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**UNITED STATES DISTRICT COURT  
DISTRICT OF IDAHO**

**EDWIN BORJAS**, on behalf of himself  
and all others similarly situated,  
Plaintiff,

v.

**IDAHO CENTRAL CREDIT UNION**,  
Defendant.

Case No.

**CLASS ACTION COMPLAINT AND  
DEMAND FOR JURY TRIAL**

COMES NOW the Plaintiff Edwin Borjas, by counsel, for his Class Action Complaint against the Defendant, alleges as follows:

## INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Idaho Central Credit Union (“ICCU”), arising from the unfair and unconscionable assessment and collection of Overdraft Fees (“OD Fees”) on transactions that did not overdraw an account.

2. The plain language of ICCU’s adhesion contracts specifically promises that ICCU will only charge OD Fees or NSF Fees on items when such items cause the account to have a negative balance.

3. The Overdraft Form that is part of the contract between ICCU and Mr. Borjas states that “[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway.” Exhibit 1 attached hereto.

4. The Account Agreement between ICCU and Mr. Borjas and its other accountholders contains a promise that an “overdraft” is only a “withdrawal request[] that overdraw[s] your account” and that an overdraft fee will only be charged when “the available funds in your account are not sufficient to cover items...presented for payment on your account.” *See* Exhibit 2 attached hereto.

5. The Account Agreement does not define “cover” or “overdraw” or “available funds,” or specify the manner in which an account balance is calculated for purposes of determining overdrafts.

6. According to the monthly account statements prepared by ICCU, Mr. Borjas’s account balance was not negative when he was charged OD Fees on at least two transactions. Thus, the items did not actually overdraw Mr. Borjas’s account and ICCU charged hefty OD Fees anyway.

7. These practices work to catch accountholders in an increasingly devastating cycle of bank fees.

8. Mr. Borjas and other ICCU customers have been injured by ICCU's practices. On behalf of himself and the putative class, Mr. Borjas seeks damages, restitution and injunctive relief for ICCU's breach of contract and violation of Idaho's consumer protection law.

### **JURISDICTION**

9. This Court has original jurisdiction over this putative class action lawsuit pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d)(2) & (6), because the aggregate sum of the claims of the members of each of the putative classes exceeds \$5 million, exclusive of interest and costs, Mr. Borjas brings this action on behalf of proposed classes that are each comprised of over one hundred members, and at least one of the members of each of the proposed classes is a citizen of a different state than ICCU.

10. Venue and personal jurisdiction are proper in this district because ICCU is located in a county encompassed by this District.

### **CLASS ACTION ALLEGATIONS**

11. Mr. Borjas brings this action on behalf of himself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of Rule 23.

12. The proposed classes are defined as:

All ICCU checking account holders in the state of Idaho who, during the applicable statute of limitations, were charged OD Fees or NSF Fees on items that did not overdraw their checking accounts.

13. Mr. Borjas reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

14. Excluded from the Class are ICCU, its parents, subsidiaries, affiliates, officers and directors, any entity in which ICCU has a controlling interest, all customers who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

15. The members of the Class are so numerous that joinder is impractical. The Class consist of thousands of members, the identity of whom is within the knowledge of and can be ascertained only by resort to ICCU's records.

16. The claims of Mr. Borjas are typical of the claims of the Class in that he, like all Class members, was charged improper NSF Fees and OD Fees. Mr. Borjas, like all Class members, has been damaged by ICCU's misconduct in that he paid improper NSF Fees and OD Fees. Furthermore, the factual basis of ICCU's misconduct is common to all Class members, and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Class.

17. There are numerous questions of law and fact common to the Class and those common questions predominate over any questions affecting only individual Class members.

18. Among the questions of law and fact common to the Class are whether ICCU:

- a. Charged OD Fees or NSF Fees on items when those items did not overdraw accounts;
- b. Breached its contract with consumers by charging OD Fees or NSF Fees on items when those items did not overdraw accounts;
- c. Breached the covenant of good faith and fair dealing by charging OD Fees or NSF Fees on items when those items did not overdraw accounts;
- d. Violated Idaho consumer protection law by charging OD Fees or NSF Fees

on items when those items did not overdraw accounts;

- e. Whether Mr. Borjas and the Class were damaged by Defendant's conduct and if so, the proper measure of damages.

19. Mr. Borjas is committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers and against financial institutions. Accordingly, Mr. Borjas is an adequate representative and will fairly and adequately protect the interests of the Class.

20. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of ICCU, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and ICCU's misconduct will proceed without remedy. Moreover, given that the improper fees were assessed in a uniform manner, common issues predominate over any questions, to the extent there are any, affecting only individual members.

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

## PARTIES

22. Mr. Borjas is a natural person who is a citizen of Washington and resides in Spokane, Washington. Mr. Borjas has a personal checking account with ICCU.

23. ICCU is the largest credit union in Idaho. ICCU is headquartered in Chubbuck, Idaho and maintains branch locations across the state of Idaho.

## FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

### **A. ICCU's Account Documents Promise That It Will Only Charge OD Fees or NSF Fees on Transactions That Actually Overdraw An Account**

24. Mr. Borjas's checking account with ICCU was, at all relevant times, governed by ICCU's standardized Account Agreement and Overdraft Form, the material terms of which are drafted by ICCU, amended by ICCU from time to time at its convenience and complete discretion, and imposed by ICCU on all of its customers.

25. In plain, clear, and simple language, the contract documents discussing OD Fees and NSF Fees promise that ICCU will only charge OD Fees or NSF Fees on items which would place the account in the negative.

26. The Overdraft Form that is part of the contract between ICCU and Mr. Borjas states that "[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway." Exhibit 1 attached hereto.

27. The Account Agreement between ICCU and Mr. Borjas and its other accountholders contains a promise that an "overdraft" is only a "withdrawal request[] that overdraw[s] your account" and that an overdraft fee will only be charged when "the available funds in your account are not sufficient to cover items...presented for payment on your account." See Exhibit 2 attached hereto.

28. The Account Agreement does not define "cover" or "overdraw" or "available

funds,” or specify the manner in which an account balance is calculated for purposes of determining overdrafts.

29. Contrary to these promises, ICCU’s uniform policy and practice is to disregard the actual amount of money in the account or whether there is a negative balance and, instead, to assess OD Fees or NSF Fees.

30. By using some other, unspecified calculation—as opposed to the actual money in an accountholder’s account—to determine whether to assess an OD Fee or NSF Fees, ICCU increases the number of OD Fees and NSF Fees it assesses on its accountholders.

31. This manufactured balance is not the official balance of the account and it is not the balance provided to accountholders in their monthly statements from ICCU. As such, it is reasonable for Mr. Borjas and accountholders like his to interpret and understand ICCU’s use of the terms above as referring to the official balance in the account i.e. the actual money in the account. Mr. Borjas and class members could not reasonably have expected that ICCU would assess OD Fees or NSF Fees in this manner.

**B. Examples of ICCU’s Imposition of NSF Fees on Mr. Borjas**

32. ICCU charged Mr. Borjas NSF Fees on items that did not overdraw his account.

33. For example, on May 3, 2018, Mr. Borjas was assessed an OD Fee for a \$57.68 withdrawal. This is despite the fact that, according to the bank statement issued by ICCU, *his account never went negative and always had sufficient funds to cover the item.*

34. In another example, on June 5, 2018, Mr. Borjas was assessed a NSF Fee for a \$16.53 withdrawal. This is despite the fact that, according to the bank statement issued by ICCU, *his account never went negative and always had sufficient funds to cover the item.*

**C. ICCU Abuses Its Discretion**

35. To the extent the account documents do not explicitly bar the practice described above, ICCU exploits contractual discretion to the detriment of accountholders and breaches good faith and fair dealing when it uses these policies.

36. It was bad faith and totally outside Mr. Borjas's reasonable expectations for the credit union to use its discretion to assess NSF Fees for items that did not actually overdraw his account.

37. Additionally, ICCU grants itself discretion to charge—or not to charge—an OD Fee or NSF Fee on a given item. When it charges an OD Fee or an NSF Fee on items that do not actually overdraw an account, ICCU engages in bad faith and contradicts reasonable consumer expectations.

38. ICCU acted in bad faith and outside reasonable consumer expectations when it assessed OD Fees and NSF Fees when there was enough money in accountholders' accounts to cover the items and by using a manufactured account calculation to increase the number of OD Fees or NSF Fees it could assess.

**FIRST CLAIM FOR RELIEF**  
**Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**  
**(On Behalf of Plaintiff and the Class)**

39. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

40. Mr. Borjas and ICCU have contracted for bank account deposit, checking, ACH, ATM, and debit card services. That contract does not permit ICCU to charge OD Fees or NSF Fees on items that do not actually overdraw an account.

41. Thus, ICCU breached the express terms of its contract with Mr. Borjas and the



Class by charging OD Fees or NSF Fees on items that do not actually overdraw the account *i.e.* when there were sufficient actual funds in the account to cover the item.

42. Under the laws of Idaho, good faith is an element of every contract pertaining to the assessment of OD Fees and NSF Fees. Whether by common law or statute, all such 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.

43. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A failure to act in good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing include 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.

44. ICCU has breached the covenant of good faith and fair dealing in its Account Agreement with customers by charging OD Fees and NSF Fees on items that do not actually overdraw the account *i.e.* when there were sufficient actual funds in the account to cover the items.

45. Mr. Borjas and members of the Class have performed all, or substantially all, of the obligations imposed on them under the contract.

46. Mr. Borjas and members of the Class have sustained damages as a result of ICCU's breach of the contract.

**SECOND CLAIM FOR RELIEF**  
**Violations of Idaho Consumer Protection Statute**  
**(On Behalf of Plaintiff and the Class)**

47. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

48. The contract between ICCU and Mr. Borjas and the Class does not provide that ICCU can or will charge OD Fees and NSF Fees on items which do not actually overdraw an account.

49. Charging OD Fees and NSF fees on items which do not actually overdraw an account misleads and deceives the account holder and accordingly constitutes a violation of the Idaho Consumer Protection Act, specifically Idaho Code §48-603(17), in that such practice is misleading, false or deceptive to Mr. Borjas and the members of the Class.

50. When the Defendant charges OD Fees and NSF fees on items which do not actually overdraw an account it is taking advantage of Mr. Borjas and the members of the Class in that it is basing its actions in reliance on concepts of which the majority of its account holders are either ignorant, unaware or unable to understand.

51. Charging OD Fees and NSF fees on items which do not actually overdraw an account in reliance on concepts of which the majority of its account holders are either ignorant, unaware or unable to understand constitutes a violation of the Idaho Consumer Protection Act, specifically Idaho Code §48-603(18), in that it is an unconscionable practice as provided in Idaho Code §48-603(C).

52. Mr. Borjas and the members of the Class have performed and continue to perform all, or substantially all, of the obligations imposed on them pursuant to their contract with ICCU.

53. Mr. Borjas and the members of the Class have sustained damages as a result of

ICCU's violations of the Idaho Consumer Protection Act.

54. Mr. Borjas and the members of the Class have sustained damages as a result of ICCU's unconscionable acts in violation of the Idaho Code §48-603(C).

**PRAYER FOR RELIEF**

WHEREFORE, Mr. Borjas and members of the Class demand a jury trial on all claims so triable and judgment as follows:

A. Declaring ICCU's NSF Fee and OD Fee policies and practices to be wrongful, unfair and unconscionable;

B. Restitution of all OD Fees and NSF Fees paid to ICCU by Mr. Borjas and the Class on items that did not actually overdraw an account i.e. when there were sufficient actual funds in the account to cover the items;

C. For each member of the Class, actual damages in an amount according to proof;

D. An injunction against ICCU's NSF Fee and OD Fee policies challenged herein;

E. Pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;

F. Costs and disbursements assessed by Mr. Borjas in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and

G. Such other relief as this Court deems just and proper.

**TRIAL BY JURY IS DEMANDED**

Plaintiff respectfully demands a trial by jury on all issues so triable.

Dated: February 7, 2020

HEPWORTH HOLZER, LLP

By /s/ J. Charles Hepworth  
J. Charles Hepworth  
Attorneys for Plaintiff