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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF NEVADA**

16 TONYA GUNTER, individually, and on behalf
17 of all others similarly situated,

18 Plaintiff,

19 v.

20 UNITED FEDERAL CREDIT UNION, DOES
1-5 inclusive and ROE CORPORATIONS 6-10
21 inclusive,

22 Defendants.

Case No.: 3:15-cv-00483-MMD-WGC

CLASS ACTION

SECOND AMENDED COMPLAINT FOR:

- (1) Breach of Contract;**
- (2) Violation of Electronic Fund Transfer Act**

DEMAND FOR JURY TRIAL

1 Plaintiff Tonya Gunter (“Plaintiff”), by her attorneys, hereby brings this class and representative
2 action against United Federal Credit Union and other unknown defendants (DOES 1-5 and ROE
3 CORPORATIONS 6-10) (the named and unknown defendants will be collectively referred to herein as
4 “UFCU” or “Defendant”). All allegations herein are based upon information and belief except those
5 allegations which pertain to Plaintiff or her counsel, which are based on personal knowledge. Plaintiff’s
6 information and belief are based upon, inter alia, Plaintiff’s own investigation and the investigation
7 conducted by Plaintiff’s attorneys. Each allegation either has evidentiary support or is likely to have
8 evidentiary support after a reasonable opportunity for further investigation or discovery.

9 **VENUE AND JURISDICTION**

10 1. This Court has jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. §
11 1332(d). Jurisdiction is proper because (1) the claims of plaintiffs, aggregated together, exceed
12 \$5,000,000 and (2) some putative class members are citizens of different states than the defendant. This
13 Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to
14 28 U.S.C. § 1391(b)(1) because at the time of the transaction giving rise to this lawsuit, Plaintiff was a
15 resident of the District of Nevada (Washoe County).

16 **NATURE OF THE ACTION**

17 2. This is a class and representative action brought by Plaintiff to assert claims in her own
18 right, in her capacity as the class representative of all others similarly situated, and in her representative
19 capacity as a private attorney general on behalf of the members of the general public. This class action
20 seeks monetary damages, restitution, and injunctive relief against Defendant UFCU arising from
21 UFCU’s breach of its contracts with consumers in its implementation of an overdraft fee program.
22 Specifically, Plaintiff asserts that UFCU charged overdraft fees for transactions for which there was
23 money in the checking account to cover the transactions, thereby breaching the express terms of its
24 consumer contracts.

PARTIES

1
2 3. Plaintiff is a resident of Washoe County, Nevada, and at all times relevant herein,
3 maintained her UFCU personal consumer checking and savings account at a branch in Sparks, Nevada,
4 located in Washoe County.

5 4. Based on information and belief, Defendant United Federal Credit Union is a federally
6 chartered credit union headquartered in St Joseph, Michigan.

7 5. Based on information and belief, DOES 1-5 and ROE CORPORATIONS 6-10 are
8 fictitious names for individuals and entities whose identities are not presently known to Plaintiff.

9 6. There exists, and at all times herein mentioned, existed, a unity of interest and ownership
10 between the named defendants (including DOES) such that any corporate individuality and separateness
11 between the named defendants has ceased, and that the named defendants are alter egos in that the
12 named defendants effectively operate as a single enterprise, or are mere instrumentalities of one another.

13 7. At all material times herein, each defendant was the agent, servant, co-conspirator and/or
14 employer of each of the remaining defendants, acted within the purpose, scope, and course of said
15 agency, service, conspiracy and/or employment and with the express and/or implied knowledge,
16 permission, and consent of the remaining defendants, and ratified and approved the acts of the other
17 defendants. However, each of these allegations are deemed alternative theories whenever not doing so
18 would result in a contradiction with the other allegations.

19 8. Whenever in the complaint reference is made to any act, deed, or conduct of a defendant
20 corporation, the allegation means the defendant corporation engaged in the act, deed, or conduct by or
21 through one or more of its officers, directors, agents, employees, or representatives who was actively
22 engaged in the management, direction, control, or transaction of the defendant corporation's ordinary
23 business and affairs. (Doe Defendants are collectively referred to herein and are included in the term
24 "Defendant.")

1 9. As to the conduct alleged herein each act was authorized ratified or directed by
2 Defendants' officers, directors, or managing agents.

3 **FACTUAL ALLEGATIONS**

4 **A. UFCU's Unlawful Overdraft Program**

5 10. UFCU is a Michigan-based credit union that provides banking services in Michigan,
6 Nevada, Ohio, North Carolina, Indiana, and Arkansas to over 130,000 members. UFCU has 24
7 branches in 6 states, including the state of Nevada, and has over \$1.8 billion in assets. One of the
8 services offered by UFCU to consumer banking customers is a checking account. One of the benefits
9 UFCU offers with a checking account is a debit card that can be used for a variety of transactions
10 including buying goods and services, as well as the ability to write checks, withdraw from ATM
11 machines, schedule ACH (Automated Clearing House transactions) such as certain recurring payments,
12 and other type of transaction items that debit from the checking account. In connection with processing
13 debit items (including debit card, ATM, check, ACH and other types of transactions), UFCU charges
14 overdraft fees when it determines there are insufficient funds in the account.

15 11. Credit unions have increasingly turned to overdraft fees as a substantial source of income.
16 According to the June 11, 2013 report entitled CFPB Study of Overdraft Programs¹, credit unions
17 generated \$7.4 billion in overdraft fees in 2012 (p. 14). That reflects an increase of 15% in overdraft
18 fees from 2007 to 2012 (p. 16). Overdraft and NSF fees now generate over 50% of all fees, and
19 constitute 11.6% of net income (p. 15) for credit unions.

20 12. The high cost of an overdraft fee is usually unfairly punitive. In a 2012 study, more than
21 90% of customers who were assessed overdraft fees overdrafted their account by mistake. (May 2012
22 Pew Charitable Trust report entitled "Overdraft America: Confusion and Concerns about Bank
23

24 _____
¹ http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf

1 Practices”, p.4) More than 60% of the transactions that resulted in a large overdraft fee were for less
2 than \$50. (June 2014 Pew Charitable Trust report entitled “Overdrawn”, p.8). More than 50% of those
3 who were assessed overdraft fees do not recall opting into an overdraft program (*Id.*, p. 5), and more
4 than two-thirds of customers would have preferred the financial institution decline their transaction
5 rather than paying the transaction into overdraft and charging a very large fee. (*Id.*, p. 10.)

6 13. Unfortunately, the customers who are assessed these fees are the most vulnerable
7 customers. Younger, lower-income, and nonwhite account holders are among those who were more
8 likely to be assessed overdraft fees. (*Id.*, p.1.) A 25 year old is 133% more likely to pay an overdraft
9 penalty fee than a 65 year old. (*Id.*, p.3.) More than 50% of the customers assessed overdraft fees
10 earned under \$40,000 per year. (*Id.*, p.4.) Nonwhites are 83% more likely to pay an overdraft fee than
11 whites. (*Id.*, p.3.)

12 14. In reaction to banks and credit unions taking advantage of millions of customers through
13 the unfair practice of charging overdraft fees and using methodologies that maximize the possible
14 number of expensive overdraft fees to be charged, a substantial amount of litigation on these issues have
15 occurred over the past few years. The results of this litigation include a trial verdict in California and
16 nationwide settlements wherein banks and credit unions have been ordered or have agreed to pay
17 unfairly assessed overdraft fees back to their customers in an amount in the hundreds of millions of
18 dollars as well as changes in their overdraft practices.

19 15. Furthermore, the federal government has also stepped in to provide additional protections
20 to customers with respect to abusive overdraft policies. In 2010, the Federal Reserve Board enacted
21 regulation that financial institutions were only permitted to charge overdraft fees on ATM and one-time
22 debit card charges if they obtained the affirmative consent of the customer. 12 C.F.R. § 1005.17 (“Opt-
23 In Rule”).

24 16. To qualify as affirmative consent, the opt-in notice must include, but is not limited to the

1 following:

- 2 • The customer must be provided the overdraft policy, including the dollar amount of
- 3 any fees that will be charged for an overdraft;
- 4 • The opt-in consent must be obtained separately from other consents and
- 5 acknowledgements;
- 6 • The consent cannot serve any purpose other than opting into the overdraft program;
- 7 • The consent cannot be a pre-selected checked box;
- 8 • The financial institution may not provide different terms for the account depending on
- 9 whether the customer opted in to the overdraft program.

10 If the financial institution did not obtain proper affirmative consent from the consumer that meets all of
11 the requirements of the Opt-in Rule, then it is not allowed to charge overdraft fees on ATM and one-
12 time debit card transactions.

13 17. For all times relevant to this complaint, UFCU has had an overdraft program (sometimes
14 referred to as "Courtesy Pay") in place for assessing overdraft fees on certain transactions which is
15 contrary to the express terms of its contracts with members; is contrary to how UFCU represents its
16 overdraft program to its members; and is contrary to what consumers would expect as to when they
17 would be assessed overdraft fees. UFCU contracts with its members that it is entitled to assess an
18 overdraft fee when UFCU pays a item (an item is a check, debit card withdrawal, ATM, or ACH) when
19 it is presented without sufficient funds to pay the item ("Overdraft" section of its 12/12 UFCU Account
20 Agreement ("Account Agreement"), p. 5 attached hereto as Exhibit 1). In another contract with its
21 members, instead of stating "using insufficient funds to pay", it defines an overdraft as when there is not
22 enough money in the account to cover the transaction (Courtesy Pay Opt-In contract ("Opt-In
23 Agreement") attached hereto as Exhibit 2).

24 18. UFCU's contractual promises in the Account Agreement and Opt-In Agreement to only

1 assess overdraft fees when there is not enough money in the account to pay the item (insufficient funds),
2 was also provided to customers in other disclosures and marketing materials it provided to customers.

3 19. However, contrary to the Account Agreement, Opt-In Agreement, and other marketing
4 materials that UFCU will only charge overdraft fees when there is not enough money in the checking
5 account, UFCU's practice when assessing an overdraft fee on a transaction is to ignore whether there is
6 money in the account or a negative balance, and instead make the automated decision on assessing
7 overdraft fees based on an artificial internal calculation (available balance) rather than the actual
8 balance. The available balance is the actual balance minus anticipated debits and credits in the future
9 (that may or may not occur). The use of an internal available balance rather than the actual balance to
10 determine whether a transaction is overdrawn and subject to an overdraft fee is directly contrary to the
11 language in the contracts. The result is that UFCU improperly charges members overdraft fees in
12 situations when there is money in the account, and there is a positive balance in the account sufficient to
13 pay the items.

14 20. This practice is in breach of both UFCU's Account Agreement and Opt-In Agreement.
15 Further, the practice of charging overdraft fees even when there are sufficient money/funds in the
16 account is inconsistent with how UFCU describes the circumstances of when it assesses overdraft fees in
17 other customer materials. Further, UFCU has failed to inform customers of the conditions under which
18 overdraft fees will be assessed in both the Account Agreement and other consumer materials.

19 21. Therefore, Plaintiff, on behalf of herself and all others similarly situated, seeks relief as
20 set forth below.

21 **B. Unlawful Overdraft Fees Assessed to Plaintiff Tonya Gunter**

22 22. Plaintiff was harmed by the practice of charging overdraft fees when there were was
23 money in the account to cover the transaction. Plaintiff entered into agreements with UFCU, where
24 UFCU would only charge overdraft fees if there was not money to cover the transaction (negative

1 balance) at time of posting. UFCU breached these agreements, and in breaching the Opt-In Agreement,
2 also violated Regulation E. It will be necessary to obtain Defendant's records to determine each
3 occasion when UFCU engaged in this practice, and the resulting damage to Plaintiff from the practice.

4 23. However, Plaintiff has been the subject of this practice as illustrated by just looking at
5 one day of transactions. On July 23, 2015, Plaintiff incurred eight overdraft fees of \$30 each for
6 purported overdraft transactions. However, at the time of posting and paying the transactions, for each
7 of the transactions there were sufficient funds and money in the account to pay and cover the
8 transactions. It is believed a complete review of Plaintiff's records will show multiple instances of
9 Plaintiff being improperly charged overdraft fees for transactions despite having sufficient funds and
10 money in her account to pay the transaction.

11 24. Furthermore, the assessment and unilateral taking of improper overdraft fees, further
12 reduces the balance and amount of funds in the account, resulting in aggressively causing subsequent,
13 otherwise non-overdrafting transactions to be deemed transactions for which further overdraft fees are
14 assessed. A complete evaluation of UFCU's records is necessary to determine the full extent of
15 Plaintiff's harm from this practice.

16 **CLASS ACTION ALLEGATIONS**

17 25. Plaintiff brings this case, and each of her respective causes of action, as a class action
18 pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), and (b)(3) on behalf of the following classes.

19 26. The "Class" is composed of two potential classes:

20 **The Positive Balance Class:**

21 **All persons who have or have had accounts with United Federal Credit Union who**
22 **incurred overdraft fees for transactions when there was sufficient funds in their checking**
23 **account to pay the transactions within six years preceding the filing of this Complaint.**

24 **The Regulation E Class:**

1 **All US residents who have or have had accounts with United Federal Credit Union**
2 **who were opted into the overdraft program for ATM and non-recurring debit card**
3 **transactions through the use of the opt-in agreement which provided inaccurate or**
4 **misleading information on United Federal Credit Union’s overdraft program in**
5 **violation of Regulation E, and were assessed overdraft charges resulting from ATM**
6 **and/or non-recurring debit card transactions since August 15, 2010.**

7 27. Excluded from the above Class is any entity in which Defendant has a controlling
8 interest, and officers or director of Defendant, this Court and its employees, and all employees of the law
9 firms representing Plaintiff and the Class.

10 28. Certification of Plaintiff’s claims for class-wide treatment is appropriate because Plaintiff
11 can prove the elements of her claims on a class-wide basis using the same evidence as would be used to
12 prove those elements in individual actions alleging the same claim.

13 29. This action has been brought and may be properly maintained on behalf of each member
14 of the Class proposed herein under Federal Rule of Civil Procedure 23.

15 30. **Numerosity of the Class (Federal Rule of Civil Procedure 23(a)(1))** – The members of
16 the Class are so numerous that a joinder of all members would be impracticable. While the exact
17 number of the members of the Class is unknown to Plaintiff at this time and can be determined only by
18 appropriate discovery, Plaintiff believes that the Class is likely to include thousands of members.

19 31. Upon information and belief, Defendant retains the databases, or other documentation, of
20 transactions and account enrollment which will be analyzed by an expert to ascertain all members of the
21 Class who have been harmed by the practice. Further, the Class definition identifies groups of unnamed
22 plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to
23 identify himself or herself as having a right to recover based on the description. Other than by direct
24 notice, alternatively proper and sufficient notice of this action may be provided to the Class members

1 through notice published in newspapers or other publications.

2 32. **Commonality (Federal Rule of Civil Procedure 23(a)(2)** – This action involves
3 common questions of law and fact. These common questions of law and fact take precedence over those
4 questions that may only affect individual Class members. The questions of law and fact common to
5 Plaintiff and the Class members include, among others, the following:

- 6 a. Whether Defendant had standardized Account Agreements during the class period
7 that was provided to customers;
- 8 b. Whether Defendant had standardized Opt-In Agreements during the class period
9 that was provided to customers;
- 10 c. Whether Defendant breached that customer agreement by use of an automated
11 system of assessing overdraft fees for transactions when customers' checking
12 accounts had sufficient funds/money to pay the transactions; and
- 13 d. Whether Defendant's conduct violated state consumer protection laws.

14 33. **Typicality (Federal Rule of Civil Procedure 23(a)(3))** – Plaintiff's claims are typical of
15 all of the members of the Class. The evidence and the legal theories regarding Defendant's alleged
16 wrongful conduct are substantially the same for Plaintiff and all of the Class members, as the relevant
17 agreements and the challenged overdraft fee practice that was applied to Defendant's customers'
18 accounts are uniform for Plaintiff and all Class members.

19 34. **Adequacy (Federal Rule of Civil Procedure 23(a)(4))** – Plaintiff will fairly and
20 adequately protect the interests of the Class members. Plaintiff has retained competent counsel
21 experienced in class action litigation to ensure such protection. There are no material conflicts between
22 the claims of the representative Plaintiff and the members of the Class that would make class
23 certification inappropriate. Plaintiff and her counsel intend to prosecute this action vigorously.

24 35. **Predominance and Superiority (Federal Rule of Civil Procedure 23(b)(3))** – The

1 common questions of law or fact identified herein and to be identified through discovery take
2 precedence over questions that may affect only individual Class members. Further, the class action is
3 superior to all other available methods for the fair and efficient adjudication of this case or controversy.
4 Because the injury suffered by the Class members may be relatively small, the expense and burden of
5 individual litigation make it virtually impossible for Plaintiff and Class members individually to seek
6 redress for the alleged wrongful conduct. Even if any individual persons or group(s) of Class members
7 could afford individual litigation, it would be unduly burdensome to the courts in which the individual
8 litigation(s) would proceed. The class action device is preferable to individual litigation(s) because it
9 provides the benefits of unitary adjudication, economies of scale, and comprehensive adjudication by a
10 single court. In contrast, the prosecution of separate actions by individual Class members would create a
11 risk of inconsistent or varying adjudications with respect to individual Class members that would
12 establish incompatible standards of conduct for the party (or parties) opposing the Class and would lead
13 to repetitious trials of the numerous common questions of fact and law. Plaintiff knows of no difficulty
14 that will be encountered in the management of this litigation that would preclude its maintenance as a
15 class action. As a result, a class action is superior to other available methods for the fair and efficient
16 adjudication of this controversy. Absent a class action, Plaintiff and the Class members will continue to
17 suffer losses, thereby allowing these violations of law to proceed without remedy and allowing
18 Defendant to retain the proceeds of their ill-gotten gains.

19 36. Plaintiff contemplates the eventual issuance of notice to the proposed Class members
20 setting forth the subject and nature of the instant action. Upon information and belief, Defendant's own
21 business records and electronic media can be utilized for the contemplated notices. To the extent that
22 any further notices may be required, Plaintiff would contemplate the use of additional media and/or
23 mailings.

24 37. The matter is properly maintained as a class action pursuant to Rule 23(b) of the Federal

1 Rules of Civil Procedure, in that:

2 a. Without class certification and determination of declaratory, injunctive, statutory and
3 other legal questions within the class format, prosecution of separate actions by
4 individual members of the Class will create the risk of:

5 1. Inconsistent or varying adjudications with respect to individual members of
6 the Class which would establish incompatible standards of conduct for the
7 parties opposing the Class; or

8 2. Adjudication with respect to individual members of the Class which would
9 as a practical matter be dispositive of the interests of the other members not
10 parties to the adjudication or substantially impair or impede their ability to
11 protect their interests;

12 b. The parties opposing the Class have acted or refused to act on grounds generally
13 applicable to each member of the Class, thereby making appropriate final injunctive
14 or corresponding declaratory relief with respect to the Class as a whole; or

15 c. Common questions of law and fact exist as to the members of the Class and
16 predominate over any questions affecting only individual members, and a Class
17 Action is superior to other available methods of the fair and efficient adjudication of
18 the controversy, including consideration of:

19 1. The interests of the members of the Class in individually controlling the
20 prosecution or defense of separate actions;

21 2. The extent and nature of any litigation concerning controversy already
22 commenced by or against members of the Class;

23 3. The desirability or undesirability of concentrating the litigation of the claims
24 in the particular forum; and

1 required by each of them on their part to be performed in accordance with the terms and conditions of
2 the contracts, except for those they were prevented from performing or which were waived or excused
3 by Defendant's misconduct.

4 44. Defendant breached the expressed terms of the contracts by, inter alia, charging overdraft
5 fees when there was enough money in the account to pay the items.

6 45. Alternatively, Defendant breached the implied covenant of good faith and fair dealing
7 based on this practice.

8 46. As a proximate result of Defendant's breach of the contract, Plaintiff and the Class
9 members have been damaged in an amount to be proven at trial and seek relief as set forth in the Prayer
10 below.

11 **SECOND CAUSE OF ACTION**
12 **(Violation of Electronic Fund Transfer Act)**

13 47. The preceding allegations are incorporated by reference and realleged as if fully set forth
14 herein.

15 48. Because of the failure to truthfully and accurately provide the conditions under which an
16 overdraft fee will be assessed, Defendant failed to comply with Regulation E, 12 C.F.R. § 1005.17,
17 which requires affirmative consent before a financial institution is permitted to assess overdraft fees on a
18 customer's account through an overdraft program for ATM and non-recurring debit card transactions.

19 49. As a result of assessing overdraft fees in circumstances for which it did not garner the
20 consent necessary to do so pursuant to Regulation E, Defendant has harmed Plaintiff and the Class.

21 50. Due to Defendant's failure to comply with 12 C.F.R. § 1005.17, Plaintiffs and members
22 of the Class are entitled to actual and statutory damages, as well as attorneys' fees and costs of suit
23 pursuant to 12 U.S.C. § 1693m.

24 //

PRAYER

WHEREFORE, Plaintiff and the Class pray for judgment as follows:

1. For an order certifying this action as a class action;
2. For compensatory damages on all applicable claims and in an amount to be proven at trial;
3. For an order requiring Defendant to disgorge, restore, and return all monies wrongfully obtained together with interest calculated at the maximum legal rate;
4. For an order enjoining the wrongful conduct alleged herein, including ceasing to charge overdraft fees for transactions for which there are sufficient funds/money in the account, and providing accurate and reliable information regarding the overdraft practice;
5. For costs;
6. For interest;
7. For attorneys' fees, the Electronic Fund Transfer Act, the common fund doctrine, other applicable law, and the customer account agreement;
8. For such other relief as the Court deems just and proper.

Dated: June 29, 2016

McCUNEWRIGHT, LLP

By: /s/ Richard D. McCune

Richard D. McCune

Jae (Eddie) K. Kim

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Thomas A. Segal

Attorneys for Plaintiff Tonya Gunter and the Putative Class

DEMAND FOR JURY TRIAL

Plaintiff, and all others similarly situated, hereby demands a trial by jury herein.

Dated: June 29, 2016

McCUNEWRIGHT, LLP

By: /s/ Richard D. McCune

Richard D. McCune

Jae (Eddie) K. Kim

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