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21 **UNITED STATES DISTRICT COURT**
22 **NORTHERN DISTRICT OF CALIFORNIA**
23 **SAN FRANCISCO DIVISION**

24 ELIZABETH EIESS, on behalf of
herself and all others similarly situated,

25
26 Plaintiff,

27 v.

28 USAA FEDERAL SAVINGS BANK,

Defendant.

Case No. 3:19-cv-00108

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 **CLASS ACTION COMPLAINT**

2 Plaintiff Elizabeth Eieess (“Plaintiff”), on behalf of herself and all persons
3 similarly situated, alleges the following based on personal knowledge as to allegations
4 regarding the Plaintiff and on information and belief as to other allegations.

5 **INTRODUCTION**

6 1. Plaintiff brings this action on behalf of herself and a class of all similarly
7 situated consumers, and the general public with respect to injunctive relief, against
8 Defendant USAA Federal Savings Bank (“USAA” or the “Bank”), arising from the
9 assessment of multiple Non-Sufficient Funds Fees (“NSF Fees”) on the same
10 transaction, which is barred by the account contract and is deceptive.

11 2. In violation of its contract and reasonable consumer understanding,
12 USAA often charges more than one \$29 NSF Fee on the *same transaction*, even though
13 the contract states—and reasonable consumers understand—that the same transaction
14 can only incur a *single* NSF Fee. These double and triple penalties crush accountholders
15 already struggling to make ends meet.

16 3. This practice works to catch accountholders—many of whom are
17 struggling get by—in an increasingly devastating cycle of fees.

18 4. Plaintiff, and other consumers, have been injured by USAA’s improper
19 practice. On behalf of herself and the Classes, Plaintiff seeks damages, restitution and
20 injunctive relief for USAA’s breach of contract and violation of California consumer
21 protection statutes.

22 5. Plaintiff further seeks redress for USAA’s misleading and deceptive
23 misrepresentations regarding the assessment of multiple NSF Fees on the same
24 transaction in its publicly available marketing materials, including its own account
25 contracts, and for USAA’s omission of material facts pertaining to that practice in its
26 publicly available marketing materials, including its account contracts.

27 6. Plaintiff and other consumers have been injured by USAA’s breach of
28 contract and violations of consumer protection statutes.

1 7. In addition, USAA’s deceptive scheme aimed at the general public
2 continues to this day. USAA’s account contracts (including the Deposit Agreement,
3 Fee Schedule, and Online Banking Agreement) are publicly available online to all
4 current and prospective accountholders. The general public relies on representations in
5 these documents in making important financial decisions regarding with whom they
6 would like to open a checking account. Consumers who have already opened accounts
7 also rely on the misrepresentations and omissions in the publicly available account
8 documents when making every day financial transactions.

9 8. The Pew Charitable Trusts has emphasized the importance of transparent
10 checking account fee disclosures for both comparison shopping for checking accounts
11 and for effective fee avoidance:

12 Bank accounts are an essential financial product, used by 9 in 10
13 American households, and need to be safe and transparent. Account
14 agreements and fee schedules provide customers with account costs,
15 terms, and conditions. Among the largest U.S. banks, however, the median
16 length of checking account disclosure documents is 40 pages, and the
information is presented in varied formats with inconsistent wording,
making it difficult for consumers to easily find the information they need
to comparison shop, avoid overdraft and other fees, and manage their
money.

17 The Pew Trusts, “The Benefits of Uniform Checking Account Disclosures.”
18 Transparency is especially essential given that research has revealed that fees are the
19 most important factor influencing consumers’ selection of a new banking provider. *See*
20 Ron Shevlin, “How Consumers Choose a Bank: A Tale of Two Surveys.” *Insight*
21 *Vault*, Cornerstone Advisors, 23 Aug. 2018, *available at*
22 [https://www.cornerstone.com/insightvault/2018/08/23/how-consumers-choose-a-bank-](https://www.cornerstone.com/insightvault/2018/08/23/how-consumers-choose-a-bank-a-tale-of-two-surveys/)
23 [a-tale-of-two-surveys/](https://www.cornerstone.com/insightvault/2018/08/23/how-consumers-choose-a-bank-a-tale-of-two-surveys/).

24 9. Members of the public considering opening a checking account have the
25 right to accurate information regarding the checking accounts they are considering.
26 Reasonable consumers would not agree to open USAA checking accounts if they were
27 informed, for example, that they would incur multiple NSF fees on a single transaction.
28

1 10. Plaintiff seeks injunctive relief on behalf of the general public in order to
2 prevent USAA from continuing to make material misrepresentations and omissions in
3 publicly available account documents, misrepresentations and omissions which
4 prevent all California consumers from accessing truthful and transparent information
5 regarding USAA's practices.

6 **JURISDICTION AND VENUE**

7 11. This Court has original jurisdiction of this action under the Class Action
8 Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has
9 original jurisdiction because the aggregate claims of the putative class members exceed
10 \$5 million, exclusive of interest and costs, and at least one of the members of the
11 proposed classes is a citizen of a different state than USAA.

12 12. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because a
13 substantial part of the events or omissions giving rise to the claims asserted herein
14 occurred in this district.

15 **PARTIES**

16 13. Plaintiff Eieess is a citizen of California who resides in American Canyon,
17 CA. She maintains a USAA checking account.

18 14. Defendant USAA is a federal savings association with its headquarters
19 and principal place of business located in San Antonio, TX. Among other things,
20 USAA is engaged in the business of providing retail banking services throughout
21 California to consumers, including Plaintiff and members of the putative classes, which
22 includes the issuance of debit cards for use by its customers in conjunction with their
23 checking accounts.

24 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

25 **I. USAA ASSESSES TWO, THREE AND SOMETIMES MORE NSF FEES**
26 **ON THE SAME TRANSACTION**

27 15. As a matter of policy and practice, USAA has programmed its systems to
28 charge two, three, or even more NSF Fees on the same electronic transactions, when

1 those transactions are rejected for insufficient funds then re-submitted for payment over
2 and over again.

3 16. This abusive practice is not universal in the banking industry. Indeed,
4 major banks like Chase—the largest consumer bank in the country—do not undertake
5 the practice of charging more than one NSF Fee on the same item when it is submitted
6 for payment multiple times. Instead, they charge one NSF Fee even if a transaction is
7 resubmitted for payment multiple times.

8 17. Worse, USAA's Deposit Agreement never discloses this practice; to the
9 contrary, it indicates it will not undertake this practice.

10 **A. The Purpose and Nature of Overdraft and NSF Fees**

11 18. When a bank rejects an attempted transaction on a checking account due
12 to insufficient funds, it sends an electronic notification back to the merchant stating
13 that the transaction was not approved. USAA charges a \$29 NSF Fee when it performs
14 this action. Because rejection is essentially cost-free, the \$29 NSF is pure profit.

15 19. The rejection of an attempted transaction provides zero benefit to the
16 accountholder, as the CFPB has noted:

17 An important consumer outcome of any overdraft program is the
18 percentage of negative transactions that are paid (i.e., result in
19 overdrafts) or returned unpaid (i.e., were NSFs). **Paying overdraft
20 transactions may confer some benefit (in exchange for the
21 associated fees and other costs) to consumers by helping them make
22 timely payments and avoid late penalty fees and/or interest charges
23 from a merchant or biller. In contrast, returning an item generally
24 confers little benefit to the consumer (other than perhaps deterring
future overdrafting and any subsequent consequences) and can
result in an NSF fee as well as additional related fees, such as a
returned check fee charged by the institution to whom the check
was presented or a late fee charged by the entity to whom payment
was due.** At the median, study banks paid into overdraft 83% of
transactions that exceeded the available balance in 2011 and returned
17%.

25 *CFPB Study of Overdraft Programs*, CFPB (June 2013), at 26 (emphasis added),
26 available at [https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-](https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf)
27 [practices.pdf](https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf). Worse, multiple rejection and fee assessments on the same transaction
28 not only provide no benefit to already-strapped accountholders, they devastate them.

1 **B. Plaintiff's Experiences**

2 20. On October 30, 2018, Plaintiff attempted a \$358.83 payment on her
3 Citibank credit card.

4 21. USAA rejected payment of that transaction due to insufficient funds and
5 charged Plaintiff a \$29 NSF Fee for doing so.

6 22. Three days later, on November 2, 2018, the same transaction was
7 submitted for payment again, and again USAA rejected the transaction due to
8 insufficient funds, and again charged Plaintiff a \$29 NSF Fee.

9 23. USAA expressly referred to this transaction on Plaintiff's bank statements
10 as a "RETRY PAYMENT," indicating even USAA understood this transaction to be
11 another iteration of the same authorization for payment.

12 24. Another five days later, on November 7, 2018, the same transaction was
13 submitted for payment yet again, and again USAA rejected the transaction due to
14 insufficient funds and again charged Plaintiff a \$29 NSF Fee for doing so.

15 25. Again, USAA expressly referred to this transaction on Plaintiff's bank
16 statements as a "RETRY PAYMENT," indicating even USAA understood this
17 transaction to be another iteration of the same authorization for payment.

18 26. In sum, *USAA charged Plaintiff \$87 in fees to attempt to process a single*
19 *\$358.83 payment.*

20 27. Plaintiff took no affirmative action to reinitiate or resubmit the
21 transaction, which was submitted for payment automatically over and over again.

22 28. Plaintiff understood the payment to Citibank be a single transaction,
23 capable at most of receiving a single NSF or Overdraft (OD) Fee.

24 **C. USAA Violates the Express Promises and Representations Made by**
25 **USAA When It Charges More than One NSF Fee on the Same**
26 **"Item"**

27 29. USAA's account contract documents state that it will charge \$12 per
28 "item" that is returned due to insufficient funds.

1 30. While the term “item” is not expressly defined, its usage throughout
2 USAA’s Deposit Agreement reveals that the term “item” must describe all iterations
3 of a given instruction for transfer or payment from a checking or savings account.

4 31. According to the USAA Deposit Agreement, attached hereto as Exhibit
5 A:

6 Overdrafts and Insufficient Funds Fees

7 When you do not have enough available funds in your account to cover
8 a check or other **item** (such as an in person withdrawal, ATM
9 withdrawal, automatic payment, point-of-sale or debit card purchase,
10 or other electronic transaction), FSB considers this to be a
11 Nonsufficient Funds (NSF) item (insufficient funds item). FSB may,
12 without notice to you and in its sole discretion, **either pay such items
13 and overdraw your account, or decline or return such items
14 unpaid.** In either case, **FSB may charge for each insufficient funds
15 item** and for each overdraft, as set forth in the Service Fee Schedule for
16 your account. If FSB pays insufficient funds items by overdrawing your
17 account on one or more occasions, FSB is not obligated to continue
18 doing so in the future, and may stop paying such items and return them
19 unpaid without notice to you.

20 (emphasis added).¹

21 32. The Online Banking Agreement, attached hereto as Exhibit B, makes no
22 reference whatsoever to fees for returned transactions:

23 Failed or Returned Transactions

24 In using the Service, you are requesting the Service to make payments
25 for you from your Payment Account. If we are unable to complete the
26 transaction for any reason associated with your Payment Account (for
27 example, there are insufficient funds in your Payment Account to cover
28 the transaction), the transaction will not be completed. In some
instances, you will receive a return notice from the Service.

33. USAA’s Deposit Agreement, Fee Schedule, and Online Banking
Agreement are all publicly available documents available online to all current and
prospective accountholders. Consumers, and the general public, rely on these
documents in making important financial decisions regarding to whom they would like
to entrust their money.

¹ USAA refers to itself as “FSB” in certain contractual documents.

1 34. And according the Fee Schedule, attached hereto as Exhibit C, which is a
2 part of the contractual terms governing a USAA account, a single \$29 fee will be
3 assessed for “checks and other withdrawals,” but there is no hint that multiple fees can
4 be charged for the same “checks and withdrawals”:

5 NON-SUFFICIENT FUNDS FEE (NSF FEE – ITEM RETURNED)
6 Checks and other withdrawals.....\$29
7 **Applies to checks and other withdrawals** from your account that
FSB returns without paying due to non-sufficient funds.

8 35. The same instruction for payment on an account cannot conceivably
9 become a new “item” each time it is rejected for payment and then resubmitted,
10 especially when—as here—Plaintiff took no action to resubmit them.

11 36. There is zero indication anywhere in the account documents that the same
12 “item,” “check” or “other withdrawal” is eligible to incur *multiple* NSF or OD Fees.
13 Instead, the Fee Schedule plainly states that only a single \$29 NSF Fee will be assessed
14 per item.

15 37. Moreover, USAA uses singular terms to discuss the assessment of fees
16 on transactions. For example, the Deposit Agreement states

17 FSB may, without notice to you and in its sole discretion, either pay
18 such items and overdraw your account, or decline or return such items
19 unpaid. In either case, FSB may charge for each insufficient funds item
and for each overdraft, as set forth in the Service Fee Schedule for your
account.

20 38. This is binary: for a given transaction, USAA cannot do the same thing
21 more than once. In fact, USAA expressly states that USAA may charge for each
22 insufficient funds item and for each overdraft, not multiple times for each item or
23 overdraft.

24 39. In sum, USAA promises that *one* \$29 NSF or OD Fee will be assessed per
25 item, “check or other withdrawal,” and these terms must mean all iterations of the same
26 instruction for payment. As such, USAA breached the contract when it charged more
27 than one fee per item.
28

1 40. Consistent with express representations in the contract, reasonable
2 consumers understand any given authorization for payment to be one, singular “item,”
3 “check or other withdrawal,” as that term is used in USAA’s contract documents. No
4 reasonable consumer would understand a single check, for example, to be multiple
5 “items.”

6 41. Upon information and belief, USAA has this same understanding in
7 practice, since its systems code transactions in a way that alerts USAA when the same
8 item or transaction is being re-submitted for payment, viz., as “RETRY PAYMENTS.”

9 42. The contract documents bar USAA from assessing multiple NSF Fees on
10 the same item.

11 43. Lastly, the contract documents never state that one transaction or item can
12 incur multiple NSF Fees, and never discloses that one transaction can count as multiple
13 “items” for purposes of fee assessment.

14 44. USAA’s misrepresentations and omissions are ongoing, and negatively
15 affect not only current accountholders’ ability to manage their funds, but also deceive
16 members of the general public who have no choice but to rely on USAA’s publicly
17 available statements in making important decisions regarding who to bank with, what
18 kinds of accounts to open, and what transactions to make. Current and prospective bank
19 customers have a right to know what they can expect from the institutions they entrust
20 with their money, especially if what they can expect are multiple NSF Fees on a single
21 transaction.

22 45. Banks like USAA that employ this abusive practice know how to plainly
23 and clearly disclose it. Indeed, other banks that do engage in this abusive practice
24 disclose it expressly to their accountholders—USAA did not.

25 46. For example, First Citizens Bank, a major institution in the Carolinas,
26 engages in the same abusive practice as USAA, but at least expressly states:

27 Because we may charge a service fee for an NSF item each time it is
28 presented, **we may charge you more than one service fee for any given item.** All fees are charged during evening posting. When we

1 charge a fee for NSF items, the charge reduces the available balance in
2 your account and may put your account into (or further into) overdraft.

3 (emphasis added).

4 47. First Hawaiian Bank engages in the same abusive practice as Defendant,
5 but at least currently discloses it in its Online Banking Agreement, in all capital letters,
6 as follows:

7 **YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO**
8 **SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT**
9 **MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT**
10 **OF A RETURNED ITEM AND RESUBMISSION.**

11 (emphasis added).

12 48. Klein Bank similarly states in its Online Banking Agreement:

13 [W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill
14 Payment (electronic or check) is submitted to us for payment from your
15 Bill Payment Account when, at the time of posting, your Bill Payment
16 Account is overdrawn, would be overdrawn if we paid the item
17 (whether or not we in fact pay it) or does not have sufficient available
18 funds; or (2) we return, reverse, or decline to pay an item for any other
19 reason authorized by the terms and conditions governing your Bill
20 Payment Account. We will charge an NSF/Overdraft Fee as provided
21 in this section regardless of the number of times an item is submitted or
22 resubmitted to us for payment, and regardless of whether we pay the
23 item or return, reverse, or decline to pay the bill payment.

24 49. USAA provides no such disclosure, and in so doing, deceives its
25 accountholders.

26 **D. USAA Abuses Any Discretion**

27 50. Parties to a contract are required not only to adhere to the express
28 conditions in the contract, but also to act in good faith when they are invested with a
discretionary power over the other party. In such circumstances, the party with
discretion is required to exercise that power and discretion in good faith. This creates
an implied promise to act in accordance with the parties' reasonable expectations. That
means that USAA is prohibited from exercising its discretion to enrich itself and gouge
its customers. Instead of exercising any discretion it may have in good faith and
consistent with Plaintiff's reasonable expectations, USAA abuses that discretion to take

1 money out of Plaintiff’s account without her permission and contrary to her reasonable
2 expectation that she will not be charged multiple fees for the same transaction.

3 51. To the extent the account documents do not explicitly bar the policy
4 described above, USAA exploits any contractual discretion to the detriment of
5 accountholders and breaches good faith and fair dealing when it uses the policy. The
6 allegations that USAA has contractual discretion are made in the alternative to the
7 allegations that the NSF Fee practices are expressly in breach of the account contract
8 documents.

9 52. As set forth in the Deposit Agreement, “FSB *may* charge for each
10 insufficient funds item and for each overdraft, as set forth in the Service Fee Schedule
11 for your account.” Given that when an “item” is re-submitted for payment a second,
12 third, or additional times, USAA has *already* assessed a \$29 NSF Fee on that item,
13 USAA could simply not charge another \$29 NSF Fee on the same item when a
14 customer’s account lacks sufficient funds. This would result in a single NSF fee, rather
15 than two or more NSF fees. By exercising its discretion in its own favor—and to the
16 prejudice and expense of Plaintiff and other customers, USAA abuses the power it has
17 and acts contrary to its customers’ reasonable expectations under the Deposit
18 Agreement. This is a breach of USAA’s implied covenant to engage in fair dealing and
19 act in good faith.

20 53. For example, it was bad faith and totally outside Plaintiff’s reasonable
21 expectations for USAA to abuse its discretion to assess \$87 in fees for a single \$358.83
22 credit card payment.

23 54. USAA uses its discretion to interpret “item” and “check or other
24 withdrawal” in an unreasonable way that violates common sense and reasonable
25 consumer expectations. USAA uses its contractual discretion to set the meaning of that
26 term to choose a meaning that directly causes more NSF Fees.

27
28

1 55. Moreover, USAA grants itself discretion to refuse to re-submit
2 transactions that are initially rejected. It abuses that discretion to repeatedly resubmit
3 transactions and to charge fees each time.

4 56. Additionally, USAA grants itself discretion to charge—or not to charge—
5 an NSF Fee on a given transaction. When it charges more than one NSF Fee on a given
6 item or transaction, USAA behaves in bad faith and contradicts reasonable consumer
7 expectations.

8 **CLASS ALLEGATIONS**

9 57. Plaintiff brings this action on behalf of herself and all others similarly
10 situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action
11 satisfies the numerosity, commonality, typicality, adequacy, predominance and
12 superiority requirements of Rule 23.

13 58. The proposed classes are defined as:

14 All USAA checking accountholders in the United States
15 who, during the applicable statute of limitations, were
16 charged multiple NSF Fees on the same item (the “National
Class”).

17 All USAA checking accountholders in California who,
18 during the applicable statute of limitations, were charged
multiple NSF Fees on the same item (the “California
Subclass”).

19 The classes are collectively referred to as the “Classes.”

20 59. Plaintiff reserves the right to modify or amend the definition of the
21 proposed Classes before the Court determines whether certification is appropriate.

22 60. Excluded from the Classes are USAA, its parents, subsidiaries, affiliates,
23 officers and directors, any entity in which USAA has a controlling interest, all
24 customers who make a timely election to be excluded, governmental entities, and all
25 judges assigned to hear any aspect of this litigation, as well as their immediate family
26 members, and any member of such judge’s staff and immediate family.
27
28

1 61. The members of the Classes are so numerous that joinder is impractical.
2 The Classes consist of thousands of members, the identity of whom is within the
3 knowledge of and can be ascertained only by resort to USAA's records.

4 62. The claims of the representative Plaintiff are typical of the claims of the
5 Classes in that the representative Plaintiff, like all Class members, was charged
6 improper NSF Fees. The representative Plaintiff, like all Class members, has been
7 damaged by USAA's misconduct in that she paid improper NSF Fees. Furthermore,
8 the factual basis of USAA's misconduct is common to all Class members and
9 represents a common thread of unfair and unconscionable conduct resulting in injury
10 to all members of the Classes.

11 63. There are numerous questions of law and fact common to the Classes and
12 those common questions predominate over any questions affecting only individual
13 Class members.

14 64. Among the questions of law and fact common to the Classes are whether
15 USAA:

- 16 a. Charged multiple NSF Fees on a single transaction;
- 17 b. Breached its contract with consumers by charging multiple NSF
18 Fees on a single transaction;
- 19 c. Breached the covenant of good faith and fair dealing by charging
20 multiple NSF Fees on a single transaction;
- 21 d. Violated California consumer protection law by charging multiple
22 NSF Fees on a single transaction;
- 23 e. Whether Plaintiff and the Classes were damaged by USAA's
24 conduct and if so, the proper measure of damages; and
- 25 f. Whether USAA misrepresented and omitted material information
26 regarding its fee practices in publicly available account
27 documents.

28 65. Plaintiff is committed to the vigorous prosecution of this action and has

1 retained competent counsel experienced in the prosecution of class actions and, in
2 particular, class actions on behalf of consumers and against financial institutions.
3 Accordingly, Plaintiff is an adequate representative and will fairly and adequately
4 protect the interests of the Classes.

5 66. A class action is superior to other available methods for the fair and
6 efficient adjudication of this controversy. Since the amount of each individual Class
7 member's claim is small relative to the complexity of the litigation, and due to the
8 financial resources of USAA, no Class member could afford to seek legal redress
9 individually for the claims alleged herein. Therefore, absent a class action, the Class
10 members will continue to suffer losses and USAA's misconduct will proceed without
11 remedy.

12 67. Even if Class members themselves could afford such individual litigation,
13 the court system could not. Given the complex legal and factual issues involved,
14 individualized litigation would significantly increase the delay and expense to all
15 parties and to the Court. Individualized litigation would also create the potential for
16 inconsistent or contradictory rulings. By contrast, a class action presents far fewer
17 management difficulties, allows claims to be heard which might otherwise go unheard
18 because of the relative expense of bringing individual lawsuits, and provides the
19 benefits of adjudication, economies of scale and comprehensive supervision by a single
20 court.

21 **DESCRIPTION OF PUBLIC INJUNCTIONS SOUGHT**

22 68. Plaintiff is seeking injunctions on behalf of herself, the putative classes,
23 and the public, prohibiting USAA from making material omissions and
24 misrepresentations to the public as to its multiple NSF fee policy alleged in this
25 Complaint. Along with Plaintiff's prayers for monetary relief, the injunctive relief
26 sought is essential to eradicating USAA's deceptive scheme. In the absence of an
27 injunction, USAA will remain free to continue to mislead members of the public
28 regarding its fee practices, causing them to incur the same unexpected NSF fees

1 Plaintiff and other accountholders experienced.

2 69. Fees are one of the most important factors that consumers take into
3 account when deciding whether to open a checking account, and which financial
4 institution to bank with. The public has the right to a transparent marketplace in which
5 banks are open and honest about the number, nature, and amount of fees they charge,
6 and the circumstances under which those fees are assessed.

7 70. The injunctive relief sought by Plaintiff will protect the public from
8 USAA's deceitful marketing practices which lure customers in by misunderstanding
9 the amount and frequency it assesses NSF Fees on a single transaction. It will prevent
10 USAA from distorting the marketplace by representing that it charges fewer fees than
11 it actually does. It will also serve as a deterrent to other bank that may consider
12 unlawfully charging NSF Fees.

13 71. Specifically, USAA misleads consumers as to the number of NSF Fees it
14 assesses on a given transaction. Plaintiff seeks to enjoin USAA from misrepresenting
15 and/or omitting this material and accurate information in the documents that it makes
16 available to the public.

17
18 **FIRST CLAIM FOR RELIEF**
Breach of Contract Including Breach of the
Covenant of Good Faith and Fair Dealing

19
20 **(On Behalf of the Classes)**

21 72. Plaintiff incorporates by reference each of the allegations set forth in the
22 preceding paragraphs.

23 73. Plaintiff (and fellow members of the Classes) and USAA have contracted
24 for bank account deposit and checking services, as embodied in USAA's Deposit
25 Agreement and related documentation, including USAA's Online Banking Agreement
26 and Fee Schedule.

27 74. For the reasons alleged herein, the contract documents bar USAA from
28 assessing multiple NSF Fees on the same item or transaction.

1 75. USAA charged Plaintiff and members of the Classes multiple NSF Fees
2 on the same transaction.

3 76. Therefore, USAA breached the terms of the Deposit Agreement and
4 related documentation, with consumers by charging multiple NSF Fees on the same
5 transaction.

6 77. Additionally, under the laws of each state where USAA does business and
7 has customers, good faith is an element of every contract. Whether by common law or
8 statute, all such contracts impose upon each party a duty of good faith and fair dealing.
9 Good faith and fair dealing, in connection with executing contracts and discharging
10 performance and other duties according to their terms, means preserving the spirit –
11 not merely the letter – of the bargain. Put differently, the parties to a contract are
12 mutually obligated to comply with the substance of their contract in addition to its form.
13 Evading the spirit of the bargain and abusing the power to specify terms constitute
14 examples of bad faith in the performance of contracts.

15 78. Subterfuge and evasion violate the obligation of good faith in performance
16 even when an actor believes their conduct to be justified. Bad faith may be overt or
17 may consist of inaction, and fair dealing may require more than honesty. Examples of
18 bad faith are evasion of the spirit of the bargain, willful rendering of imperfect
19 performance, abuse of a power to specify terms, and interference with or failure to
20 cooperate in the other party's performance.

21 79. USAA has breached the covenant of good faith and fair dealing in the
22 Account Agreement through its NSF Fee policies and practices as alleged herein.

23 80. Instead of exercising that discretion in good faith and consistent with
24 Plaintiff's reasonable expectations, USAA abuses that discretion to assess NSF fees
25 and take money out of Plaintiff's account without her permission and contrary to her
26 reasonable expectations that she will not be charged multiple NSF Fees for the same
27 transaction. Specifically, USAA regularly (a) resubmits previously declined
28

1 transactions, even when it knows a customer’s account lacks sufficient funds, and (b)
2 charges NSF Fees upon resubmission of previously declined transactions.

3 81. USAA further breaches the covenant of good faith and fair dealing by
4 charging more than one NSF Fee on a single transaction.

5 82. By exercising its discretion to enrich itself by gouging its consumers,
6 USAA consciously and deliberately frustrates the agreed common purposes of the
7 contract and disappoints the reasonable expectations of Plaintiff and members of the
8 Classes, thereby depriving them of the benefit of their bargain.

9 83. In addition, USAA grants itself discretion to charge—or not to charge—
10 an NSF Fee on a given transaction. When it charges more than one NSF on a given
11 transaction, USAA breaches the covenant of good faith and fair dealing.

12 84. Plaintiff and members of the Classes have performed all, or substantially
13 all, of the obligations imposed on them under the contract.

14 85. Plaintiff and members of the Classes have sustained damages as a result
15 of USAA’s breach of contract and breach of the covenant of good faith and fair dealing.

16
17 **SECOND CLAIM FOR RELIEF**
Violation of California Unfair Competition Law
Business and Professions Code § 17200
18 **(On Behalf of the California Subclass)**

19 86. Plaintiff incorporates by reference each of the allegations set forth in the
20 preceding paragraphs.

21 87. USAA’s conduct described herein violates the Unfair Competition Law
22 (the “UCL”), codified at California Business and Professions Code section 17200, *et*
23 *seq.*

24 88. The UCL prohibits, and provides civil remedies for, unfair competition.
25 Its purpose is to protect both consumers and competitors by promoting fair competition
26 in commercial markets for goods and services. In service of that purpose, the
27 Legislature framed the UCL’s substantive provisions in broad, sweeping language.

28 89. By defining unfair competition to include any “any unlawful, unfair or
fraudulent business act or practice,” the UCL permits violations of other laws to be

1 treated as unfair competition that is independently actionable, and sweeps within its
2 scope acts and practices not specifically proscribed by any other law.

3 90. The UCL expressly provides for injunctive relief, and also contains
4 provisions denoting its public purpose. A claim for injunctive relief under the UCL is
5 brought by a plaintiff acting in the capacity of a private attorney general. Although the
6 private litigant controls the litigation of an unfair competition claim, the private litigant
7 is not entitled to recover compensatory damages for his own benefit, but only
8 disgorgement of profits made by the defendant through unfair or deceptive practices in
9 violation of the statutory scheme or restitution to victims of the unfair competition.

10 91. As further alleged herein, USAA's conduct violates the UCL's "unfair"
11 prong insofar as USAA charges multiple NSF Fees on a single transaction.

12 92. USAA's conduct was not motivated by any legitimate business or
13 economic need or rationale. The harm and adverse impact of USAA's conduct on
14 members of the general public was neither outweighed nor justified by any legitimate
15 reasons, justifications, or motives.

16 93. The harm to Plaintiff and members of the California Subclass arising from
17 USAA's unfair practices relating to the imposition of the improper fees outweighs the
18 utility, if any, of those practices.

19 94. USAA's unfair business practices as alleged herein are immoral,
20 unethical, oppressive, unscrupulous, unconscionable and/or substantially injurious to
21 Plaintiff, members of the California Subclass, and the general public.

22 95. USAA's conduct was substantially injurious to consumers in that they
23 have been forced to pay improper, abusive, and/or unconscionable NSF fees.

24 96. Moreover, USAA committed fraudulent business acts and practices in
25 violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, when it affirmatively and
26 knowingly misrepresented its NSF Fee practices. Such representations misled the
27 Plaintiff and are likely to mislead the public.

1 97. Specifically, Plaintiff relied on USAA's misrepresentations and material
2 omission regarding its NSF Fee practices. Specifically, Plaintiff had no idea she would
3 be charged multiple NSF Fees for a single transaction. If Plaintiff knew she would be
4 charged multiple NSF Fees for a single transaction, she would have switched banks to
5 a bank that did not use this practice. Such misrepresentations and omissions misled
6 Plaintiff and are likely to mislead the public. Plaintiff seeks to enjoin USAA from
7 misrepresenting and/or omitting this material and accurate information in the
8 documents that it makes available to existing accountholders and the general public
9 who might consider banking with USAA.

10 98. Plaintiff and members of the California Subclass relied on USAA's
11 misrepresentations and omissions in that Plaintiff received and reviewed the materials
12 provided by USAA, and like any reasonable customer understood these documents to
13 mean they would not be charged more than one NSF Fee on a single transaction. Had
14 Plaintiff and others been informed in any of the documents provided by USAA that
15 they would be subject to these practices, they would have been able to weigh the
16 convenience and benefits in engaging in transactions against the cost of the multiple
17 NSF Fees charged by USAA.

18 99. Moreover, USAA committed unlawful business acts and practices in
19 violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, when it violated the CLRA, as
20 alleged herein.

21 100. As a result of USAA's violations of the UCL, Plaintiff and members of
22 the California Subclass have paid, and/or will continue to pay NSF Fees and thereby
23 have suffered and will continue to suffer actual damages.

24 101. Absent injunctive and public injunctive relief prohibiting USAA from
25 misrepresenting and omitting material information concerning its NSF Fee policy at
26 issue in this lawsuit, Plaintiff and other existing accountholders, and the general public
27 will be exposed to USAA's conduct violative of the UCL.
28

1 111. Plaintiff and members of the California Subclass relied on USAA's
2 misrepresentations and omissions in that Plaintiff received and reviewed the materials
3 provided by USAA, and like any reasonable customer understood these documents to
4 mean she would not be charged more than one NSF Fee on a single transaction. Had
5 Plaintiff been informed in any of the documents provided by USAA that she would be
6 subject to these practices, she would have been able to weigh the convenience and
7 benefits in engaging in transactions against the cost of the multiple NSF Fees charged
8 by USAA.

9 112. Plaintiff and the California Subclass members are injured in fact and lost
10 money as a direct and proximate result of USAA's unfair methods of competition
11 and/or deceptive acts or practices in that they incurred NSF Fees that were improper.

12 113. Plaintiff and the California Subclass members seek declaratory relief,
13 injunctive relief, and other relief allowable under Bus. & Prof. Code § 17203, including
14 but not limited to enjoining USAA from continuing to engage in the unfair, unlawful,
15 and fraudulent conduct alleged herein.

16 114. Pursuant to Section 1782(d) of the CLRA, Plaintiff reserves the right to
17 amend this Complaint to include a request for damages under the CLRA pursuant to
18 Section 1782(a) of the CLRA within thirty (30) days of providing the required notice.

19 115. Plaintiff's affidavit stating facts showing that venue in this District is
20 proper pursuant to Cal. Civ. Code § 1780(c) is attached hereto.

21 116. As a result of USAA's violations of the CLRA, Plaintiff and members of
22 the California Subclass have paid, and/or will continue to pay NSF Fees and thereby
23 have suffered and will continue to suffer actual damages.

24 117. Absent injunctive and public injunctive relief prohibiting USAA from
25 misrepresenting and omitting material information concerning its NSF Fee policy at
26 issue in this lawsuit, Plaintiff and other existing accountholders, and the general public
27 will be exposed to USAA's conduct violative of the CLRA.
28

PRAYER FOR RELIEF

1
2 WHEREFORE, Plaintiff and the Classes demand a jury trial on all claims so
3 triable and judgment as follows:

4 1. An order on behalf of the general public enjoining USAA from continuing
5 to misrepresent or omit material information pertaining to its multiple NSF Fee policy
6 in its publicly available account documents and marketing materials such as its
7 “Deposit Agreement,” “Fee Schedule,” and “Online Banking Agreement”;

8 2. Declaring USAA’s NSF Fee policies and practices to be wrongful, unfair
9 and unconscionable, as well as fraudulent;

10 3. Restitution of all relevant fees paid to USAA by Plaintiff and the Classes,
11 as a result of the wrongs alleged herein in an amount to be determined at trial;

12 4. Disgorgement of the ill-gotten gains derived by USAA from its
13 misconduct;

14 5. Actual damages in an amount according to proof;

15 6. Statutory damages as permitted by law;

16 7. Punitive and exemplary damages;

17 8. Pre-judgment interest at the maximum rate permitted by applicable law;

18 9. Costs and disbursements assessed by Plaintiff in connection with this
19 action, including reasonable attorneys’ fees pursuant to applicable law; and

20 10. Such other relief as this Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff and all others similarly situated hereby demand trial by jury on all issues in this complaint that are so triable as a matter of right.

Dated: January 8, 2019

Respectfully submitted,

/s/ Todd D. Carpenter

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