she was charged \$35 *more* than the allowable fee. Any Class member falling into this category, including the Plaintiff, is entitled to any amount charged and paid above the allowable fee they were subject to under the HELOC Agreement.

40. As a result of PNC's breach of its obligations under the HELOC Agreement, Plaintiff and members of the Class have been damaged in the amount of fees and other overcharges imposed by PNC arising out of the subordination clause. Accordingly, PNC is liable to Plaintiff and the Class.

COUNT I

Breach of Contract

(Unenforceability)

18. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above as though fully set forth herein.

19. Plaintiff and other members of the Class entered into contracts for home equity lines of credit with PNC without a clear understanding or agreement as to under what circumstances the obligation to pay a subordination fee would arise.

20. The phrase “another creditor” contained in the subordination clause of the HELOC Agreement is undefined, unclear and so ambiguous on its face so that no reasonable borrower could understand to what entity that term referred or when the fee associated with the superior lien position of “another creditor” would attach.

21. Because the subordination clause is unreasonably vague and ambiguous, it cannot be enforced against the Plaintiff and members of the Class.

22. PNC breached the HELOC Agreement with the Plaintiff and members of the Class by enforcing the subordination clause when it had no right under the HELOC Agreement to do so.

23. As a result of PNC’s breach, Plaintiffs and members of the Class were damaged by being charged and paying any and all sums in connection with the subordination clause.

COUNT II

Breach of Contract

(Improper Enforcement)

18. Plaintiff incorporates by reference and re-alleges each and every allegation set

forth above, as though fully set forth herein.

Scenario A

19. Assuming a clear meaning could be distilled from the vague language of the subordination clause (*i.e.*, “another creditor”), Plaintiff and other members of the Class entered into the HELOC Agreement with the understanding that they would be subject to fees in relation to a subordination clause only when the borrower requested and PNC agreed to subordinate its lien position to that of a creditor who it was not *already* subordinate to.

20. PNC breached the HELOC Agreement with Plaintiff and other members of the Class by charging subordination fees when PNC’s lien position was not subordinated to a creditor to which it was not already subordinate.

21. As a result of PNC’s breach, Plaintiff and other members of the Class who paid fees when PNC’s subordinated lien position did not change to another creditor were damaged by the amount of subordination fees they paid and/or overpaid in connection therewith.

Scenario B

22. Alternatively, assuming the HELOC Agreement can be construed to mean that PNC would be entitled to a maximum fee expressed under the subordination clause any time PNC’s subordinate lien position was implicated by a financing amendment (regardless of whether the superior creditor remained the same), Plaintiffs and members of the Class understood this to mean they would not be charged any more than the fee expressed.

23. PNC breached the HELOC Agreement with Plaintiff and other members of the Class by charging subordination fees over and above those allowable in the subordination clause.

24. As a result of PNC’s breach, Plaintiff and other members of the Class who paid more subordination fees than allowable under the HELOC Agreement were damaged by the

amount of fees they paid and/or overpaid in connection therewith.

COUNT III

Breach of Duty of Good Faith and Fair Dealing

25. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above, as though fully set forth herein.

26. PNC has a duty of good faith and fair dealing that is implied in each of its contracts with Plaintiff and the other members of the Class, including the duty not to charge fees that are unclear and/or not authorized under the HELOC Agreement and/or to charge no more than what is specifically provided for in the HELOC Agreement.

27. PNC breached its duty of good faith and fair dealing by, *inter alia*, seeking fees in circumstances where no fees should have been sought and/or seeking fees in amounts that exceeded those allowable under the HELOC Agreement.

28. Based upon the foregoing, Plaintiff and the other Class members are entitled to a judgment that PNC has breached its duty of good faith and fair dealing implied in the HELOC Agreement.

29. As a result of PNC's breach, Plaintiff and the other members of the Class have been damaged in an amount equal to any and all fees charged in excess of the amounts PNC was entitled to receive under the Home Equity Line of Credit Agreements.

COUNT IV

Unjust Enrichment

30. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above, as though fully set forth herein.

31. As a result of seeking and collecting subordination fees when no valid or

enforceable agreement existed giving PNC the right to collect such fees or collecting fees in excess of those authorized, PNC has been and will be unjustly enriched at the expense of Plaintiff and members of the Class.

32. As a result of PNC's unjust enrichment, Plaintiff and each member of the Class is entitled to restitution of any and all sums paid to PNC in the form of so-called subordination fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment and relief as follows:

A. Declaring that this lawsuit is properly maintainable as a class action and certifying Plaintiff as a representative of the Class;

B. Declaring that PNC breached its contract with Plaintiff and the members of the Class;

C. Declaring that PNC has violated its duty of good faith and fair dealing towards Plaintiff and members of the Class;

D. Declaring that PNC has been and will continue to be unjustly enriched at the expense of Plaintiff and the members of the Class;

E. Awarding damages against PNC, in an amount to be determined at trial, together with prejudgment interest at the maximum rate allowable by law;

F. Permanently enjoining and restraining PNC, directly or indirectly, from charging and/or overcharging subordination fees where they have no right to do so under the HELOC Agreement;

G. To the extent the Court finds any ambiguity in the HELOC Agreement relating to subordination fees, directing PNC to redraft the same in a manner that fully and fairly describes

the rights of PNC and obligations of the borrower;

H. Awarding Plaintiff and the Class their costs and disbursements and reasonable allowances for Plaintiff's counsel and experts' fees and expenses; and

I. Granting such other and further relief as may be just and proper.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury.

Dated: December 23, 2010

Respectfully submitted,

**LAW OFFICE OF ALFRED G. YATES JR.,
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