

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

DAVID THOMPSON, on behalf of
himself and all others similarly
situated,

Plaintiff,

v.

CREDIT UNION ONE

Defendant.

CASE NO.

CLASS ACTION COMPLAINT

CLASS ACTION COMPLAINT

NOW COMES, the Plaintiff David Thompson (“Plaintiff”), on behalf of himself and all persons similarly situated, alleges the following based on personal knowledge as to allegations regarding himself and on information and belief as to other allegations.

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Credit Union One (“CUO”), arising from the unfair and unconscionable assessment and collection of “overdraft fees” (“OD Fees”) on accounts that were never actually overdrawn.

2. These practices breach contractual promises made in CUO's adhesion contracts, the "Account Documents".

3. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that CUO will only charge OD Fees on transactions where there are insufficient funds to cover them.

4. As happened to Plaintiff, however, CUO charges OD Fees even when there are sufficient funds to cover a debit card or other point of sale ("POS") transaction, in breach of the Account Documents and the duty of good faith and fair dealing. The wrongful taking of funds from accounts also constitutes conversion.

5. CUO's customers have been injured by CUO's improper practices to the tune of millions of dollars billed from their accounts in violation of their agreements with CUO.

6. On behalf of himself and the Class, Plaintiff seeks damages, restitution, and injunctive relief for Defendant's violations as set forth more fully below.

PARTIES AND JURISDICTION

7. Plaintiff Thompson is a natural person who is a citizen of Michigan and resides in Garden City, MI. Plaintiff has a personal checking account with CUO, which is governed by CUO's Account Documents.

8. Defendant is a member-owned financial cooperative providing banking services in this district. CUO has its headquarters in Ferndale, Michigan. CUO has

over \$1.5 billion in assets and provides services to customers through credit union branches in Michigan.

9. Venue and jurisdiction are proper in this district because CUO is headquartered in a county encompassed by this District.

10. 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, because Plaintiff brings this action on behalf of proposed classes that are each comprised of over one hundred members, and because at least one of the members of each of the proposed classes is a citizen of a different state than Defendant. Further, this Court has federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

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

11. Plaintiff has a checking account with CUO.

12. CUO issues debit cards to its checking account customers, including Plaintiff, which allows its customers to have electronic access to their checking accounts for purchases, payments, withdrawals and other electronic debit transactions.

13. Pursuant to its Account Documents, CUO charges fees for transactions that purportedly result in an overdraft.

14. Plaintiff Thompson brings this cause of action challenging CUO's practice of charging OD Fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions" ("APPSN Transactions").

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

16. However, CUO still assesses crippling OD Fees on many of these transactions and misrepresents its practices in its Account Documents.

17. Despite putting aside sufficient available funds for debit card and other POS transactions at the time those transactions are authorized, CUO 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.

18. CUO maintains a running account balance in real time, tracking funds accountholders 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, CUO 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 accountholder, and such funds are specifically associated with a given debit card transaction.

19. 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.

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

21. 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 fees under these circumstances was found to be unfair.

Consumer Financial Protection Bureau, Winter 2015 "Supervisory Highlights."

22. There is no justification for these practices, other than to maximize CUO's OD Fee revenue. APPSN Transactions only exist because intervening

checking account transactions supposedly reduce an account balance. But CUO 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 CUO was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

23. Besides being unfair and unjust, these practices breach contract promises made in CUO's adhesion contracts—contracts which fail to inform accountholders about the true nature of CUO's processes and practices. These practices also exploit contractual discretion to gouge accountholders.

24. In plain, clear, and simple language, the Account Documents covering OD Fees promise that CUO will only charge OD Fees on transactions that have insufficient funds to cover that transaction.

25. In short, CUO 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.

A. *Mechanics of a Debit Card Transaction*

26. A debit card transaction occurs in two parts. First, authorization for the purchase amount is instantaneously obtained by the merchant from CUO. When a merchant physically or virtually “swipes” a customer's debit card, the credit card terminal connects, via an intermediary, to CUO, which verifies that the customer's

account is valid and that sufficient available funds exist to cover the transaction amount.

27. At this step, if the transaction is approved, CUO immediately decrements the funds in an accountholder's account and sequesters funds in the amount of the transaction but does not yet transfer the funds to the merchant.

28. 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 5498-01 (Jan. 29, 2009).

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

30. CUO (like all credit unions and banks) decides whether to "pay" debit card transactions at authorization. After that, CUO is obligated to pay the transaction no matter what. For debit card transactions, that moment of decision can only occur

at the point of sale, at the instant the transaction is authorized or declined. It is at that point—and only that point—when CUO may choose to either pay the transaction or decline it. When the time comes to actually settle the transaction, it is too late—the financial institution has no discretion and must pay the charge. This “must pay” rule applies industry wide and requires that, once a financial institution authorizes a debit card transaction, it “must pay” it when the merchant later makes a demand, regardless of other account activity. *See* Electronic Fund Transfers, 74 Fed. Reg. 59033-01, 59046 (Nov. 17, 2009).

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

B. *CUO’s Account Contract*

32. Plaintiff has a CUO checking account, which is governed by CUO’s standardized Account Documents.

33. CUO’s Deposit Agreement promises that the moment of authorization, which is when CUO decides whether to “pay” a debit card transaction or not, is dispositive for purposes of OD Fees:

Payment of Overdrafts. If, on any day, the available funds in your share or deposit account are not sufficient to pay the full amount of a check, draft, transaction, or other item, plus any applicable fee, that is posted to your account, *we may return the item or pay it, as described below.* The Credit Union's determination of an insufficient available account balance may be made at any time between presentation and the Credit Union's midnight deadline with only one review of the account required. We do not have to notify you

if your account does not have sufficient available funds in order to pay an item. **Your account may be subject to a charge for each item regardless of whether we pay or return the item.** If we offer standard overdraft services, this service allows us to authorize payment for the following types of transactions regardless of whether your share or deposit account has sufficient funds: (1) share drafts/checks and other transactions made using your checking account, except as otherwise described below; (2) automatic bill payments; (3) ACH transactions. For ATM and one-time debit card transactions, you must affirmatively consent to such coverage.

Without your consent, the Credit Union may not authorize and pay an ATM or one-time debit card transaction that will result in insufficient funds in your account. If you have established a service linking your share or deposit account with other individual or joint accounts, you authorize us to transfer funds from other another account of yours to cover an insufficient item, including transfers from a share or deposit account, an overdraft line-of-credit account, or other account you so designate. Services and fees for these transactions are shown in the document the Credit Union uses to capture your affirmative consent and the Schedule of Fees and Charges. Except as otherwise agreed in writing, **if we exercise our right to use our discretion to pay such items that result in an insufficiency of funds in your account, we do not agree to pay them in the future and may discontinue coverage at any time without notice.** If we pay these items or impose a fee that results in insufficient funds in your account, you agree to pay the insufficient amount, including the fee assessed by us, in accordance with our standard overdraft services or any other service you may have authorized with us, or if you do not have such protections with us, in accordance with any overdraft payment policy we have, as applicable.

Deposit Agreement, Ex. A, at 6.

34. CUO further promises that an “overdraft” occurs when you do not have enough money in your account to “cover” a transaction. It further links the time of authorization as the moment the credit union determines whether an overdraft occurs.

Platinum Mastercard Debit Card. If approved, you may use your Mastercard® card to purchase goods and services from participating merchants. However, you may not use your card to initiate any type of electronic gambling transactions through the Internet. If you wish to pay for goods or services over the Internet, you may be required to provide card number security information before you will be permitted to complete the transaction. You agree that you will not use your card for any transaction that is illegal under applicable federal, state, or local law. Funds to cover your card purchases will be deducted from your checking account. **For ATM and one-time debit card transactions, you must consent to the Credit Union's overdraft protection plan in order for the transaction amount to be covered under the plan. Without your consent, the Credit Union may not authorize and pay an overdraft resulting from these types of transactions.** Services and fees for overdrafts are shown in the document the Credit Union uses to capture the member's opt-in choice for overdraft protection and the Schedule of Fees and Charges.

Deposit Agreement, Ex. A, at 12.

35. Likewise, CUO's Overdraft Disclosure likewise promises that an overdraft only occurs when you do not have enough funds to "cover" a transaction and again promises that the moment of "authorization" is when the credit union determines whether to assess a fee:

An overdraft occurs on your account when you do not have enough available funds in your checking account to cover a transaction. Your account features an automatic overdraft protection plan whereby funds from applicable savings accounts will be transferred to your checking account to cover any overdraft. If funds are transferred from any of your applicable savings accounts to cover an overdraft you will be assessed a fee according to the Personal Accounts Fee Guide. We also offer a line of credit that may serve as an additional overdraft protection plan. You may inquire about this plan at any branch or by calling the Member Contact Center at 800451-4292.

In the event you do not have enough available funds in your overdraft protection plans to cover an overdraft, we may, at our discretion, extend an additional overdraft service to you. This service allows Credit Union ONE the discretion to honor and pay checks, automatic bill payments and other transactions made using your account number so that the items presented against your checking account are not returned unpaid. **As part of this overdraft service the credit union may also authorize and pay, at our discretion, overdrafts as a result of ATM and everyday debit card transactions if you tell us to (Opt-In).** If you do not opt-in to this service for ATM and everyday debit card transactions your transaction will be declined.

....

For each item paid using overdraft service you will be charged an overdraft fee as published in the Personal Accounts Fee Guide.

Ex. B, Overdraft Disclosure.

36. 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 CUO assesses OD Fees on them anyway.

37. The above promise means that transactions are only overdraft transactions when they are authorized into a negative account balance. Of course, that is not true for APPSN Transactions.

38. APPSN transactions are always *initiated* at the time the customer swipes the debit card when there are sufficient available funds in the account.

39. In fact, CUO actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to settle those same transactions. Instead, it uses a secret posting process described below.

40. All the above representations and contractual promises are untrue. In fact, CUO 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 CUO may impose OD Fees on any APPSN Transactions.

41. The Account Documents misconstrue CUO's true debit card processing and overdraft practices.

42. First, and most fundamentally, CUO charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions. That is despite contractual representations that CUO will only charge OD Fees on transactions with insufficient available funds to cover a given transaction.

43. CUO assesses OD Fees on APPSN Transactions that ***do*** have sufficient funds available to cover them throughout their lifecycle.

44. CUO'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 CUO's actual practice and the contract causes accountholders like the Plaintiff to incur more OD Fees than they should.

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

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

47. In reality, CUO'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.

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

49. Upon information and belief, something more is going on: at the moment a debit card transaction is getting ready to settle, CUO does something new and unexpected, during the middle of the night, during its nightly batch posting process. Specifically, CUO 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.

50. This secret step allows CUO to charge OD Fees on transactions that never should have caused an overdraft—transactions that were authorized into sufficient funds, and for which CUO specifically set aside money to pay.

51. This discrepancy between CUO's actual practices and the contract causes accountholders to incur more OD Fees than they should.

52. In sum, there is a huge gap between CUO's practices as described in the Account Documents and CUO's practices in reality.

C. *CUO Abuses Contractual Discretion*

53. CUO's treatment of debit card transactions to charge OD Fees is not simply a breach of the express terms of the numerous Account Documents. In addition, CUO exploits contractual discretion to the detriment of accountholders when it uses these policies.

54. CUO uses its contractual discretion to cause APPSN Transactions to incur OD Fees by knowingly authorizing later transactions that it allows to consume available funds previously sequestered for APPSN Transactions.

55. CUO uses these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable accountholder would believe could cause OD Fees.

D. Reasonable Accountholders Understand Debit Card/POS Transactions are Debited Immediately

56. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with immediate withdrawal of funds for debit card/POS 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.

57. CUO was and is aware that this is precisely how accountholders reasonably understand such transactions to work.

58. CUO knows that many accountholders prefer debit cards for these very reasons. Research indicates that accountholders 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.

59. 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." *What Do I Need to Know About Using a Debit Card?*, ConsumerAction (Jan. 14, 2019),

https://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card.

60. 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.” *Understanding Debit Cards*, ConsumerAction, http://www.consumeraction.org/english/articles/understanding_debit_cards (last visited March 11, 2020).

61. This understanding 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.” Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*, MarketWatch, Mar. 23, 2016, <http://www.marketwatch.com/story/morepeople-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23>.

62. Not only have accountholders increasingly transitioned 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.

63. CUO was aware of accountholder 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.

E. *Plaintiff's Experience*

64. As examples, on June 18, 2020 and January 6, 2020, Plaintiff was assessed OD Fees for debit card transactions that settled that day, despite the fact that positive funds were deducted immediately, prior to that day, for the transactions on which Plaintiff was assessed the OD Fee. At the time that the positive funds were deducted, Plaintiff had a positive balance, which would not have caused an OD Fee.

F. *CUO Violations Regulation E*

65. The federal government has stepped in to provide additional protections to customers with respect to abusive overdraft policies. In 2010, the Federal Reserve Board enacted regulations giving financial institutions the authority to charge overdraft fees on ATM and one-time debit card transactions only if the institution first obtained the affirmative consent of the customer to do so. (12 C.F.R. § 1005.17 (Regulation E's "Opt-In Rule")).

66. To qualify as affirmative consent, the opt-in form must include, but is not limited to the following:

- The customer must be provided the overdraft policy, including the dollar amount of any fees that will be charged for an

overdraft, and the maximum number of fees that can be assessed on any given day (if there is no maximum, that fact must be stated);

- The financial institution must state whether alternatives, such as linking the checking account to a secondary account or line of credit, are available.
- The opt-in consent must be obtained separately from other consents and acknowledgements;
- The consent cannot serve any purpose other than opting into the overdraft program;
- The consent cannot be a pre-selected checked box;
- The financial institution may not provide different terms for the account depending on whether the customer opted in to the overdraft program.

67. If the financial institution does not obtain proper, affirmative consent from the customer that meets all of the requirements of Regulation E's Opt-in Rule, including fulfilling each of the above requirements, then it is not permitted to charge overdraft fees on ATM and one-time debit card transactions. CUO did not fulfill these prerequisites because at all relevant times, CUO has had an overdraft program in place for assessing overdraft fees which is contrary to CUO's representations about its overdraft program to its members.

CLASS ALLEGATIONS

68. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated pursuant to Rule 23. The Classes include:

All consumers who, within the applicable statute of limitations period, were charged OD Fees on APPSN transactions on a CUO checking account (the “OD Fees Class”).

All consumers who, during the applicable statute of limitations, were charged an overdraft fee for ATM or non-recurring debit card transaction(s) (the “Regulation E Class”).

69. Excluded from the Classes are CUO, CUO’s subsidiaries and affiliates, their officers, directors and member of their immediate families and any entity in which Defendant has a controlling interest, the legal representatives, heirs, successors or assigns of any such excluded party, the judicial officer(s) to whom this action is assigned, and the members of their immediate families.

70. Plaintiff reserves the right to modify or amend the definition of the proposed Class and/or to add a subclass(es), if necessary, before this Court determines whether certification is appropriate.

71. The parties are numerous such that joinder is impracticable. Upon information and belief, and subject to class discovery, the Class consist of thousands of members or more, the identity of whom are within the exclusive knowledge of and can be ascertained only by resorting to CUO’s records. CUO has the administrative capability through its computer systems and other records to identify

all members of the Class, and such specific information is not otherwise available to Plaintiff.

72. The questions here are ones of common or general interest such that there is a well-defined community of interest among the members of the Class. These questions predominate over questions that may affect only individual class members because CUO has acted on grounds generally applicable to the class. Such common legal or factual questions include, but are not limited to:

- a) Whether CUO improperly charged OD Fees on APPSN Transactions;
- b) Whether the conduct enumerated above violates the contract;
- c) Whether the conduct enumerated above violates the covenant of good faith and fair dealing;
- d) Whether CUO's practices constitute conversion;
- e) Whether CUO violated Regulation E; and
- f) the appropriate measure of damages.

73. Plaintiff's claims are typical of the claims of the other members of the Class in that they arise out of the same wrongful business practices by CUO, as described herein.

74. Plaintiff is a more than an adequate representative of the Class in that Plaintiff has a CUO checking accounts and has suffered damages as a result of CUO's contract violations. In addition:

- a) Plaintiff is committed to the vigorous prosecution of this action on behalf of himself and all others similarly situated and has retained

competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of accountholders against financial institutions.

- b) There is no conflict of interest between Plaintiff and the unnamed members of the Class.
- c) Plaintiff anticipates no difficulty in the management of this litigation as a class action; and
- d) Plaintiff's legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

75. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

76. Plaintiff and the members of the Class suffered, and will continue to suffer, harm as a result of CUO'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 Class 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 CUO'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 members of the Class.

77. CUO has acted or refused to act on grounds generally applicable to the class, thereby making appropriate corresponding declaratory relief with respect to the Class as a whole.

78. All conditions precedent to bringing this action have been satisfied and/or waived.

FIRST CLAIM FOR RELIEF

Breach of Contract, Including the Covenant of Good Faith and Fair Dealing (On Behalf of Plaintiff and the OD Fee Class)

79. Plaintiff incorporates by reference the preceding paragraphs.

80. Plaintiff and CUO have contracted for credit union services, as embodied in CUO's Account Documents and related documentation.

81. All contracts entered by Plaintiff and the Class are identical or substantively identical because CUO's form contracts were used uniformly.

82. CUO has breached the express terms of its own agreements as described herein when it charged overdraft fees on accounts that were not overdrawn.

83. Further, under the law of the state of Michigan, 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.

84. 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.

85. CUO abused the discretion it granted to itself when it assessed OD Fees on accounts that were not actually overdrawn.

86. In these and other ways CUO violated good faith and fair dealing.

87. CUO 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 Plaintiff and other members of the Class.

88. Plaintiff and members of the Class have performed all, or substantially all, of the obligations imposed on them under the contracts.

89. Plaintiff and members of the Class have sustained damages as a result of CUO's breaches of the parties' contracts and breaches of contract through violations of the covenant of good faith and fair dealing.

90. Plaintiff and members of the Class have no adequate remedy at law.

SECOND CLAIM FOR RELIEF

Conversion Under MCL 600.2919a
(On Behalf of Plaintiff and the OD Fee Class)

91. Plaintiff incorporates by reference the preceding paragraphs.

92. Plaintiff and members of the class entrusted money to be held by Defendant.

93. The money Defendant held for Plaintiff and class members were held in identifiable accounts and was still the property of Plaintiff and class members.

94. These deposits were bailments and the Defendant was a bailee.

95. Defendant stole, embezzled and/or converted funds belonging to Plaintiff and members of the class and converted Plaintiff's funds to its own use.

96. Money taken out of the accounts of Plaintiff and members of the class for OD fees were converted to Defendant's ledgers.

97. Plaintiff and members of the class no longer had use of the funds taken as OD fees.

98. Defendant did have use of funds taken from the account of Plaintiff and from the accounts of members of the class as OD fees.

99. Defendant had dominion and control of all funds taken from accounts as OD fees.

100. Defendant wrongfully took OD fees from the accounts of Plaintiff and members of the class.

101. Plaintiff and members of the class were harmed and are entitled to all of the remedies described in MCL 600.2919a.

THIRD CLAIM FOR RELIEF

Violation of Electronic Fund Transfers Act (Regulation E) 12 C.F.R. § 1005 et seq. (authority derived from 15 U.S.C. § 1693 et seq.) **(On Behalf of Plaintiff and the OD Fee Class and the Regulation E Class)**

102. Plaintiff incorporates by reference the preceding paragraphs.

103. By charging overdraft fees on ATM and nonrecurring transactions, Defendant violated Regulation E (12 C.F.R. §§1005 et seq.), whose “primary objective” is “the protection of consumers” (§1005.1(b)) and which “carries out the purposes of the [Electronic Fund Transfer Act 15 U.S.C. §§1693 et seq.), the “EFTA”] (§1005. 1(b)), whose express “primary objective” is also “the provision of individual consumer rights” (15 U.S.C. §1693(b)).

104. Specifically, the charges violated what is known as the “Opt In Rule” of Regulation E (12 C.F.R. § 1005.17.) The Opt In Rule states: “a financial institution ... shall not assess a fee or charge ... pursuant to the institution’s overdraft service, unless the institution: (i) [p]rovides the consumer with a notice in writing [the opt-in notice]. . . describing the institution’s overdraft service” and (ii) “[p]rovides a reasonable opportunity for the consumer to affirmatively consent” to enter

into the overdraft program. (Id.) The notice “shall be clear and readily understandable.” (12 C.F.R. §205.4(a)(l).) To comply with the affirmative consent requirement, a financial institution must provide a segregated description of its overdraft practices that is accurate, non-misleading and truthful and that conforms to 12 C.F.R. § 1005.17 prior to the opt-in, and must provide its customers a reasonable opportunity to opt-in after receiving the description. The affirmative consent must be provided in a way mandated by 12 C.F.R. § 1005.17, and the financial institution must provide confirmation of the opt-in in a manner that conforms to 12 C.F.R. § 1005.17.

105. The intent and purpose of this Opt-In Form is to “assist customers in understanding how overdraft services provided by their institutions operate by explaining the institution's overdraft service ... in a clear and readily understandable way”-as stated in the Official Staff Commentary (74 Fed. Reg. 59033, 59035, 59037, 5940, 5948), which is “the CFPB’s official interpretation of its own regulation,” “warrants deference from the courts unless ‘demonstrably irrational,’” and should therefore be treated as “a definitive interpretation” of Regulation E. *Strubel v. Capital One Bank (USA)*, 2016 U.S. Dist. LEXIS 41487, *11 (S.D. N.Y. 2016) (quoting *Chase Bank USA v. McCoy*, 562 U.S. 195, 211 (2011)) (so holding for the CFPB’s Official Staff Commentary for the Truth In Lending Act’s Regulation Z)).

106. Defendant has failed to comply with the 12 C.F.R. § 1005.17 opt-in requirements, including failing to provide its customers with a valid description of the overdraft program which meets the strictures of 12 C.F.R. § 1005.17. Defendant's opt-in method fails to satisfy 12 C.F.R. § 1005.17 because, *inter alia*, it states that an overdraft occurs when you do "not have enough available funds in your checking account to cover a transaction" when in fact Defendant assesses overdraft fees when there is enough money in the account to cover the transaction at issue.

107. As a result of violating Regulation E's prohibition against assessing overdraft fees on ATM and non-recurring debit card transactions without obtaining affirmative consent to do so, Defendant has harmed Plaintiff and the Classes.

108. Due to Defendant's violation of Regulation E (12 C.F.R. § 1005.17), Plaintiff and members of the Class are entitled to actual and statutory damages, as well as attorneys' fees and costs of suit pursuant to 15 U.S.C.A. § 1693m.

PRAYER FOR RELIEF

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

1. Certification for this matter to proceed as a class action on behalf of the Class;
2. Declaring CUO's OD Fee policies and practices to be in breach of its contract with accountholders;

3. Restitution of all OD Fees paid to CUO by Plaintiff and the members of the Class, as a result of the wrongs alleged herein in an amount to be determined at trial;
4. Actual damages in an amount according to proof;
5. Statutory damages under the applicable law;
6. Treble Damages under MCL 600.2919a;
7. Pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;
8. For costs and attorneys' fees under the common fund doctrine, and all other applicable law; and
9. Such other relief as this Court deems just and proper.

TRIAL BY JURY IS DEMANDED

Respectfully submitted,

Date: August 26, 2020

/s/ Jeff Kaliel

Jeffrey D. Kaliel

Sophia G. Gold

KALIEL PLLC

1875 Connecticut Ave. NW 10th Floor

Washington, D.C. 20009

Telephone: (202) 350-4783

jkaliel@kaliellpc.com

sgold@kaliellpc.com

Taras Kick (Not yet admitted)

The Kick Law Firm, APC

815 Moraga Drive

Los Angeles, CA 90049

Phone: (310)395-2988

Fax: (310)395-2088

***Counsel for Plaintiff and the Proposed
Class***