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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JENNA LLOYD and JAMIE
PLEMONS, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

NAVY FEDERAL CREDIT UNION,

Defendant.

**SECOND AMENDED CLASS
ACTION COMPLAINT**

CASE NO. 3:17-cv-01280-BAS-RBB

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CLASS ACTION COMPLAINT

Plaintiffs, Jenna Lloyd and Jamie Plemons, individually and on behalf of all persons similarly situated, for complaint against Defendant Navy Federal Credit Union, allege as follows:¹

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Navy Federal Credit Union (“NFCU”), arising from the unfair and unconscionable assessment and collection of “Optional Overdraft Protection Fees” (“OOPFs”).

2. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, NFCU immediately decrements consumers’ checking accounts for the amount of the purchase and sets aside funds in a checking account to cover that specific transaction. As a result, and with limited exceptions, customers’ accounts *always* have sufficient available funds to cover these transactions throughout their entire life-cycle.

3. However, NFCU still assesses crippling \$20 OOPFs on many of these transactions, in violation of its contractual promises not to do so.

4. Despite putting aside sufficient available funds for debit card transactions, NFCU charges OOPFs on those same transactions if they purportedly settle—days later—into a negative balance (“Authorize Positive, Purportedly Settle Negative Transactions” or “APPSN Transactions”).

5. Here is how it works. NFCU 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 instant they

¹ This Second Amended Complaint excludes claims for Unjust Enrichment and violations of the California’s and Consumer Legal Remedies Act, which claims were dismissed with prejudice. ECF No. 33 at 44. Plaintiffs elect not to amend their claims for violations of California’s Unfair Competition Law, which were dismissed without prejudice. Plaintiffs reserve their right to appeal the dismissal of those claims upon entry of a final order in this action.

1 are made. When a customer makes a purchase with a debit card, NFCU sequesters the
2 funds needed to pay the transaction, subtracting the dollar amount of the transaction
3 from the customer's account balance. Such funds are not available for any other use
4 by the accountholder, and such funds are specifically associated with a given debit card
5 transaction.

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

10 When a consumer uses a debit card to make a purchase, a hold may be
11 placed on funds in the consumer's account to ensure that the consumer
12 has sufficient funds in the account when the transaction is presented for
13 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.

14 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union
15 Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29, 2009).

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

21 8. Still, despite keeping those held funds off-limits for other transactions,
22 NFCU improperly charges OOPFs on APPSN Transactions—the latter which always
23 have sufficient available funds to be "covered."

24 9. Indeed, the Consumer Financial Protection Bureau ("CFPB") has
25 expressed concern with this very issue, flatly calling the practice "deceptive" when:

26 a financial institution authorized an electronic transaction, which
27 reduced a customer's available balance but did not result in an overdraft
28 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

1 electronic transaction was later presented for settlement, because of the
2 intervening transaction and overdraft fee, the electronic transaction also
3 posted as an overdraft and an additional overdraft fee was charged.
4 Because such fees caused harm to consumers, one or more supervised
5 entities were found to have acted unfairly when they charged fees in the
6 manner described above. Consumers likely had no reason to anticipate
7 this practice, which was not appropriately disclosed. They therefore
8 could not reasonably avoid incurring the overdraft fees charged.
9 Consistent with the deception findings summarized above, examiners
10 found that the failure to properly disclose the practice of charging
11 overdraft fees in these circumstances was deceptive. At one or more
12 institutions, examiners found deceptive practices relating to the
13 disclosure of overdraft processing logic for electronic transactions.
14 Examiners noted that these disclosures created a misimpression that the
15 institutions would not charge an overdraft fee with respect to an
16 electronic transaction if the authorization of the transaction did not push
17 the customer's available balance into overdraft status. But the
18 institutions assessed overdraft fees for electronic transactions in a
19 manner inconsistent with the overall net impression created by the
20 disclosures. Examiners therefore concluded that the disclosures were
21 misleading or likely to mislead, and because such misimpressions could
22 be material to a reasonable consumer's decision-making and actions,
23 examiners found the practice to be deceptive. Furthermore, because
24 consumers were substantially injured or likely to be so injured by
25 overdraft fees assessed contrary to the overall net impression created
26 by the disclosures (in a manner not outweighed by countervailing
27 benefits to consumers or competition), and because consumers could
28 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.”

16 Consumer Financial Protection Bureau, Winter 2015 “Supervisory Highlights.”
17 [https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf)
18 [2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf) (last visited April 20, 2018).

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

26 11. Besides being deceptive, unfair and unconscionable, these practices
27 breach contract promises made in the NFCU's adhesion contracts—contracts which
28

1 fundamentally misconstrue the true nature of the NFCU’s processes and practices.
2 These practices also exploit contractual discretion to gouge consumers.

3 12. In plain, clear, and simple language, the checking account contract
4 documents covering OOPFs promise that the NFCU will only charge OOPFs on
5 transactions with insufficient funds to “cover” a given transaction:

6 An overdraft occurs when you do not have enough money in your
7 account to cover a transaction, but we pay it anyway.

8 Ex. A, NFCU “What You Need to Know About Overdrafts and Overdraft Fees.”

9 13. But for APPSN transactions, which are immediately deducted from a
10 positive account balance and held aside for payment of that same transaction, there are
11 always funds to “cover” those transactions—yet NFCU assesses OOPFs on them
12 anyway.

13 14. Moreover, NFCU reaffirms that debit cards transactions are “authorized
14 and approved” immediately, in one fell swoop:

15 We may **authorize and approve** the following types of transactions
16 under our Optional Overdraft Protection Service (OOPS) if you ask us
(see below):

- 17 • Checks and other transactions made using your checking account
18 number • ATM transactions • Debit card transactions • Electronic
debits cleared through the Automated Clearing House (ACH)

19 *Id.*

20 15. This promise indicates that transactions are only “OOPS” transactions
21 when they are “authorized and approved” into a negative balance. Of course, that is
22 not true for APPSN transactions.

23 16. Lest there be any doubt, NFCU also clarifies that “authorization” and
24 “payment” are a linked and essentially coterminous process—in other words, that
25 authorization necessitates payment, and account balances are deducted once for any
26 given transaction:

27 We pay overdrafts at our discretion, which means we do not guarantee
28 that we will always authorize and pay any type of transaction. If we do

1 not authorize and pay an overdraft, your transaction will be declined
and/or your check/ACH will be returned.

2 *Id.*

3 17. In fact, NFCU actually “authorizes” transactions on positive funds, sets
4 those funds aside on a hold, then fails to use those same funds to “pay” those same
5 transactions when they settle.

6 18. All these representations and contractual promises are untrue. In fact,
7 NFCU charges OOPFs even when sufficient funds exist to “cover” transactions that
8 are “authorized and approved” into a positive balance.

9 19. Bizarrely, this means NFCU actually debits an account twice for the same
10 transaction—not just at the moment of purchase, but later during a secret posting
11 process described below.

12 20. The NFCU breaches these plain contractual promises when it assesses
13 OOPFs on APPSN Transactions that *did* have funds to cover them throughout their
14 lifecycle. By definition, there are always available funds sufficient to “cover” debit
15 card transactions authorized into positive funds, for the simple reason that those funds
16 are sequestered at the instant of authorization (as described above).

17 21. The contract also fundamentally misconstrues the process by which
18 OOPFs are determined—and, more generally, how debit card transactions are
19 executed.

20 22. In short, NFCU is not authorized by contract to charge OOPFs on APPSN
21 Transactions, but it has done so and continues to do so, to the tune of millions of dollars
22 in consumer harm every year.

23 23. Plaintiffs and other NFCU customers have been injured by NFCU’s
24 practices. On behalf of themselves and the putative class, Plaintiffs seek damages,
25 restitution and injunctive relief for NFCU’s breach of contract, unjust enrichment,
26 conversion, and violation of California consumer protection law.

27 **JURISDICTION AND VENUE**

28 24. This Court has original jurisdiction of this action under the Class Action

1 Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has
2 original jurisdiction because the aggregate claims of the putative class members exceed
3 \$5 million, exclusive of interest and costs, and at least one of the members of the
4 proposed class is a citizen of a different state than NFCU.

5 25. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because
6 NFCU is subject to personal jurisdiction here and regularly conducts business in the
7 Central District of California, and because a substantial part of the events or omissions
8 giving rise to the claims asserted herein occurred in this district.

9 **PARTIES**

10 26. Plaintiffs are citizens of the State of California. At all times relevant,
11 Plaintiffs patronized NFCU banking centers located in Orange County, CA, Riverside
12 County, CA, and San Diego County, CA.

13 27. Defendant NFCU is a national bank with its headquarters and principal
14 place of business located in Vienna, Virginia. Among other things, NFCU is engaged
15 in the business of providing retail banking services to consumers, including Plaintiffs
16 and members of the putative class, which includes the issuance of debit cards for use
17 by its customers in conjunction with their checking accounts. NFCU operates banking
18 centers, and thus conducts business, throughout the State of California and the United
19 States.

20 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

21 28. Plaintiffs have checking accounts with NFCU.

22 29. NFCU issues debit cards to its checking account customers, including
23 Plaintiffs, which allows its customers to have electronic access to their checking
24 accounts for purchases, payments, withdrawals and other electronic debit transactions.

25 30. Pursuant to its standard account agreement, NFCU charges OOPFs (at all
26 materials times in the amount of \$20) for debit card transactions that purportedly result
27 in an overdraft.
28

1 **A. Mechanics of a Debit Card Transaction**

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

8 32. At this step, if the transaction is approved, NFCU immediately decrements
9 the funds in a consumer’s account and sequesters funds in the amount of the
10 transaction, but does not yet transfer the funds to the merchant.

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

15 When a consumer uses a debit card to make a purchase, a hold may be
16 placed on funds in the consumer's account to ensure that the consumer
17 has sufficient funds in the account when the transaction is presented for
18 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.

19 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union
20 Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29, 2009).

21 34. Sometime thereafter, the funds are actually transferred from the
22 customer’s account to the merchant’s account. This is referred to in the banking
23 industry as “posting” or “settling”—something which may occur several days after the
24 transaction was initially initiated.

25 35. There is no change—no impact whatsoever—to the available funds in an
26 account when posting or payment of a transaction that settles in the same amount for
27 which it authorized occurs. That is because available funds amounts do not change for
28 debit card transactions that settle in the same amount for which they were authorized.

1 **B. NFCU Account Documents**

2 36. Plaintiffs’ checking accounts with NFCU were, at all relevant times,
3 governed by NFCU’s standardized contract for deposit accounts, the material terms of
4 which are drafted by NFCU, amended by NFCU from time to time at its convenience
5 and complete discretion, and imposed by NFCU on all of its customers.

6 37. NFCU’s “What You Need to Know About Overdrafts and Overdraft
7 Fees,” the portion of the standardized contract dealing with overdraft fees, contains the
8 following relevant provisions.

9 38. The checking account contract documents covering OOPFs promise that
10 the NFCU will only charge OOPFs on transactions with insufficient funds to “cover”
11 a given transaction:

12 An overdraft occurs when you do not have enough money in your
13 account to cover a transaction, but we pay it anyway.

14 Ex. A.

15 39. The critical contract term “to cover” is never defined.

16 40. For APPSN transactions, which are immediately deducted from a positive
17 account balance and held aside for payment of that same transaction, there are always
18 funds to “cover” those transactions—yet NFCU assesses OOPFs on them anyway.

19 41. Moreover, NFCU reaffirms that debit card transactions are “authorized
20 and approved” immediately, in one fell swoop:

21 We may **authorize and approve** the following types of transactions
22 under our Optional Overdraft Protection Service (OOPS) if you ask us
(see below):

- 23 • Checks and other transactions made using your checking account
24 number • ATM transactions • Debit card transactions • Electronic
debits cleared through the Automated Clearing House (ACH)

25 *Id.*

26 42. This promise indicates that transactions are only “OOPS” transactions
27 when they are “authorized and approved” into a negative balance. Of course, that is
28 not true for APPSN transactions.

1 43. Lest there be any doubt, NFCU also clarifies that “authorization” and
2 “payment” are a linked and essentially coterminous process—in other words, that
3 authorization necessitates payment, and account balances are deducted once for any
4 given transaction:

5 We pay overdrafts at our discretion, which means we do not guarantee
6 that we will always authorize and pay any type of transaction. If we do
7 not authorize and pay an overdraft, your transaction will be declined
and/or your check/ACH will be returned.

8 *Id.*

9 44. In fact, NFCU actually “authorizes” transactions on positive funds, sets
10 those funds aside on a hold, then fails to use those same funds to “pay” those same
11 transactions when they settle. Instead, it uses a secret posting process described below.

12 45. All these representations and contractual promises are untrue. In fact,
13 NFCU charges OOPFs even when sufficient funds exist to “cover” transactions that
14 are “authorized and approved” into a positive balance.

15 46. No express language in any document states that the NFCU may impose
16 fees for overdrafts on APPSN Transactions.

17 **C. The Account Documents Fundamentally Misconstrue the NFCU’s True**
18 **Overdraft Fee and Debit Processing Practices**

19 47. The Account Documents misconstrue the NFCU’s true debit card
20 processing and OOPF practices in at least four ways.

21 48. First, and most fundamentally, the NFCU charges OOPFs on debit card
22 transactions for which there are sufficient available funds to “cover” the transactions.
23 That is despite contractual representations that the NFCU will only charge OOPFs on
24 transactions with insufficient available funds to “cover” a given transaction.

25 49. The NFCU assesses OOPFs on APPSN Transactions that do have
26 sufficient available funds to “cover” them throughout their lifecycle.

27 50. Those available funds are sequestered at the moment a debit card
28 transaction is approved by NFCU.

1 51. The NFCU’s practice of charging OOPFs even where sufficient available
2 funds exist to “cover” a transaction violates a contractual promise not to do so. This
3 discrepancy between the NFCU’s actual practice and the contract causes consumers
4 like Plaintiffs to incur more OOPFs than they should.

5 52. Third, sufficient funds for APPSN Transactions actually are debited from
6 the account immediately, consistent with standard industry practice.

7 53. Because these withdrawals take place upon initiation, then cannot be re-
8 debited later. But that is what NFCU does when it re-debits the account during a secret
9 batch posting process.

10 54. In reality, the NFCU’s actual practice is to assay the same debit card
11 transaction twice to determine if the transaction overdraws an account—both at the
12 time a transaction is authorized and at the time of settlement. Then the NFCU makes
13 that determination again, at settlement.

14 55. At the time of settlement, however, an available balance *does not change*
15 *at all* for these transactions previously authorized into good funds. As such, NFCU
16 cannot then charge an OOPF on such a transaction because the available balance has
17 not been rendered insufficient due to the pseudo-event of settlement.

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

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

27 58. This discrepancy between the NFCU’s actual practices and the contract
28 causes consumers to incur more OOPFs than they should.

1 59. In sum, there is a yawning gap between the NFCU’s practices as described
2 in the account documents and the NFCU’s practices in reality.

3 **D. The NFCU Abuses Contractual Discretion**

4 60. The NFCU’s treatment of debit card transactions to charge OOPFs is not
5 simply a breach of the express terms of the numerous account documents. In addition,
6 NFCU exploits contractual discretion to the detriment of accountholders when it uses
7 these policies.

8 61. The term “to cover” a transaction is undefined. The NFCU uses its
9 discretion to define “to cover” in a manner contrary to any reasonable, common sense
10 understanding of that term. In NFCU’s definition, a transaction is not “covered” even
11 if the NFCU sequesters sufficient available funds for that transaction.

12 62. Moreover, NFCU uses its contractual discretion to cause APPSN
13 Transactions to incur OOPFs by knowingly authorizing later transactions that it allows
14 to consume available funds previously sequestered for APPSN Transactions: “We pay
15 overdrafts at our discretion, which means we do not guarantee that we will always
16 authorize and pay any type of transaction. If we do not authorize and pay an overdraft,
17 your transaction will be declined and/or your check/ACH will be returned.” Ex. A.

18 63. NFCU uses all of these contractual discretion points unfairly to extract
19 OOPFs on transactions that no reasonable consumer would believe could cause
20 OOPFs.

21 **E. Reasonable Consumers Understand Debit Card Transactions are Debited**
22 **Immediately**

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

1 65. NFCU was and is aware that this is precisely how its accountholders
2 reasonably understand debit card transactions to work.

3 66. NFCU well knows that many consumers prefer debit cards for these very
4 reasons. Consumer research indicates that consumers prefer debit cards as a budgeting
5 device because they don't allow debt like credit cards do, and because the money comes
6 directly out of a checking account.

7 67. Consumer Action, a national nonprofit consumer education and advocacy
8 organization, advises consumers determining whether they should use a debit card that
9 "[t]here is no grace period on debit card purchases the way there is on credit card
10 purchases; the money is immediately deducted from your checking account. Also,
11 when you use a debit card you lose the one or two days of 'float' time that a check
12 usually takes to clear." See [https://www.consumer-](https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card)
13 [action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card](https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card)
14 (last visited April 20, 2018).

15 68. Further, Consumer Action informs consumers that, "Debit cards offer the
16 convenience of paying with plastic without the risk of overspending. When you use a
17 debit card, you do not get a monthly bill. You also avoid the finance charges and debt
18 that can come with a credit card if not paid off in full." See [https://www.consumer-](https://www.consumer-action.org/english/articles/understanding_debit_cards)
19 [action.org/english/articles/understanding_debit_cards](https://www.consumer-action.org/english/articles/understanding_debit_cards) (last visited April 20, 2018).

20 69. This is a large part of the reason that debit cards have risen in popularity.
21 The number of terminals that accept debit cards in the United States has increased by
22 approximately 1.4 million in the last five years, and with that increasing ubiquity,
23 consumers have (along with credit cards) viewed debit cards "as a more convenient
24 option than refilling their wallets with cash from an ATM."²

25
26
27 ² Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*,
28 MARKETWATCH, Mar. 23, 2016, <http://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23>

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

5 71. NFCU was aware of a consumer perception that debit card transactions
6 reduce an available balance *in a specified order*—namely, the order the transactions
7 are actually initiated—and its account agreement only supports this perception.

8 **F. Plaintiffs’ Experience**

9 72. On October 27, 2014, Plaintiff Lloyd was assessed three OOPFs in the
10 amount of \$20.00 each for six transactions that settled that day, five of which were
11 debit card transactions that were initiated on or prior to October 26, 2014—all despite
12 the fact that positive funds were deducted immediately for at least three of the debit
13 card transactions on which she was assessed OOPFs.

14 73. Indeed, the only reason any of the five debit card transactions that settled
15 on October 27 incurred overdraft fees was because of a \$260 ATM withdrawal that
16 Plaintiff Lloyd made *after* the debit card transactions had already been initiated.

17 74. Plaintiff Lloyd does not dispute that NFCU was within its rights to charge
18 an OOPF on the ATM transaction, because it was authorized into insufficient funds.
19 Plaintiff Lloyd disputes that NFCU was authorized to charge OOPFs on the prior in
20 time debit card transactions.

21 75. On January 31, 2014, 2014, Plaintiff Lloyd was assessed three OOPFs in
22 the amount of \$20.00 each for four transactions, three of which were debit card
23 transactions. Upon information and belief, positive funds were deducted immediately
24 for at least two of the debit card transactions on which she was assessed OOPFs.

25 76. Indeed, the only reason any of the three debit card transactions that settled
26 on January 31 incurred overdraft fees was because of a \$400 ATM withdrawal that
27 Plaintiff Lloyd made *after* some or all of the debit card transactions had already been
28 initiated.

1 77. Plaintiff Lloyd does not dispute that NFCU was within its rights to charge
2 an OOPF on the ATM transaction, because it was authorized into insufficient funds.
3 Plaintiff Lloyd disputes that NFCU was authorized to charge OOPFs on the prior in
4 time debit card transactions that were authorized into sufficient funds.

5 78. NFCU assessed OOPFs on the held transactions even though it had
6 sequestered available funds for those transactions at the time they were authorized.

7 79. On February 18, 2014, Plaintiff Plemons was assessed three OOPFs in the
8 amount of \$20.00 each for three transactions that settled that day, two of which were
9 debit card transactions that were initiated on or prior to February 15, 2014—all despite
10 the fact that positive funds were deducted immediately for at least two of the debit card
11 transactions on which he was assessed OOPFs.

12 80. Indeed, the only reason any of the two debit card transactions that settled
13 on February 18, 2014 incurred overdraft fees was because of a \$82.75 ATM withdrawal
14 that Plaintiff Plemons made *after* the debit card transactions had already been initiated.

15 81. Plaintiff Plemons does not dispute that NFCU was within its rights to
16 charge an OOPF on the ATM transaction, because it was authorized into insufficient
17 funds. Plaintiff Plemons disputes that NFCU was authorized to charge OOPFs on the
18 prior in time debit card transactions.

19 82. NFCU assessed OOPFs on the held transactions even though it had
20 sequestered available funds for those transactions at the time they were authorized.

21 **CLASS ALLEGATIONS**

22 83. Plaintiffs bring this action on behalf of themselves and all others similarly
23 situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action
24 satisfies the numerosity, commonality, typicality, adequacy, predominance and
25 superiority requirements of Rule 23.

26
27 84. The proposed class is defined as:
28

1 All NFCU checking account holders in the United States who, from
2 June 22, 2011, through the date of class certification, were charged
3 OOPFs on transactions that were authorized into a positive available
4 balance (the “Class”).

5 85. Plaintiffs reserve the right to modify or amend the definition of the
6 proposed Class before the Court determines whether certification is appropriate.

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

12 87. The members of the Class are so numerous that joinder is impractical. The
13 Class consists of thousands of members, the identity of whom is within the knowledge
14 of and can be ascertained only by resort to NFCU’s records.

15 88. The claims of the representative Plaintiffs are typical of the claims of the
16 Class in that the representative Plaintiffs, like all Class members, were charged OOPFs
17 by NFCU as a result of charging OOPFs on transactions that were authorized into a
18 sufficient available balance, but whose available balances were insufficient at the time
19 the transactions were settled. The representative Plaintiffs, like all Class members,
20 have been damaged by NFCU’s misconduct in that they have been assessed unfair and
21 unconscionable overdraft charges. Furthermore, the factual basis of NFCU’s
22 misconduct is common to all Class members, and represents a common thread of unfair
23 and unconscionable conduct resulting in injury to all members of the Class.

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

27 90. Among the questions of law and fact common to the Class are whether
28 NFCU:

- a. Imposed OOPFs on debit card transactions when those transactions were

- 1 authorized into sufficient available balances or funds available;
- 2 b. Breached its contract and the covenant of good faith and fair dealing with
- 3 Plaintiffs and other members of the Class through its overdraft policies
- 4 and practices on APPSN Transactions;
- 5 c. Converted money belonging to Plaintiffs and other members of the Class
- 6 through its overdraft policies and practices;

7 Other questions of law and fact common to the Class include:

- 8 d. The proper method or methods by which to measure damages, and
- 9 e. The declaratory relief to which the Class are entitled.

10 91. Plaintiffs' claims are typical of the claims of other Class members, in that
11 they arise out of the same wrongful overdraft policies and practices of NFCU's Rules
12 Governing Deposit Accounts. Plaintiffs have suffered the harm alleged and have no
13 interests antagonistic to the interests of any other Class member.

14 92. Plaintiffs are committed to the vigorous prosecution of this action and
15 have retained competent counsel experienced in the prosecution of class actions and,
16 in particular, class actions on behalf of consumers and against financial institutions.
17 Accordingly, Plaintiffs are adequate representatives and will fairly and adequately
18 protect the interests of the Class.

19 93. A class action is superior to other available methods for the fair and
20 efficient adjudication of this controversy. Since the amount of each individual Class
21 member's claim is small relative to the complexity of the litigation, and due to the
22 financial resources of NFCU, no Class member could afford to seek legal redress
23 individually for the claims alleged herein. Therefore, absent a class action, the Class
24 members will continue to suffer losses and NFCU's misconduct will proceed without
25 remedy.

26 94. Even if Class members themselves could afford such individual litigation,
27 the court system could not. Given the complex legal and factual issues involved,
28 individualized litigation would significantly increase the delay and expense to all

1 parties and to the Court. Individualized litigation would also create the potential for
2 inconsistent or contradictory rulings. By contrast, a class action presents far fewer
3 management difficulties, allows claims to be heard which might otherwise go unheard
4 because of the relative expense of bringing individual lawsuits, and provides the
5 benefits of adjudication, economies of scale and comprehensive supervision by a single
6 court.

7 **FIRST CLAIM FOR RELIEF**
8 **Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**

9 95. Plaintiffs repeats paragraphs 1 through 94 above.

10 96. Plaintiffs and members of the Class and NFCU have contracted for bank
11 account deposit, checking, ATM, and debit card services, agreeing that Virginia law
12 applies.

13 97. NFCU misconstrued in the account documents its true debit card
14 processing and OOPF practices and breached the express terms of the account
15 documents.

16 98. NFCU breached promises included in the account documents.

17 99. No contract provision authorizes NFCU to charge OOPFs on APPSN
18 Transactions.

19 100. Therefore, NFCU breached the terms of its account documents by
20 charging OOPFs on transactions that were authorized into a sufficient available
21 balance, but whose available balances were allegedly insufficient at the time the
22 transactions were settled.

23 101. Under Virginia law, every contract carries with it an implied covenant of
24 good faith and fair dealing. Good faith and fair dealing, in connection with executing
25 contracts and discharging performance and other duties according to their terms, means
26 preserving the spirit – not merely the letter – of the bargain. Put differently, the parties
27 to a contract are mutually obligated to comply with the substance of their contract in
28 addition to its form. The covenant requires faithfulness to an agreed common purpose

1 and consistency with the justified expectations of the other party to a contract. Evading
2 the spirit of the bargain and abusing the power to specify terms constitute examples of
3 bad faith in the performance of contracts.

4 102. Subterfuge and evasion violate the obligation of good faith in performance
5 even when an actor believes their conduct to be justified. Bad faith may be overt or
6 may consist of inaction, and fair dealing may require more than honesty. Examples of
7 bad faith are evasion of the spirit of the bargain, willful rendering of imperfect
8 performance, abuse of a power to specify contract terms, and interference with or
9 failure to cooperate in the other party's performance.

10 103. NFCU has breached the covenant of good faith and fair dealing in the
11 contract through its overdraft policies and practices as alleged herein. Specifically,
12 NFCU harms consumers by exercising its contractual discretion in bad faith, even
13 though that discretion is only vested in NFCU, in a number of ways which no
14 reasonable consumer would anticipate. First, the term "to cover" a transaction is
15 undefined, and the NFCU uses its discretion to define "to cover" in a manner contrary
16 to any reasonable, common sense understanding of that term. In NFCU's definition, a
17 transaction is not "covered" even if NFCU sequesters sufficient available funds for the
18 transaction at the time it is initiated.

19 104. Second, NFCU exercised its contractual discretion in bad faith to cause
20 APPSN Transactions to incur OOPFs by knowingly authorizing later transactions that
21 it allows to consume available funds previously sequestered for APPSN Transactions:
22 "We pay overdrafts at our discretion, which means we do not guarantee that we will
23 always authorize and pay any type of transaction. If we do not authorize and pay an
24 overdraft, your transaction will be declined and/or your check/ACH will be returned."

25 105. NFCU uses these contractual discretion points to extract OOPFs on
26 transactions that no reasonable consumer would believe could cause OOPFs.

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28

1 106. Plaintiffs and members of the Class have performed all, or substantially
2 all, of the obligations imposed on them under the contract.

3 107. Plaintiffs and members of the Class have sustained damages as a result of
4 NFCU's breach of the contract.

5 **SECOND CLAIM FOR RELIEF**

6 **Conversion**

7
8 108. Plaintiffs repeats paragraphs 1 through 94 above.

9 109. NFCU had and continues to have a duty to maintain and preserve its
10 customers' checking accounts and to prevent their diminishment through its own
11 wrongful acts.

12 110. NFCU has wrongfully collected OOPFs from Plaintiffs and the members
13 of the Class, and has taken specific and readily identifiable funds from their accounts
14 in payment of these fees in order to satisfy them.

15 111. NFCU has, without proper authorization, assumed and exercised the right
16 of ownership over these funds, in hostility to the rights of Plaintiffs and the members
17 of the Class, without legal justification.

18 112. NFCU continues to retain these funds unlawfully without the consent of
19 Plaintiffs or members of the Class.

20 113. NFCU intends to permanently deprive Plaintiffs and the members of the
21 Class of these funds.

22 114. These funds are properly owned by Plaintiffs and the members of the
23 Class, not NFCU, which now claims that it is entitled to their ownership, contrary to
24 the rights of Plaintiffs and the members of the Class.

25 115. Plaintiffs and the members of the Class are entitled to the immediate
26 possession of these funds.

27 116. NFCU has wrongfully converted these specific and readily identifiable
28 funds.

1 117. NFCU's wrongful conduct is continuing.

2 118. As a direct and proximate result of this wrongful conversion, Plaintiffs
3 and the members of the Class have suffered and continue to suffer damages.

4 119. By reason of the foregoing, Plaintiffs and the members of the Class are
5 entitled to recover from NFCU all damages and costs permitted by law, including all
6 amounts that NFCU has wrongfully converted.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs and the Class demand a jury trial on all claims so
9 triable and judgment as follows:

- 10 1. Declaring NFCU's OOPF policies and practices to be wrongful, unfair
11 and unconscionable;
- 12 2. Restitution of all OOPFs paid to NFCU by Plaintiffs and the Class, as a
13 result of the wrongs alleged herein in an amount to be determined at trial;
- 14 3. Disgorgement of the ill-gotten gains derived by NFCU from its
15 misconduct;
- 16 4. Actual damages in an amount according to proof;
- 17 5. Punitive and exemplary damages;
- 18 6. Pre-judgment interest at the maximum rate permitted by applicable law;
- 19 7. Costs and disbursements assessed by Plaintiffs in connection with this
20 action, including reasonable attorneys' fees pursuant to applicable law; and
- 21 8. Such other relief as this Court deems just and proper.

22 **DEMAND FOR JURY TRIAL**

23 Plaintiffs and all others similarly situated hereby demand trial by jury on all
24 issues in this complaint that are so triable as a matter of right.
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1 Dated: May 4, 2018

Respectfully submitted,

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