

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JEFFREY FEINMAN, individually and on behalf of
all others similarly situated,

Plaintiff,

-against-

TD BANK, N.A.,

Defendant.

Index No.

SUMMONS

The basis for venue is CPLR § 503 as
plaintiff resides in New York County.

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, NY
April 18, 2016

BRAGAR EAGEL & SQUIRE, P.C.

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To:

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SUPREME COURT OF THE STATE OF NEW YORK
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JEFFREY FEINMAN, individually and on
behalf of all others similarly situated,

Plaintiff,

-against-

TD BANK, N.A.,

Defendant.

Case No.: _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Jeffrey Feinman (“Plaintiff” or “Feinman”), by and through his undersigned counsel, alleges as follows, based on personal knowledge as to himself and his conduct, and upon information and belief as to all other matters. Plaintiff’s information and belief is based on the investigation of counsel.

JURISDICTION AND VENUE

1. This Court has personal jurisdiction over this action and Defendant, pursuant to CPLR 302(a), because Defendant is present in the State of New York, New York County, transacts business in the State of New York, New York County, and because this action arises out of conduct that took place in the State and County of New York.

2. Venue is proper in this Court pursuant to CPLR 503(a) because Plaintiff resides in the County of New York.

THE PARTIES

3. Plaintiff Jeffrey Feinman is a resident of the state of New York.

4. Defendant TD Bank, N.A. (“TD Bank”) is a national banking association chartered by the Office of the Comptroller of the Currency, which, upon information and belief, maintains its principal place of business in Cherry Hill, New Jersey.

SUBSTANTIVE ALLEGATIONS

5. TD Bank is a nationally chartered bank supervised by the Office of the Comptroller of the Currency. It provides banking and other services in Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Washington, D.C. TD Bank proclaims itself as “America’s Most Convenient Bank.”

6. One service that TD Bank offers for customers and non-customers is the “Penny Arcade” coin counting machine. TD Bank invites members of the public to deposit their coins in the Penny Arcade machines, which will count the coins and provide a receipt for the value of the deposited coins. Individuals can redeem the receipt at the bank for cash; TD Bank customers can have the amount deposited directly into their bank accounts. The Penny Arcade service is free for TD Bank customers. TD Bank charges an 8% fee, based on the total coin count, to non-customers. TD Bank offers the Penny Arcade in every state in which TD Bank operates. In New York alone there are nearly 20 banking locations that offer the Penny Arcade service.

7. TD Bank represents that the Penny Arcade machines count the deposited coins with 100% accuracy. TD Bank’s website boasts that it tests each Penny Arcade’s accuracy at least three times per day. TD Bank claims that in 2012, its Penny Arcades counted more than 29 billion coins.

8. Feinman has long used the TD Bank Penny Arcade service to count his coins. Feinman viewed various TD Bank advertisements and representations that claimed, expressly or

implicitly, that the Penny Arcade was 100% accurate. Feinman used the Penny Arcade machines only because he was led to believe that the machine's counts were 100% accurate. If Feinman knew that the machine's counts were not 100% accurate, he would not have used TD Bank's Penny Arcades.

9. Feinman used the Penny Arcades by taking his loose change to a TD Bank and depositing it in the Penny Arcade. On one occasion, Feinman counted his coins before depositing them into the Penny Arcade. He counted \$26 dollars' worth of coins. However, the Penny Arcade represented that he deposited only \$25.44, and gave him a receipt for that amount.

10. Feinman was concerned that there was an undercount and that it was not an isolated incident. He went to a different bank and obtained \$31 of coins, which he counted to verify. Feinman deposited the \$31 in coins into the same Penny Arcade. The Penny Arcade claimed he had deposited only \$30.05 of coins and gave him a receipt for that amount.

11. Feinman's experience is not an isolated incident. A recent report by the NBC Today Show, which has been picked up by media outlets across the country, found wide-spread counting errors with TD Bank's Penny Arcade machines. The report details numerous instances where the Penny Arcade "short-changed" customers who used it. In one extreme instance, the report found that a person who deposited \$300 worth of coins only received \$256.90 back – nearly a 15% undercount.

12. This is not the first time that issues arose regarding the Penny Arcade's counting of coins. A 2012 report from the Asbury Park Press found counting errors and tried to bring in county regulators.

13. As a result of the NBC Today Show report, TD Bank shut down all of its Penny Arcades.

CLASS ACTION ALLEGATIONS

14. Feinman brings this case as a class action pursuant to New York CPLR §§ 901, *et seq.*, on behalf of all persons who were injured using Defendant's Penny Arcade machines when they redeemed their change and did not get back the proper amount from the machines.

15. The members of the Class are believed to number in the hundreds of thousands and are so numerous that joinder of all members is impracticable.

16. Common questions of law and fact exist as to all members of the Class. These common questions predominate over the questions affecting only individual class members.

17. The questions common to members of the Class are, *inter alia*:

- a. Whether Defendant entered into, and breached, a contract with Feinman and other Class members;
- b. Whether Defendant's Penny Arcade machines accurately counted the deposited coins.
- c. Whether Defendant converted Feinman and other Class members' property;
- d. Whether Defendant committed fraud against Feinman and other Class members;
- e. Whether Defendant engaged in a deceptive business act or practice in violation of New York General Business Law § 349;
- f. Whether Defendant falsely advertised its services in violation of New York General Business Law § 350;
- g. Whether Defendant was unjustly enriched at Feinman and the Class members' expense;

- h. Whether Defendant was negligent in breach of its duty to Feinman and Class members to exercise proper care;
- i. Whether, as a result of Defendant's misconduct as alleged herein, Feinman and the Class are entitled to damages, restitution and/or other remedies to which Class members are entitled as a result of Defendant's wrongful conduct, and, if so, the amount and nature of such relief.

18. Feinman's claims are typical of the claims of the members of the Class and all are similarly affected by Defendant's wrongful conduct. Feinman has no interest antagonistic to the interests of the other members of the Class. Feinman and all members of the Class have sustained economic injury arising out of Defendant's violation of law as alleged herein.

19. Feinman is an adequate representative of the Class because his interests do not conflict with the interests of the members of the Class that he seeks to represent; Feinman has retained counsel competent and experienced in complex class action litigation; and Feinman intends to prosecute this action vigorously. The interests of the members of the Class will be fairly and adequately protected by Feinman and his counsel.

20. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class individually to redress the wrongs done to them. Individual litigation presents the potential for inconsistent or contradictory judgments. A class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision.

COUNT 1
(Breach of Unilateral Contract)

21. Plaintiff, on behalf of himself and the Class, realleges and incorporates herein by reference each of the foregoing paragraphs.

22. TD Bank made substantively uniform communications to the public that communicated an offer to enter into a contract. TD Bank promised that, if an individual deposited his or her coins in a Penny Arcade, the Penny Arcade would accurately count the coins and provide a receipt for the total value of the deposited coins. TD Bank represented that its customers could redeem the receipt for 100% of the amount or deposit it into their account. TD Bank represented that non-customers could redeem the receipt subject to paying an 8% fee. TD Bank's representations constituted offers to enter a unilateral contract.

23. Class members accepted TD Bank's offer for unilateral contract by depositing their coins in a Penny Arcade machine.

24. TD Bank breached its contract with Class members by failing to count the deposited coins accurately and providing receipts for less than the amount deposited.

25. Defendant is liable for breach of contract to Plaintiff and to the Class in an amount to be determined at trial.

COUNT 2
(Conversion)

26. Plaintiff, on behalf of himself and the Class, realleges and incorporates herein by reference each of the foregoing paragraphs.

27. As alleged above, Feinman and Class members deposited their property – coins – into TD Bank's Penny Arcades. TD Bank represented that the Penny Arcade would accurately count the coins and provide a receipt for 100% of the deposited coins. TD Bank's Penny Arcades failed to accurately count the coins that Feinman and Class members deposited and, as a

result, provided a receipt for less than 100% of the coins. TD Bank wrongfully and unconscionably converted the remaining coins.

28. Plaintiff and the Class members had a clear right to ownership over the value of the money they deposited into the Penny Arcades. By returning less than the value deposited by Plaintiff and the Class, Defendant assumed unauthorized possession of that property and excluded the rights of Plaintiff and the Class members to their property.

29. Based upon the foregoing, Plaintiff and the Class members have sustained damages in an amount to be determined at trial.

COUNT 3 (Fraud)

30. Plaintiff, on behalf of himself and the Class, realleges and incorporates herein by reference each of the foregoing paragraphs.

31. TD Bank represented to Feinman and the Class that the Penny Arcades would accurately count deposited coins and provide a receipt for 100% of the deposited coins. TD Bank knew or was grossly negligent or reckless in not knowing that the Penny Arcades did not accurately count the deposited coins. TD Bank intended its statements to induce Feinman and members of the public to use the Penny Arcade counting machines. Feinman and the Class members reasonably relied upon TD Bank's representations and deposited their coins in the Penny Arcades. In fact, the Penny Arcades did not accurately count the deposited coins and did not provide receipts for 100% of the deposited coins. Feinman and the Class were injured thereby.

32. By reason of the conduct alleged above, Feinman and the Class are entitled to actual damages and punitive damages in an amount to be determined at trial.

COUNT 4
(New York General Business Law §349- Deceptive Acts and Practices)

33. Plaintiff, on behalf of himself and the Class, realleges and incorporates herein by reference each of the foregoing paragraphs.

34. New York General Business Law § 349 prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York State.

35. By acting as a banking service for its customers, and charging a fee to its non-customers to use its Penny Arcade service, Defendant conducts a “business” and provides a service within the meaning of General Business Law § 349.

36. Defendant engaged in a deceptive act or practice by representing to its customers and non-customers alike that its Penny Arcade service accurately counts users’ coins and in exchange for those coins gives them an amount of cash equivalent to the value of the coins deposited.

37. By reason of the conduct alleged above, Defendant is engaging in deceptive conduct in violation of General Business Law § 349.

38. Plaintiff and the other members of the Class have been damaged by Defendant’s violations of section 349 of the GBL, for which they seek recovery of the actual damages they suffered due to Defendant’s willful and wrongful violations of section 349, in an amount to be determined at trial.

39. Plaintiff and the other members of the Class also seek to enjoin Defendant’s practices that violate section 349 of the GBL.

40. Plaintiff and the other members of the New York Subclass seek treble damages and an award of attorneys’ fees pursuant to section 349(h) of the GBL.

COUNT 5
(New York General Business Law § 350- False Advertising)

41. Plaintiff, on behalf of himself and the Class, realleges and incorporates herein by reference each of the foregoing paragraphs.

42. Defendant, through the above described conduct, falsely advertised its Penny Arcades as counting coins accurately and accurately returning the value deposited in the Penny Arcades to its users.

43. Defendant did not in fact return equal value to users of its Penny Arcades, in violation of New York General Business Law § 350.

44. Plaintiff and the Class relied on Defendant's false advertising that its Penny Arcades accurately counted coins the Plaintiff and the Class deposited into the Penny Arcades and got an equal return on their deposits of loose change. If Plaintiff knew or suspected that he was not receiving an equal return on his deposit, he would not have used TD Bank's Penny Arcades.

45. Plaintiff and the other members of the Class have been damaged by Defendant's violations of section 350 of the GBL, for which they seek recovery of the actual damages they suffered due to Defendant's willful and wrongful violations of section 350, in an amount to be determined at trial.

46. Plaintiff and the other members of the Class also seek to enjoin Defendant's practices that violate section 350 of the GBL.

47. Plaintiff and the other members of the New York Subclass seek treble damages and an award of attorneys' fees pursuant to section 350(e)(3) of the GBL.

COUNT 6
(Negligence)

48. Plaintiff, on behalf of himself and the Class, realleges and incorporates herein by reference each of the foregoing paragraphs.

49. Defendant had a duty to ensure that the Penny Arcade machines accurately counted the coins deposited. Defendant did not properly monitor, test, and/or clean its Penny Arcade machines, resulting in Defendant continuously paying out less value than Defendant's customers put in to its Penny Arcades.

50. Defendant was negligent in its maintenance of the Penny Arcade machines, and had a duty to exercise reasonable care, as it was foreseeable that not doing so could result in users of TD Bank's Penny Arcades to be harmed by not being paid out proper values for their deposited coins.

51. Plaintiff and Class members were harmed, directly, by Defendant's negligence in an amount to be determined at trial.

COUNT 7
(Unjust Enrichment)

52. Plaintiff, on behalf of himself and the Class, realleges and incorporates herein by reference each of the foregoing paragraphs.

53. Defendant, by its actions and policies regarding the Penny Arcade service, benefited from the Penny Arcades' inaccurate counting of coins.

54. Defendant accepted and received the benefits from Feinman and the Class members who used its Penny Arcades, at the expense of Feinman and the Class Members who received less value than they put in to the Penny Arcades.

55. Defendant was unjustly enriched as a result of the above described events, and it would be inequitable and unjust to allow it to reap the benefits of its wrongful action.

56. Feinman and the Class are entitled to relief for this unjust enrichment in an amount equal to the benefits unjustly retained by Defendant.

WHEREFORE, Plaintiff requests, on behalf of himself and other members of the Class, for judgment against Defendant as follows:

A. An Order certifying the proposed Class herein under CPLR Article 9 for all claims alleged, and designating Plaintiff as the representative of the Class and the undersigned counsel as counsel for the Class;

B. For actual damages for injuries suffered by Plaintiff and the members of the proposed Class as a result of Defendant's conduct toward Plaintiff and the members of the Proposed Class;

C. Restitution of funds wrongfully retained by TD Bank;

D. Awarding Plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

E. Awarding such other and further relief as this Court may deem just and proper including any extraordinary equitable relief as permitted by law or equity to attach, impound, or otherwise restrict Defendant's assets to assure Plaintiff and the members of the Class have an effective remedy.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by Jury.

Dated: April 18, 2016

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