

**IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF COLORADO**

Civil Action No.:

STEPHANIE NELSON AND ASHLEY BRYMER, ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

ENT CREDIT UNION

Defendant.

COMPLAINT AND JURY DEMAND

CLASS ACTION COMPLAINT

Plaintiffs, Stephanie Nelson, and Ashley Brymer, individually and on behalf of the classes of persons preliminarily defined below, make the following allegations based upon information and belief, except as to allegations specifically pertaining to Plaintiffs, which are based on personal knowledge.

NATURE OF THE ACTION

1. Plaintiffs bring this action on behalf of themselves and classes of all similarly situated consumers against Defendant, Ent Credit Union (“ENT”), arising from its routine practices of (a) assessing Overdraft Fees (“OD Fees”) on transactions that did not actually overdraw the account; and (b) charging two or three non-sufficient funds fees (“NSF Fee”) on a single transaction.

2. ENT misleadingly and deceptively misrepresents each of the above practices, including in its own account contracts. ENT also omits material facts pertaining to each of the above practices, including in its account contracts.

3. This is a civil action seeking monetary damages, restitution, and declaratory and injunctive relief.

4. As described herein, Defendant's practices violate Colorado statutory and common law, as well as the Defendant's own form contracts.

5. Defendant's improper scheme to extract funds from account holders has victimized Plaintiffs and hundreds of other similarly situated consumers. Unless enjoined, Defendant will continue to engage in these schemes and continue to cause substantial injury to its consumers.

PARTIES

6. Plaintiff Stephanie Nelson is an individual and resident of Tarrant County, Texas.

7. Plaintiff Ashley Brymer is an individual and resident of El Paso, County, Colorado.

8. Defendant, ENT, is a Colorado corporation located at 7250 Campus Drive, Colorado Springs, CO 80920. Defendant is one of Colorado's largest credit unions. It has over \$5 billion in assets and maintains several branches throughout Colorado.

JURISDICTION AND VENUE

9. This Court has original jurisdiction of this action under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has original jurisdiction because the aggregate claims of the putative class members exceed \$5 million, exclusive of

interest and costs, and at least one of the members of the proposed class is a citizen of a different state than the Defendant.

10. Venue is proper in this district pursuant to 28 U.S.C. §1391 because Defendant is subject to personal jurisdiction here and conducts business in Colorado and because a substantial part of the events or omission giving rise to the claims asserted herein occurred in this district.

BACKGROUND FACTS

I. ENT CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT

A. Overview of Claim

11. Plaintiffs bring this cause of action challenging ENT's practice of charging overdraft fees on what is referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions," or "APPSN Transactions."

12. Here's how it works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, ENT immediately reduces consumers' checking accounts for the amount of the purchase, sets aside funds in a checking account to cover that transaction, and as a result, the consumer's displayed "available balance" reflects that subtracted amount. As a result, customers' accounts will always have sufficient funds available to cover these transactions because ENT has already sequestered these funds for payment.

13. However, ENT still assesses crippling \$25 OD Fees on many of these transactions and misrepresents its practices in its account documents.

14. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, ENT later assesses OD Fees on those same transactions

when they purportedly settle days later into a negative balance. These types of transactions are APPSN transactions.

15. ENT maintains a running account balance in real time, tracking funds consumers have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, ENT sequesters the funds needed to pay the transaction, subtracting the dollar amount of the transaction from the customer's available balance. Such funds are not available for any other use by the account holder, and such funds are specifically associated with a given debit card transaction.

16. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure that there are enough funds in the account to pay the transaction when it settles, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

When a consumer uses a debit card to make a purchase, a hold may be placed on funds in the consumer's account to ensure that the consumer has sufficient funds in the account when the transaction is presented for settlement. This is commonly referred to as a "debit hold." During the time the debit hold remains in place, which may be up to three days after authorization, those funds may be unavailable for the consumer's use for other transactions.

Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498 (Jan. 29, 2009).

17. That means when any *subsequent*, intervening transactions are initiated on a checking account; they are compared against an account balance that has already been reduced to account for any earlier debit card transactions. This means that many subsequent transactions incur OD Fees due to the unavailability of the funds sequestered for those debit card transactions.

18. Still, despite keeping those held funds off-limits for other transactions, ENT improperly charges OD Fees on those APPSN Transactions, although the APPSN transactions *always* have sufficient available funds to be covered.

19. Indeed, the Consumer Financial Protection Bureau (“CFPB”) has expressed concern with this very issue, flatly calling the practice “unfair” and/or “deceptive” when:

[A] financial institution authorized an electronic transaction, which reduced a customer’s available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer’s available balance and pushed the account into overdraft status; and when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged. Because such fees caused harm to consumers, one or more supervised entities were found to have acted unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which was not appropriately disclosed. They therefore could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive.

At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer’s available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that the disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer’s decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing the fees under these circumstances was found to be unfair.

Consumer Financial Protection Bureau, “Supervisory Highlights” (Winter 2015).

20. There is no justification for these practices, other than to maximize ENT's overdraft fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduce an account balance. But ENT is free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year. But ENT was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

21. Besides being deceptive, unfair, and unconscionable, these practices breach contract promises made in ENT's adhesion contracts—contracts which fundamentally misconstrue and mislead consumers about the true nature of ENT's processes and practices. These practices also exploit contractual discretion to gouge consumers.

22. In plain, clear, and simple language, the checking account contract documents covering overdraft fees promise that ENT will only charge overdraft fees on transactions that have insufficient funds to cover that transaction.

23. In short, ENT is not authorized by contract to charge OD Fees on transactions that have not overdrawn an account, but it has done so and continues to do so.

B. Mechanics of a Debit Card Transaction

24. A debit card transaction occurs in two parts. First, authorization for the purchase amount is instantaneously obtained by the merchant from ENT. When a merchant physically or virtually “swipes” a customer's debit card, the credit card terminal connects, via an intermediary, to ENT, which verifies that the customer's account is valid and that sufficient available funds exist to “cover” the transaction amount.

25. At this step, if the transaction is approved, ENT immediately decrements the funds in a consumer's account and sequesters funds in the amount of the transaction, but does not yet transfer the funds to the merchant.

26. Sometime thereafter, the funds are actually transferred from the customer's account to the merchant's account.

27. There is no change—no impact whatsoever—to the available funds in an account when this step occurs.

C. ENT's Account Contract

28. Plaintiffs have ENT checking accounts, which are currently governed by ENT's standardized "Member Service Agreement" document ("Deposit Agreement").

29. The Deposit Agreement and relevant contract documents covering overdraft fees provide that ENT will not charge OD Fees on transactions that have sufficient funds to cover them at the time they are initiated.

30. ENT promises that "available" fund is the balance used to determined overdrafts; and that immediate holds are placed on available funds for debit card transactions, at the moment of authorization:

If on any day, the available funds in your checking or savings account are not sufficient to cover checks, fees or other items posted to your account, those amounts will be handled in accordance with our overdraft procedures or an overdraft protection plan you have with us. Our determination of an insufficient available account balance may be made at any time between presentation and our midnight deadline (of the same day) with only one review of the account required. We have no duty to notify you of an insufficient funds check or item. Your account will then be subject to a charge for the check or item whether paid or returned and any subsequent overdraft processing costs as set forth in the Fee Schedule.

* * *

Transaction Authorizations. Authorization holds may reduce the amount available in your account. Ent has no control over the dollar amount and time that a merchant authorization holds your available funds. You agree that we shall not be liable for withholding any authorization. The actual or ledger balance indicates the items that have actually posted to your account but not transactions that have been authorized and are pending. As an example, any purchases, holds, fees, other charges or deposits made on your account that have not yet posted will not appear in your actual or ledger balance. **Your available account balance is the amount of money in your account that is available to you to use without incurring a non-sufficient funds (NSF) or courtesy pay (overdraft) fee.** The available account balance takes into account things like holds placed on deposits, pending transactions (such as pending debit card purchases) that have been authorized for the merchant but not posted to your account, authorized automatic bill payments and other outstanding transactions that have not posted to your account. This available balance is the balance used to determine if items are subsequently presented against insufficient funds or the amount that would overdraw your account and incur fees.

Exhibit A, Deposit Agreement, 4 (emphasis added).

31. Via this provision of the Deposit Agreements, ENT promises that it uses available balance—the same balance that is immediately reduced when a debit card transaction is authorized—to determine whether an overdraft occurs, and a fee is assessed.

32. It also promises that available balance in the amount that can be “used” without incurring a fee.

33. For APPSN Transactions, which are immediately deducted from a positive account balance and held aside for payment of that same transaction, there are always funds to “cover” those transactions—yet ENT assesses OD Fees on them anyway.

34. The above promises indicate that transactions are only overdraft transactions when they are authorized and approved into a negative account balance. Of course, that is not true for APPSN Transactions.

35. In fact, ENT actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to “post” those same transactions. Instead, it uses a secret posting process described below.

36. All the above representations and contractual promises are untrue. In fact, ENT charges OD Fees even when sufficient funds exist to cover transactions that are “authorized” into a positive balance. No express language in any document states that ENT may impose overdraft fees on any APPSN Transactions.

37. The account documents misconstrue ENT’s true debit card processing and overdraft practices.

38. First, and most fundamentally, ENT charges overdraft fees on debit card transactions for which there are sufficient funds available to “use” to cover the transactions.

39. ENT assesses OD Fees on APPSN Transactions that do have sufficient funds available to cover them throughout their lifecycle.

40. ENT’s practice of charging OD Fees even when sufficient available funds exist to cover a transaction violates a contractual promise not to do so. This discrepancy between ENT’s actual practice and the contract causes consumers like Plaintiffs to incur more overdraft fees than they should.

41. Next, sufficient funds for APPSN Transactions are actually debited from the account immediately, consistent with standard industry practice.

42. Because these withdrawals take place upon initiation, they cannot be re-debited later. But that is what ENT does when it re-debits the account during a secret batch posting process.

43. In reality, ENT's actual practice is to assay the same debit card transaction twice to determine if the transaction overdraws an account—both at the time a transaction is authorized and later at the time of settlement.

44. At the time of settlement, however, an available balance *does not change at all* for these transactions previously authorized into good funds. As such, ENT cannot then charge an overdraft fee on such transaction because the available balance has not been rendered insufficient due to the pseudo-event of settlement.

45. Upon information and belief, something more is going on: at the moment a debit card transaction is getting ready to settle, ENT does something new and unexpected, during the middle of the night, during its nightly batch posting process. Specifically, ENT releases the hold placed on funds for the transaction for a split second, putting money back into the account, then re-debits the same transaction a second time.

46. This secret step allows it to charge overdraft fees on transactions that never should have gotten them—transactions that were authorized into sufficient funds, and for which ENT specifically set aside money to pay them.

47. This discrepancy between ENT's actual practices and the contract causes consumers to incur more overdraft fees than they should.

48. In sum, there is a huge gap between ENT's practices as described in the account documents and ENT's practices in reality.

D. ENT Abuses Contractual Discretion

49. ENT's treatment of debit card transactions to charge overdraft fees is not simply a breach of the express terms of the numerous account documents. In addition, ENT exploits contractual discretion to the detriment of account holders when it uses these policies.

50. The term "to cover" a transaction is undefined. ENT uses its discretion to define "to cover" in a manner contrary to any reasonable, common sense understanding of that term. In ENT's implied definition, a balance is insufficient to "cover" a transaction even if ENT sequesters sufficient available funds for that transaction at the time it is made.

51. Moreover, ENT uses its contractual discretion to cause APPSN Transactions to incur overdraft fees by knowingly authorizing later transactions that it allows to consume available funds previously sequestered for APPSN Transactions.

52. ENT uses all of these contractual discretion points unfairly to extract overdraft fees on transactions that no reasonable consumer would believe could cause overdraft fees.

E. Reasonable Consumers Understand Debit Card Transactions Are Debited Immediately

53. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with immediate withdrawal of funds for debit card transactions. That is because if funds are immediately debited, they cannot be depleted by intervening transactions (and it is that subsequent depletion that is the necessary condition of APPSN Transactions). If funds are immediately debited, then, they are necessarily applied to the debit card transactions for which they are debited.

54. ENT was and is aware that this is precisely how account holders reasonably understand debit card transactions to work.

55. ENT knows that many consumers prefer debit cards for these very reasons. Consumer research indicates that consumers prefer debit cards as a budgeting device; because they don't allow debt like credit cards do; and because the money comes directly out of a checking account.

56. Consumer Action, a national nonprofit consumer education, and advocacy organization advises consumers determining whether they should use a debit card that “[t]here is no grace period on debit card purchases the way there is on credit card purchases; the money is immediately deducted from your checking account. Also, when you use a debit card you lose the one or two days of ‘float’ time that a check usually takes to clear.” *See* https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card (last visited March 3, 2019).

57. Further, Consumer Action informs consumers that “Debit cards offer the convenience of paying with plastic without the risk of overspending. When you use a debit card, you do not get a monthly bill. You also avoid the finance charges and debt that can come with a credit card if not paid off in full.” *See* http://www.consumer-action.org/english/articles/understanding_debit_cards (last visited March 3, 2019).

58. That is a large part of the reason that debit cards have risen in popularity. The number of terminals that accept debit cards in the United States has increased by approximately 1.4 million in the last five years, and with that increasing ubiquity, consumers have (along with

credit cards) viewed debit cards “as a more convenient option than refilling their wallets with cash from an ATM.”¹

59. Not only have consumers increasingly substituted from cash to debit cards, but they believe that a debit card purchase is the fundamental equivalent of a cash purchase, with the swipe of a card equating to handing over cash, permanently and irreversibly.

60. ENT was aware of a consumer perception that debit transactions reduce an available balance *in a specified order*—namely, the moment they are actually initiated—and its account agreement only supports this perception.

F. The Named Plaintiffs’ Debit Card Transactions

61. Ms. Nelson’s account was assessed a \$25 OD Fee on a debit card transaction on August 26, 2018, for a transaction that settled that day. However, that transaction was authorized into a positive account balance prior to August 26, 2018. The same fact pattern occurred on September 16, 2018; October 3, 2018; and January 19, 2019.

62. Likewise, Ms. Brymer’s account was assessed a \$25 OD Fee on a \$6.51 debit card transaction from Sonic restaurant on March 22, 2018, for a transaction that settled that day. However, that transaction was authorized into a positive account balance prior to March 22, 2018. The same fact pattern occurred with respect to two debit card transactions for which she was assessed OD Fees on July 31, 2018.

¹ Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*, MarketWatch, Mar. 23, 2016, <http://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23> (last visited March 3, 2019).

II. ENT CHARGES TWO OR MORE NSF FEES ON THE SAME ITEM

63. As alleged more fully herein, ENT's Account Documents allow it to take certain steps when an account holder attempts a transaction but does not have sufficient funds to cover it. Specifically, ENT may (a) authorize the transaction and charge a *single* \$25 OD Fee; or (b) reject the transaction and charge a *single* \$25 NSF Fee.

64. In contrast to its Account Documents, however, ENT regularly assesses two or more NSF Fees on the *same* item or transaction.

65. This abusive practice is not universal in the financial services industry. Indeed, major banks like Chase—the largest consumer bank in the country—do not undertake the practice of charging more than one NSF Fee on the same item when it is reprocessed. Instead, Chase charges one NSF Fee even if a transaction is resubmitted for payment multiple times.

66. ENT's Account Documents never disclose this practice. To the contrary, ENT's Account Documents indicate it will only charge a single NSF Fee on an item or per transaction.

A. The Named Plaintiffs' Experiences

67. In support of their claims, Plaintiffs offer examples of NSF Fees that should not have been assessed against their checking accounts. As alleged below, ENT: (a) reprocessed a previously declined transaction; and (b) charged a fee upon reprocessing.

68. On December 3, 2018, Plaintiff Nelson attempted an ACH payment to her cable company.

69. ENT rejected payment of that transaction due to insufficient funds in Plaintiff Nelson's account and charged her a \$25 NSF Fee for doing so. Plaintiff does not dispute the initial fee, as it is allowed by ENT's Account Documents.

70. Unbeknownst to Plaintiff Nelson and without her request to ENT to retry the transaction, however, four days later, on December 7, 2018, ENT processed the same transaction yet again, and again ENT rejected the transaction due to insufficient funds and charged Plaintiff Nelson *another* \$25 NSF Fee.

71. That is not all. Unbeknownst to Plaintiff Nelson and without her request to ENT to retry the transaction, however, seven more days later, on December 14, 2018, ENT processed the same transaction yet again, and again ENT rejected the transaction due to insufficient funds and charged Plaintiff *another* \$25 NSF Fee.

72. *In sum, ENT charged Plaintiff Nelson \$75 in fees to attempt to process a single electronic payment.*

73. Plaintiff Nelson understood the payment to be a single transaction as is laid out in the ENT contract, capable at most of receiving a single NSF Fee (if ENT returned it) or a single OD Fee (if ENT paid it).

74. Similarly, on July 10, 2018, Plaintiff Brymer attempted a \$27 electronic payment on her credit card.

75. ENT rejected payment of that transaction due to insufficient funds in Plaintiff Brymer's account and charged her a \$25 NSF Fee for doing so. Plaintiff Brymer does not dispute the initial fee, as it is allowed by ENT's Account Documents.

76. Unbeknownst to Plaintiff Brymer and without her request to ENT to retry the transaction, however, the next day, on July 11, 2018, ENT processed the same transaction yet again, and again ENT rejected the transaction due to insufficient funds and charged Plaintiff Brymer *another* \$25 NSF Fee.

77. *In sum, ENT charged Plaintiff Brymer \$50 in fees to attempt to process a single electronic payment for far less than that amount.*

78. Plaintiff Brymer understood the payment to be a single transaction as is laid out in the ENT contract, capable at most of receiving a single NSF Fee (if ENT returned it) or a single OD Fee (if ENT paid it).

79. Likewise, on February 6, 2018, Plaintiff Brymer attempted a payment of \$206.66.

80. ENT rejected payment of that transaction due to insufficient funds in Plaintiff Brymer's account and charged her a \$25 NSF Fee for doing so. Plaintiff Brymer does not dispute the initial fee, as it is allowed by ENT's Account Documents.

81. Unbeknownst to Plaintiff Brymer and without her request to ENT to retry the transaction, however, seven days later, on February 13, 2018, ENT processed the same transaction yet again, and again ENT rejected the transaction due to insufficient funds and charged Plaintiff Brymer *another* \$25 NSF Fee.

82. *In sum, ENT charged Plaintiff Brymer \$50 in fees to attempt to process a single electronic payment.*

83. Plaintiff Brymer understood the payment to be a single transaction as is laid out in the ENT contract, capable at most of receiving a single NSF Fee (if ENT returned it) or a single OD Fee (if ENT paid it).

84. The same fact pattern occurred with a \$25 credit card payment on October 2 and October 5, 2018.

B. The Imposition of Multiple NSF Fees on a Single Transaction Violates ENT's Express Promises and Representations

85. The Deposit Agreement provides the general terms of Plaintiffs' relationship with the Credit Union, and therein ENT makes explicit promises and representations regarding how transactions will be processed, as well as when NSF Fees and OD Fees may be assessed.

86. The Deposit Agreement contains explicit terms indicating that NSF Fees will only be assessed once per transaction or item—defined as a customer request for payment or transfer—when in fact ENT regularly charges two or more NSF Fees per transaction or item even though a customer only requested the payment or transfer once.

87. ENT's Account Documents indicate that a singular NSF Fee can be assessed on checks, ACH debits, and electronic payments.

88. ENT's Account Documents state that it will charge \$25 per item or transaction that is returned due to insufficient funds.

89. According to the Fee Schedule, Non-Sufficient Funds (NSF Item*) \$30.00

*Check, substitute check, or electronic item.

Exhibit B, Fee Schedule.

90. That is important because according to the Deposit Agreement, a single fee will be assessed on such items:

Checks, transfer orders or payment orders that are drawn against insufficient funds will be subject to a fee, set forth in the Fee Schedule.

Exhibit A, Deposit Agreement, 3.

91. The same “check” or “electronic item” on an account cannot conceivably become a new one each time it is rejected for payment then reprocessed, especially when—as here—Plaintiffs took no action to resubmit them.

92. There is zero indication anywhere in the Account Documents that the same “check” or “electronic item” is eligible to incur multiple NSF Fees.

93. Even if ENT reprocesses an instruction for payment, it is still the same “check” or “electronic item.” Its reprocessing is simply another attempt to effectuate an account holder’s original order or instruction.

94. The disclosures described above never discuss a circumstance where ENT may assess multiple NSF Fees for a single check or ACH transaction that was returned for insufficient funds and later reprocessed one or more times and returned again.

95. In sum, ENT promises that one \$25 NSF Fee will be assessed per electronic payment or check, and these terms must mean all iterations of the same instruction for payment. As such, ENT breached the contract when it charged more than one fee per item.

96. Reasonable consumers understand any given authorization for payment to be one, singular “check” or “electronic item,” as those terms are used in ENT’s Account Documents.

97. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same transaction will be treated as the same “item,” which it will either authorize (resulting in an overdraft item) or reject (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere does ENT disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor do ENT customers ever agree to such fees.

98. Customers reasonably understand, based on the language of the Deposit Agreement and ENT's other Account Documents, that its reprocessing of checks or ACH payments are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger NSF Fees. In other words, it is always the same item or transaction.

99. Banks and credit unions like ENT that employ this abusive practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that do engage in this abusive practice disclose it expressly to their account holders—something Defendant here never did.

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

Because we may charge a service fee for an NSF item each time it is presented, **we may charge you more than one service fee for any given item.** All fees are charged during evening posting. When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft.

First Citizens Bank Deposit Account Agreement, Fees for NSF Items (emphasis added).

101. First Hawaiian Bank engages in the same abusive practices as Defendant, but at least currently discloses it in its online banking agreement, in all capital letters, as follows:

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

Terms and Conditions of FHB Online Services – First Hawaiian Bank, Amendment of Terms and Conditions Bill Payment Service, ¶13 (September 2018) (emphasis added).

102. Klein Bank similarly states in its online banking agreement:

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

Klein Bank Consumer and Small Business Online Access Agreement, Bill Pay Service ¶H.

103. ENT provides no such disclosure, and in so doing, deceives its account holders.

C. The Imposition of Multiple NSF Fees on a Single Transaction Breaches ENT's Duty of Good Faith and Fair Dealing

104. Parties to a contract are required not only to adhere to the express 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 and means that ENT is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, ENT has a duty to honor transaction requests in a way that is fair to Plaintiffs and its other customers and is prohibited from exercising its discretion to pile on even greater penalties on the depositor. Here—in the adhesion agreements ENT foisted on Plaintiffs and its other customers—ENT has provided itself numerous discretionary powers affecting customers' credit union accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, ENT abuses that discretion to take money out of consumers' accounts without their permission and contrary to their reasonable expectations that they will not be charged multiple fees for the same transaction.

105. ENT exercises its discretion in its own favor—and to the prejudice of Ms. Nelson and Ms. Brymer and its other customers—when it reprocesses a transaction when it knows a customer’s account lacks funds and then charges additional NSF Fees on a single item. Further, ENT abuses the power it has over customers and their accounts and acts contrary to their reasonable expectations under the Deposit Agreement. This is a breach of ENT’s implied covenant to engage in fair dealing and act in good faith.

106. Further, ENT maintains complete discretion not to assess NSF Fees on transactions at all. As alleged in the previous paragraph, “a fee may be assessed” or “we may charge you a non-sufficient funds (NSF) fee.” By exercising its discretion in its own favor—and to the prejudice of Plaintiffs and other customers—by charging more than one NSF Fee on a single item, ENT breaches the reasonable expectation of Plaintiffs and other customers and in doing so violates the implied covenant to act in good faith.

107. It was bad faith and totally outside Plaintiffs’ reasonable expectations for ENT to use its discretion to assess two or three NSF Fees for a single attempted payment.

108. When ENT charges multiple NSF Fees, ENT uses its discretion to define the meaning of “writing” a “check” and “electronic transaction” in an unreasonable way that violates common sense and reasonable consumer expectations. ENT uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more NSF Fees.

109. Moreover, ENT provides itself discretion to refuse to reprocess transactions that are initially rejected. It abuses that discretion to repeatedly resubmit transactions and to charge fees each time.

CLASS ACTION ALLEGATIONS

110. Description of the Classes: Plaintiffs bring this class action on behalf of themselves and classes of persons (“the Classes”) defined as follows:

All consumers who, during the applicable statute of limitations, were charged OD Fees on debit card transactions that did not overdraw an ENT checking account (the “National APPSN Class”) (Proposed class representatives: Plaintiff Nelson and Plaintiff Brymer)

All consumers who, during the applicable statute of limitations, were charged multiple NSF Fees on the same item on an ENT checking account (the “National Multiple NSF Class”) (Proposed class representatives: Plaintiff Nelson and Plaintiff Brymer)

All consumers in the state of Colorado who, during the applicable statute of limitations, were charged multiple NSF Fees on the same item on an ENT checking account (the “Colorado Multiple NSF Class”) (Proposed class representative: Plaintiff Brymer)

111. Excluded from the Classes are Defendant’s officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded from the Classes are any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

112. The time period for each of the Classes is the number of years immediately preceding the date on which this Complaint was filed as allowed by the applicable statute of limitations, going forward into the future until such time as the ENT remedy the conduct complained of herein.

113. Numerosity: The members of the proposed Classes are so numerous that individual joinder of all members is impracticable. The exact number and identities of the members of the proposed Classes are unknown at this time and can be ascertained only through

appropriate discovery. Plaintiffs estimate the number of members in each Class to be in the thousands.

114. Common Questions of Law and Fact Predominate: There are many questions of law and fact common to Plaintiffs and the Classes, and those questions substantially predominate over any questions that may affect individual Class members. Common questions of law and fact include:

- A. Whether ENT charged OD Fees on transactions that did not overdraw an account and whether it charged multiple NSF Fees on a single transaction;
- B. Whether ENT breached its own contract by charging OD Fees on transactions that did not overdraw an account and whether it charged multiple NSF Fees on a single transaction;
- C. Whether ENT breached the covenant of good faith and fair dealing;
- D. Whether ENT was unjustly enriched;
- E. The proper method or methods by which to measure damages; and
- F. The declaratory and injunctive relief to which the Classes are entitled.

115. Typicality: Plaintiffs' claims are typical of the claims of the members of the Classes. Plaintiffs and all members of the Classes have been similarly affected by the actions of Defendant.

116. Adequacy of Representation: Plaintiffs will fairly and adequately represent and protect the interests of the Classes. Plaintiffs have retained counsel with substantial experience in prosecuting complex and consumer class action litigation. Plaintiffs and their counsel are

committed to vigorously prosecuting this action on behalf of the Classes and have the financial resources to do so.

117. Superiority of Class Action: Plaintiffs and the members of the Classes suffered, and will continue to suffer, harm as a result of Defendant's unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy. Individual joinder of all members of the Classes is impractical. Even if individual Class members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversies engendered by Defendant's common course of conduct. The class action device allows a single court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable handling of all class members' claims in a single forum. The conduct of this action as a class action conserves the resources of the parties and of the judicial system and protects the rights of the Class members.

118. Risk of Inconsistent or Varying Adjudication: Class action treatment is proper, and this action should be maintained as a class action because the risks of separate actions by individual members of the Classes would create a risk of: (a) inconsistent or varying adjudications with respect to individual Class members which would establish incompatible standards of conduct for the ENT as the parties opposing the Classes; and/or (b) adjudications with respect to individual Class members would, as a practical matter, be dispositive of the interests of other Class members not party to the adjudication or would substantially impair or impede their ability to protect their interests.

119. Action Generally Applicable to Class as a Whole: ENT, as the party opposing the Classes, has acted or refused to act on grounds generally applicable to the Classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Classes as a whole.

FIRST CLAIM FOR RELIEF
Breach of Contract, Including Breach of the Covenant of Good Faith and Fair Dealing
(On Behalf of All Classes)

120. Plaintiffs incorporate by reference the preceding paragraphs.

121. Plaintiffs and ENT have contracted for banking services, as embodied in ENT's account documents and related documentation.

122. All contracts entered by Plaintiffs and the Classes are identical or substantively identical because ENT's form contracts were used uniformly.

123. ENT has breached the express terms of their own agreements as described herein.

124. Under the law of states where ENT does business, good faith is an element of every contract. All contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

125. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of

the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

126. ENT abused the discretion it granted to itself when it charged OD Fees on transactions that did not overdraw an account and when it charged more than one NSF Fee on a single item.

127. In these and other ways, Defendant violated good faith and fair dealing.

128. Defendant willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing revenue from Plaintiffs and other members of the Classes.

129. Plaintiffs and members of the Classes have performed all, or substantially all, of the obligations imposed on them under the agreements.

130. Plaintiffs and members of the Classes have sustained damages as a result of Defendant's breaches of the parties' contracts and breaches of contract through violations of the covenant of good faith and fair dealing.

SECOND CLAIM FOR RELIEF
Colorado Consumer Protection Law
Colo. Rev. Stat. § 6-1-101, et seq.
(On Behalf of the Colorado Multiple NSF Class)

131. Plaintiffs incorporate by reference the preceding paragraphs.

132. Plaintiffs and members of the Colorado Multiple NSF Class are consumers within the meaning of the Colorado Consumer Protection Act ("CCPA").

133. ENT's conduct, as described herein, constitutes an unfair and deceptive trade practice, as defined in Colo. Rev. Stat. § 6-1-105. Specifically, ENT unfairly and deceptively

assessed multiple NSF Fees on a single transaction, and failed to inform consumers it would do so.

134. As an actual and proximate result of Defendant's misconduct, Plaintiffs and the Class were injured and suffered damages by ENT's conduct, including by paying NSF Fees.

135. ENT is liable to Plaintiffs and the Class for damages in amounts to be proven at trial, including attorneys' fees and costs.

FOURTH CLAIM FOR RELIEF
Unjust Enrichment
(On Behalf of All Classes)

139. Plaintiffs re-allege the preceding paragraphs as if fully set forth herein and, to the extent necessary, plead this cause of action in the alternative. Plaintiffs will not pursue unjust enrichment if their breach of contract claims survive at the time of trial.

140. Plaintiffs, on behalf of themselves and the Classes, assert a common law claim for unjust enrichment.

141. Defendant has requested, received, and retained funds from the Plaintiffs and members of the Classes under such circumstances that in equity and good conscience ENT ought not to retain those funds.

142. Defendant acted with conscious disregard for the rights of Plaintiffs and members of the Classes.

143. As a result of Defendant's wrongful conduct as alleged herein, Defendant has been unjustly enriched at the expense of, and to the detriment of, Plaintiffs and members of the Classes.

144. Defendant's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

145. Under the common law doctrine of unjust enrichment, it is inequitable for Defendant to be permitted to retain the benefits they received and are still receiving, without justification. Defendant's retention of such funds under the circumstances making it inequitable to do so constitutes unjust enrichment.

146. The financial benefits derived by Defendant rightfully belong to Plaintiffs and members of the Classes. Defendant should be compelled to disgorge in a common fund for the benefit of Plaintiffs and members of the Classes all wrongful or inequitable proceeds received by them. A constructive trust should be imposed upon all wrongful or inequitable sums received by Defendant traceable to Plaintiffs and the members of the Classes.

147. Plaintiffs and members of the Classes have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs on their own behalf and on behalf of the Classes respectfully request that the Court:

- (a) Certify this case as a class action, designating Plaintiffs as class representatives and designating the undersigned as Class Counsel;
- (b) Award Plaintiffs and the Classes actual, statutory, and punitive damages in an amount to be proven at trial;
- (c) Award Plaintiffs and the Classes restitution in an amount to be proven at trial;
- (d) Award Plaintiffs and the Classes pre-judgment interest in the amount permitted by law;

- (e) Award Plaintiffs and the Classes attorneys' fees and costs as permitted by law;
- (c) Declare ENT's practices outlined herein to be unlawful and a breach of contract;
- (d) Enjoin ENT from engaging in the practices outlined herein;
- (e) Grant Plaintiffs and the Classes a trial by jury; and
- (f) Granting such other relief as the Court deems just and proper.

Respectfully submitted this 4th day of March, 2019.

By: /s/ Kelly Hyman
Kelly Hyman, #51813
FRANKLIN D. AZAR & ASSOCIATES, P.C.
14426 East Evans Avenue
Aurora, CO 80014
Telephone: (303) 757-3300
Facsimile: (720) 213-5131
Email: hymank@fdazar.com

Jeffrey Kaliel
Sophia Gold
KALIEL PLLC
1875 Connecticut Avenue NW, 10th Floor
Washington, DC 20009
Telephone: (202) 250-4783
Email: jkaliel@kalielllc.com
Email: sgold@kalielllc.com

Attorneys for Plaintiffs and the putative Classes

PLAINTIFFS:

Ashley Brymer
131 Amhurst St
Colorado Springs, CO 80911

Stephanie Nelson
7518 Samantha Dr., Apt. 906
Fort Worth, TX 76134