

1 Richard D. McCune, State Bar No. 132124
rdm@mccunewright.com
2 David C. Wright, State Bar No. 177468
dcw@mccunewright.com
3 **MCCUNE WRIGHT AREVALO, LLP**
3281 E. Guasti Road, Suite 100
4 Ontario, California 91761
Telephone: (909) 557-1250
5 Facsimile: (909) 557 1275

6 Emily J. Kirk, IL Bar No. 6275282*
ejk@mccunewright.com
7 **McCUNE WRIGHT AREVALO, LLP**
231 N. Main Street, Suite 20
8 Edwardsville, IL 62025
Telephone: (618) 307-6116
9 Facsimile: (618) 307-6161

10 **Pro Hac Vice* application to be submitted

11 Attorneys for Plaintiff Cesar Cortes and the
Putative Class

12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15

16 CESAR CORTES, individually, and on
behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 CABRILLO CREDIT UNION and
20 DOES 1 through 5, inclusive,

21 Defendants.
22
23
24
25
26
27
28

Case No. '20CV2375 GPC DEB

COMPLAINT FOR:

1. Violation of the Electronic Fund Transfer Act (Regulation E, 12 C.F.R. §§ 1005, *et seq.*)
2. Violation of the California Unfair Competition Law (Bus. & Prof. Code § 17200, *et seq.*)

CLASS ACTION

DEMAND FOR JURY TRIAL

1 CLASS ACTION COMPLAINT

2 I INTRODUCTION

3 1. Cesar Cortes (“Plaintiff”) brings this lawsuit against Cabrillo Credit Union
4 (“Cabrillo” or “Defendant”) on behalf of the California public and Cabrillo’s California
5 members, on the basis that Cabrillo has violated and continues to violate Federal Reserve
6 Regulation E, 12 C.F.R. § 1005.1, *et seq.* (“Reg E” or “Regulation E”). Regulation E
7 requires that before financial institutions may charge overdraft fees on one-time debit
8 card and ATM transactions, they must provide a complete, accurate, clear, and easily
9 understandable disclosure document of their overdraft services (opt-in disclosure
10 agreement); they must provide that disclosure as a stand-alone document not intertwined
11 with other disclosures; and they must obtain verifiable agreement (affirmative consent) of
12 a member’s agreement to opt-in to the financial institution’s overdraft program.

13 2. Specifically, in order to purportedly comply with the Regulation E
14 requirements, Cabrillo provides its members with an opt-in disclosure agreement that
15 supposedly describes the credit union’s Regulation E overdraft service, known as the
16 “Debit Card Option,” including “**How...the Debit Card Option work[s]**” (emphasis in
17 original).¹ Cabrillo’s purported Regulation E opt-in disclosure agreement, however, fails
18 to comply with Regulation E’s requirements in numerous ways. First and foremost, it
19 provides members with ambiguous and misleading language to describe the
20 circumstances in which Cabrillo will charge the member an overdraft fee. Specifically,
21 the opt-in disclosure agreement does not disclose that Cabrillo uses an internal artificial
22 account balance to determine if a debit card or ATM transaction will be considered
23 overdrawn (*i.e.*, “available balance”), instead of the official and actual balance of the
24 account. Not only does it not disclose the use of the available balance to assess overdraft
25 fees, it describes an overdraft using language that conveys Cabrillo’s use of the actual
26 balance instead of the artificial available balance to assess overdraft fees.

27
28 ¹ See Exhibit A, which, on information and belief, reflects the text of Cabrillo’s
Regulation E opt-in disclosure agreement.

1 3. Cabrillo’s opt-in disclosure agreement also fails to disclose its full array of
2 overdraft services, including its policies regarding the payment of overdrafts for other
3 transactions such as checks, ACH transactions, and automatic bill payments. *See* 12
4 C.F.R. §1005.17 (d), including the Official Interpretation of 17(d) on Content and
5 Format, 12 C.F.R. §1005, Supp. I. And while the opt-in disclosure agreement makes
6 reference to “Overdraft Protection,” it does not describe what that protection is or does,
7 thus failing to meet Regulation E’s requirement that alternative plans for covering
8 overdrafts, such as through lines of credit or transfers of funds from other accounts, be
9 stated in the agreement. *Id.* The opt-in disclosure agreement fails to state the maximum
10 number of overdraft fees or charges that may be assessed per day, or that there is no limit.
11 *Id.* And the opt-in disclosure agreement as a whole fails to meet Regulation E’s
12 requirement that it be “substantially similar” to Model Form A-9.² *Id.*

13 4. Because Regulation E does not permit credit unions to charge overdraft fees
14 without affirmative consent based on a proper and accurate disclosure of its overdraft
15 practices in its stand-alone opt-in disclosure agreement, Cabrillo’s assessment of all
16 overdraft fees against members for one-time debit card and ATM transactions has been
17 and continues to be illegal. Further, Cabrillo’s continued use of an improper and non-
18 conforming disclosure agreement to “opt-in” new members to its overdraft service is
19 illegal under Regulation E.

20 5. Regulation E itself provides a cause of action for failing to abide by its
21 disclosure requirements. Cabrillo’s violations are also actionable under California’s
22 Unfair Competition Law, California Business & Professions Code § 17200. Plaintiff thus
23 seeks the return of improperly charged overdraft fees within the statute of limitations
24 period and a public injunction enjoining Defendant from harming the general public by
25 continuing to obtain new members’ “consent” to assess overdraft fees by using an opt-in
26 disclosure agreement that violates Regulation E. Plaintiff also seeks to enjoin Cabrillo
27

28 ² *See* Regulation E, Model Form A-9 attached hereto as Exhibit B.

1 from assessing any further overdraft fees on Regulation E transactions until it obtains the
2 consent of current members using a Regulation E-conforming opt-in disclosure
3 agreement.

4 II NATURE OF THE ACTION

5 6. All allegations herein are based upon information and belief except those
6 allegations pertaining to Plaintiff or counsel. Allegations pertaining to Plaintiff or
7 counsel are based upon, *inter alia*, Plaintiff's or counsel's personal knowledge, as well as
8 Plaintiff's or counsel's own investigation. Furthermore, each allegation alleged herein
9 either has evidentiary support or is likely to have evidentiary support, after a reasonable
10 opportunity for additional investigation or discovery.

11 7. Plaintiff has brought this class and representative action to assert claims in
12 his own right, as the class representative of all other persons similarly situated, and in his
13 capacity as a private attorney general on behalf of the members of the general public.
14 Regulation E requires Cabrillo to obtain informed consent, by way of a written stand-
15 alone document that fully and accurately describes in an easily understandable way its
16 overdraft services, before charging members an overdraft fee on one-time debit card and
17 ATM transactions. Because of the substantial harm to members of significant overdraft
18 fees on relatively small debit card and ATM transactions, Regulation E requires financial
19 institutions to put all pertinent overdraft information in one clear and easily understood
20 document. Financial institutions are not permitted to circumvent this requirement by
21 referencing, or relying on, their account agreements, disclosures, or marketing materials.
22 Regulation E expressly requires a financial institution to include all the relevant terms of
23 its overdraft program within the four corners of the document, creating a separate
24 agreement with members regarding overdraft policies.

25 8. Cabrillo does not meet this requirement. It uses an opt-in disclosure
26 agreement that misleadingly and/or ambiguously describes the circumstances in which
27 Cabrillo charges an overdraft fee on a paid transaction. Specifically, Cabrillo states in its
28 opt-in disclosure agreement that the Debit Card Option overdraft protection applies when

1 the member does “not have the money in [the member’s] checking account at the time of
2 [the] debit card purchase or ATM withdrawal” but Cabrillo approves and “pay[s] the
3 item.” But Cabrillo’s automated decision to assess overdraft fees is not based on whether
4 there is money in the actual account balance to pay the transaction. Instead, Cabrillo
5 calculates account balances for overdraft purposes using an artificially reduced
6 calculation created by Cabrillo’s own internal bookkeeping called the “available
7 balance,” which deducts any money it unilaterally decides should be held for future
8 transactions. When these future holds are accounted for, the calculation often results in a
9 negative “available balance” existing only on paper, even though there is actually money
10 in the account to cover a transaction without a negative account balance at the time of
11 payment and posting. While that practice is unfair on its face, the disclosure of the
12 practice is at issue, not the practice itself.

13 9. Accordingly, Cabrillo’s opt-in disclosure agreement not only fails to
14 accurately disclose to members which balance is used to assess an overdraft fee (which
15 failing to disclose in a clear and understandable way is all that is required for a Reg E
16 violation), it suggests that its overdraft policies apply a member’s actual balance when
17 determining whether to charge an overdraft fee, when it actually uses a different,
18 artificially lower balance.

19 10. Cabrillo’s use of the artificially reduced account balance instead of the
20 actual account balance to determine whether to assess overdraft fees is material. Based
21 on analysis with other financial institutions, it is likely Cabrillo assessed overdraft fees on
22 10-20% more Regulation E overdraft transactions than would otherwise be the case if it
23 used the actual balance to determine if an account was overdrawn.

24 11. Cabrillo’s failure to use an opt-in disclosure agreement that is substantially
25 similar to the Model A-9, and its failure to present all of the required information about
26 its overdraft services, also shows its disregard for Regulation E’s basic purpose – which
27 is to protect consumers by presenting them with of all of their options when it comes to
28

1 overdraft services so they can make an informed decision when deciding whether or not
2 to opt into overdraft coverage for transactions covered by Regulation E.

3 12. Plaintiff has been harmed by Cabrillo’s Regulation E violations. He was
4 opted-in to the disclosure agreement using the ambiguous, inaccurate and misleading
5 description of Cabrillo’s overdraft practices, and has been assessed overdraft fees on Reg
6 E transactions (including at least one transaction that he would not have received an
7 overdraft fee on using the actual balance, but was assessed an overdraft fee using the
8 available balance) that were not permitted because Cabrillo had earlier obtained
9 Plaintiff’s “consent” using a noncompliant Reg E opt-in disclosure agreement. This
10 action seeks statutory damages under Regulation E, restitution, and injunctive relief due
11 to, *inter alia*, Cabrillo’s policy and practice of obtaining “affirmative consent” using a
12 noncompliant opt-in disclosure agreement, unlawfully assessing and unilaterally
13 collecting overdraft fees as set forth herein.

14 **III PARTIES**

15 13. Plaintiff Cesar Cortes is a resident of San Diego County, and a Cabrillo
16 member at all relevant times.

17 14. Based on information and belief, Defendant Cabrillo is a credit union with
18 its headquarters in San Diego, California. Cabrillo also maintains several branches
19 throughout Southern California and, specifically, the Southern District of California.

20 15. Without limitation, defendants DOES 1 through 5, include agents, partners,
21 joint ventures, subsidiaries, and/or affiliates of Defendant and, upon information and
22 belief, also own and/or operate Defendant’s branch locations. As used herein, where
23 appropriate, the term “Defendant” is also inclusive of Defendants DOES 1 through 5.

24 16. Plaintiff is unaware of the true names of Defendants DOES 1 through 5.
25 Defendants DOES 1 through 5 are thus sued by fictitious names, and the pleadings will
26 be amended as necessary to obtain relief against Defendants DOES 1 through 5 when the
27 true names are ascertained, or as permitted by law or the Court.

28

1 17. There exists, and at all times herein mentioned existed, a unity of interest
2 and ownership between the named defendants (including DOES) such that any corporate
3 individuality and separateness between the named defendants has ceased, and that the
4 named defendants are *alter egos* in that they effectively operate as a single enterprise, or
5 are mere instrumentalities of one another.

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

13 19. Whenever reference is made in this Complaint to any act, deed, or conduct
14 of Defendant, the allegation means that Defendant engaged in the act, deed, or conduct
15 by or through one or more of its officers, directors, agents, employees, or representatives
16 who was actively engaged in the management, direction, control, or transaction of
17 Defendant's ordinary business and affairs.

18 20. As to the conduct alleged herein, each act was authorized, ratified, or
19 directed by Defendant's officers, directors, or managing agents.

20 **IV JURISDICTION AND VENUE**

21 21. This Court has subject matter jurisdiction over this case under 28 U.S.C. §
22 1331, 15 U.S.C. § 1693m, and 28 U.S.C. § 1367(a).

23 22. Venue is proper in this District because Cabrillo transacts business, Plaintiff
24 and similarly situated persons entered contracts with Cabrillo, and Cabrillo executed the
25 unlawful policies and practices which are the subject of this action, in this District.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

v BACKGROUND

A. Defendant Cabrillo Credit Union

23. Cabrillo is a credit union headquartered in San Diego, California with branches and ATM machines located throughout Southern California. According to its financial filings, as of December 31, 2019, Cabrillo had approximately 25,000 members, over 21,000 share draft accounts, and nearly \$333 million in assets. Cabrillo reports that in 2019 alone, it collected \$2.5 million in fee income, of which overdraft fees are believed to be a significant percentage.

24. One of the main services Defendant offers is share draft accounts (*i.e.*, checking accounts). A checking account balance can increase or be credited in a variety of ways, including automatic payroll deposits; electronic deposits; incoming transfers; deposits at a branch; and deposits at ATM machines. Debits decreasing the amount in a checking account can be made by using a debit card for purchases of goods and services (point of sale purchases) that can be one-time purchases or recurring automatic purchases; through withdrawal of money at an ATM; or by electronic purchases. Additionally, some of the other ways to debit the account include writing checks; issuing electronic checks; scheduling Automated Clearing House (ACH) transactions (which can include recurring automatic payments or one-time payments); transferring funds; and other types of transactions that debit from a checking account.

25. In connection with its processing of debit transactions (debit card, ATM, check, ACH, and other similar transactions), Defendant assesses overdraft fees (a fee for paying an overdrawn item) and non-sufficient funds (“NSF”) fees (a fee for a declined, unpaid returned item) to accounts when it claims to have determined that an account has been overdrawn.

26. The underlying principle for charging overdraft fees is that when a financial institution pays a transaction by advancing its own funds to cover the accountholder’s insufficient funds, it may charge a *contracted and/or disclosed* fee, provided that charging the fee is not prohibited by some legal regulation. The fee Defendant charges

1 here constitutes very expensive credit that harms the poorest customers and creates
2 substantial profit. According to a 2014 Consumer Financial Protection Bureau (“CFPB”)
3 study:³

- 4 • Overdraft and NSF fees constitute the majority of the total checking account
5 fees that customers incur.
- 6 • The transactions leading to overdrafts are often quite small. In the case of debit
7 card transactions, the median amount of the transaction that leads to an
8 overdraft fee is \$24.
- 9 • The average overdraft fee for bigger banks is \$34 and \$31 for smaller banks and
10 credit unions.

11 Accordingly, as highlighted in the CFPB Press Release related to this study:

12 Put in lending terms, if a consumer borrowed \$24 for three days
13 and paid the median overdraft of \$34, **such a loan would carry
14 a 17,000 percent annual percentage rate (APR).**

15 (Emphasis added)⁴

16 27. Overdraft and NSF fees constitute a primary revenue generator for banks
17 and credit unions. According to one banking industry market research company, Moeb
18 Services, banks and credit unions in 2018 alone generated an estimated \$34.5 billion on
19 overdraft fees.⁵

20 28. Defendant’s financial filings and practices reveal that it has followed these
21 trends to the letter. Defendant charges an overdraft/NSF fee of \$30.00 per item. Even if
22 Defendant had been properly charging overdraft fees, the \$30.00 overdraft fee bears no

23
24 ³ https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf
(last visited Nov. 10, 2020).

25
26 ⁴ CFPB, CFPB Finds Small Debit Purchases Lead to Expensive Overdraft Charges
(7/31/2014) <https://www.consumerfinance.gov/about-us/newsroom/cfpb-finds-small-debit-purchases-lead-to-expensive-overdraft-charges/> (last visited Nov. 10, 2020).

27
28 ⁵ Moeb Services, *Overdraft Revenue Inches Up in 2018* (March 27, 2019),
<http://www.moeb.com/Portals/0/pdf/Articles/Overdraft%20Revenue%20Inches%20Up%20in%202018%200032719-1.pdf?ver=2019-03-27-115625-283> (last visited Nov. 10, 2020).

1 relation to the financial institution's minute risk of loss or cost for administering
2 overdraft services. But the fee's practical effect is to charge those who pay it an interest
3 rate with an APR in the thousands.

4 29. Accordingly, the overdraft fee is a punitive fee rather than a service fee,
5 which makes it even more unfair because most account overdrafts are accidental and
6 involve a small amount of money in relation to the fee. A 2012 study found that more
7 than 90% of customers who were assessed overdraft fees overdrew their accounts by
8 mistake.⁶ In a 2014 study, more than 60% of the transactions that resulted in a large
9 overdraft fee were for less than \$50.⁷ More than 50% of those assessed overdraft fees do
10 not recall opting into an overdraft program, (*id.* at p. 5), and more than two-thirds of
11 customers would have preferred the financial institution decline their transaction rather
12 than being charged a very large fee. (*Id.* at p. 10.)

13 30. Finally, the financial impact of these fees falls on the most vulnerable among
14 the banking population with the least ability to absorb the overdraft fees. Younger,
15 lower-income, and non-white accountholders are among those most likely to be assessed
16 overdraft fees. *Id.* at p. 3. A 25-year-old is 133% more likely to pay an overdraft penalty
17 fee than a 65-year-old. *Id.* More than 50% of the customers assessed overdraft fees
18 earned under \$40,000 per year. *Id.* at p. 4. And non-whites are 83% more likely to pay
19 an overdraft fee than whites. *Id.* at p. 3.

20 **B. Plaintiff**

21 31. Plaintiff Cesar Cortes is a resident of the state of California and a member of
22 Cabrillo. Plaintiff has held a share draft account with Cabrillo at all times relevant to the
23

24 ⁶ Pew Charitable Trust Report, *Overdraft America: Confusion and Concerns about*
25 *Bank Practices*, at p. 4 (May 2012), [https://www.pewtrusts.org/-](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/sciboverdraft20america1pdf.pdf)
26 [/media/legacy/uploadedfiles/pcs_assets/2012/sciboverdraft20america1pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/sciboverdraft20america1pdf.pdf) (last visited
Nov. 10, 2020).

27 ⁷ Pew Charitable Trust Report, *Overdrawn*, at p. 8 (June 2014),
28 [https://www.pewtrusts.org/-](https://www.pewtrusts.org/-/media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf)
[/media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf](https://www.pewtrusts.org/-/media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf) (last visited Nov. 10,
2020).

1 allegations and opted into Cabrillo's overdraft program for his debit card and ATM
2 transactions. As will be established using Cabrillo's own records, Plaintiff has been
3 assessed numerous improper fees on debit card and ATM transactions. By way of
4 example, on August 19, 2019, Plaintiff was assessed a \$30 overdraft fee on a \$20.00
5 ATM withdrawal even though Plaintiff had a positive account balance and had money in
6 the account to cover the withdrawal. Again, on September 15, 2019, Plaintiff was
7 assessed a \$30 overdraft fee on a \$102.00 ATM withdrawal even though Plaintiff had a
8 positive account balance. The same situation happened on September 27, 2019 when
9 Plaintiff was assessed a \$30 overdraft fee on a \$40 ATM withdrawal even though
10 Plaintiff had a positive balance of \$358.05 following the withdrawal. And on October 2,
11 2019, Plaintiff made a \$40 ATM withdrawal and Cabrillo assessed a \$30 overdraft fee
12 even though Plaintiff had a positive account balance. This happened again on October
13 31, 2019 when Plaintiff withdrew \$123.99 leaving Plaintiff with a positive account
14 balance of \$13.01. But Defendant assessed Plaintiff a \$30 overdraft fee anyway. Based
15 on information and belief, Defendant was not required to advance any of its own funds to
16 cover the transactions, and Plaintiff was only assessed an overdraft fee because Cabrillo
17 used the available balance instead of the actual balance to determine if the account was
18 overdrawn. Cabrillo continued to assess overdraft fees on transactions covered by
19 Regulation E, such as on December 2 and December 5, 2019, when it assessed \$30
20 overdraft fees for ATM withdrawals. This happened again on December 7, 2019 and
21 December 9, 2019. The extent of improper charges assessed on Plaintiff and other
22 California Cabrillo members will be determined in the course of discovery using
23 Defendant's records.

24 **C. Regulation E**

25 32. For many years, banks and credit unions have offered overdraft services to
26 their accountholders. Historically, the fees generated by these services were relatively
27 low, particularly when methods of payment were limited to cash, check, and credit card.
28 But the rise of debit card transactions replacing cash for smaller transactions—especially

1 for younger customers who carried lower balances—provided an opportunity for
2 financial institutions to increase the number of transactions in a checking account that
3 could potentially be considered overdraft transactions, and for which the financial
4 institution could assess a hefty overdraft fee. The increase in these types of transactions
5 was timed perfectly for financial institutions, which faced falling revenue as a result of
6 lower overall interest rates and the rise of competitive innovations such as no-fee
7 checking accounts. Financial institutions thus recognized in overdraft fees a new and
8 increasing revenue stream.

9 33. As a result, the overdraft process became one of the primary sources of
10 revenue for financial depository institutions—banks and credit unions—both large and
11 small. As such, financial institutions became eager to provide overdraft services to
12 consumers because not only do overdrafts generate revenue, they do so with little risk.
13 When an overdraft is covered, it is on average repaid in three days, meaning that the
14 financial institution advances small sums of money for no more than a day or two.

15 34. Using common understanding bolstered by disclosures by Cabrillo, an
16 overdraft occurs when two conditions are satisfied. First, the accountholder initiates a
17 transaction that will result in the money in the account falling below zero if the financial
18 institution makes payment on the transaction. Second, the financial institution pays the
19 transaction by advancing its own funds to cover the shortfall. An overdraft, therefore, is
20 an extension of credit. The financial institution advancing the funds, allows the
21 accountholder to continue paying transactions even when the account has no money in it,
22 or the account has insufficient funds to cover the amount of the withdrawal.⁸ The
23 financial institution uses its own money to pay the transaction, on the assumption that the
24 accountholder will eventually cover the shortfall.

25 35. Before the Federal Reserve adopted Regulation E, many financial
26 institutions unilaterally adopted internal “overdraft payment” plans. Consumers would
27

28 ⁸ For a thorough description of the mechanics of an “overdraft,” see
<https://www.investopedia.com/terms/o/overdraft.osp> (last visited Nov. 10, 2020).

1 initiate transactions that financial institutions would identify as “overdrafts,” then the
2 financial institution would go ahead and cover the overdraft while charging the standard
3 overdraft fee. Under such programs, consumers were charged a substantial fee—on
4 average higher than the debit card transaction triggering the overdraft itself—without
5 ever having made any choice as to whether they wanted such transactions approved or
6 instead declined and providing the opportunity to select another form of payment rather
7 than turning the \$4 cup of coffee at Starbucks into a \$40 cup of coffee.

8 36. The Federal Reserve, which has regulatory oversight over financial
9 institutions, recognized that banks and credit unions had strong incentives to adopt these
10 punitive overdraft programs. Banks and credit unions could rely on charging high fees
11 for very little service and almost no risk on thousands of transactions per day, giving
12 consumers no choice in the matter if they wanted to have a bank account at all. It is for
13 these reasons that in 2009, the Federal Reserve Board amended Regulation E to require
14 financial institutions to obtain affirmative consent (or so-called “opt in”) from
15 accountholders for overdraft coverage on ATM and non-recurring “point of sale” debit
16 card transactions. After Regulation E’s adoption, a financial institution could only
17 lawfully charge an overdraft fee on one-time debit card purchases and ATM withdrawals
18 if the consumer opted into the financial institution’s overdraft program. Otherwise, the
19 bank or credit union could either cover the overdraft without charging a fee or, simply
20 direct the transaction to be denied at the point of sale. Further, without the opt-in, there
21 could be no NSF fee incurred because the denial of the transaction meant no transaction
22 had taken place, and thus no transaction to return unpaid.

23 37. With the creation of the CFPB, it subsequently undertook the study
24 referenced above regarding financial institutions’ overdraft programs and whether they
25 were satisfying consumer needs. Unsurprisingly, the CFPB found that overdraft
26 programs had a series of problems. The most pressing problem was that overdraft
27 services were costly and damaging to accountholders. The percentage of accounts
28 experiencing at least one overdraft (or NSF) transaction in 2011 was 27%, and the

1 average amount of overdraft and NSF-related fees paid by accounts that paid fees was
2 \$225. The CFPB further estimated that the banking industry may have collected
3 anywhere from \$12.6 to \$32 billion in consumer NSF and overdraft fees in 2011,
4 depending on what assumptions the analyst used in calculating the percentage of reported
5 fee income should be attributed to overdrafts. The CFPB also noted that there were
6 numerous “variations in overdraft-related practices and policies,” all of which could
7 “affect when a transaction might overdraw a consumer’s account and whether or not the
8 consumer would be charged a fee.”⁹

9 38. Given the state of overdraft programs prior to Regulation E, it is easy to
10 understand why the Federal Reserve was concerned about protecting consumers from
11 financial institutions unilaterally imposing high fees. Banks and credit unions in this
12 scenario had significant advantages over consumers when it came to imposing overdraft
13 policies. By defaulting to charging fees for point-of-sale transactions, banks and credit
14 unions created for themselves a virtual no-lose scenario—advance small amounts of
15 funds (average \$24) for a small period of time (average 3 days), then charge a large fee
16 (average \$34) that is unrelated to the amount of money advanced on behalf of the
17 customer, resulting in a APR of thousands of percent interest (using averages - 17,000%
18 APR), all while assuming very little risk because only a very small percentage of the
19 overdraft customers failed to repay the overdraft.

20 39. Because of this, Regulation E does not merely require a financial institution
21 to obtain an opt-in disclosure agreement before charging fees for transactions that result
22 in overdrafts. It also provides that the opt-in disclosure agreement must satisfy certain
23 requirements to be valid. The agreement must be a stand-alone document, not combined
24 with other forms, disclosures, or contracts provided by the financial institution. It must
25 also accurately disclose to the accountholder the institution’s overdraft charge policies.

26 _____
27 ⁹ The Federal Reserve has previously noted that “improvements in the disclosures
28 provided to consumers could aid them in understanding the costs associated with
overdrawing their accounts and promote better account management.” 69 Fed. Reg. 31761
(June 7, 2004).

1 The accountholder’s choices must be presented in a “clear and readily understandable
2 manner.” 12 C.F.R. § 1005.4(a)(1). The financial institution must ultimately establish
3 that the accountholder has opted-in to overdraft coverage either through a written
4 agreement, or through a confirmation letter to the customer confirming opt-in if the opt-in
5 has taken place by telephone or computer after being provided a compliant opt-in
6 disclosure agreement.

7 40. In the wake of Regulation E, some financial institutions simply decided to
8 forego charging overdraft fees on non-recurring debit card and ATM transactions. These
9 include large banks such as Bank of America, and smaller banks such as One West Bank,
10 First Republic Bank, and Mechanics Bank. However, most financial institutions
11 continued to maintain overdraft services on one-time debit card and ATM withdrawals.
12 As such, these banks and credit unions must satisfy Regulation E’s requirements in order
13 to obtain compliant affirmative consent from their accountholders before charging
14 overdraft fees on eligible transactions.

15 41. But charging these exorbitant penalty fees for the bank or credit union’s
16 small advance of funds to cover overdrafts was not where it stopped. Many financial
17 institutions began manipulating the process as to when they would consider a transaction
18 an overdraft to further increase the profit generated by their overdraft programs. They
19 charged overdraft fees no longer just when the financial institution actually advanced
20 money on behalf of the customer but also on transactions when they paid the transaction
21 with their customers’ own money. That is, the financial institution unilaterally decided
22 the account was overdrawn not by the actual lack of funds in the account, but by whether
23 the money in the account minus holds the financial institution unilaterally decided was
24 for future events was enough to cover an ATM or one-time debit transaction when these
25 transactions came in for payment at some future date.

26 42. Most banks and credit unions calculate two account balances related to their
27 accounting of a customer checking account. “Actual balance,” “ledger balance,” or
28 “current balance” are all terms used to describe the actual amount of the accountholder’s

1 money in the account at any particular time. In contrast, “available balance” is a term the
2 financial industry recognizes as a balance reduced from the actual account balance by the
3 amount the bank or credit union has either held from deposits or held from the account
4 because of authorized debit transactions that have not yet come in (and may never come
5 in) for payment.¹⁰

6 43. Although financial institutions calculate two balances, the
7 actual/ledger/current balance of the money in the account is the official balance of the
8 account. It is used when financial institutions report deposits to regulators, when they
9 pay interest on an account, and when they report the amount of money in the account in
10 monthly statements to the customer—the official record of the account.

11 44. While there is no regulation barring any financial institution from deciding
12 whether it will assess overdraft or NSF fees based on the actual balance or the “available
13 balance” for overdraft assessment purposes, per Regulation E, the terms of the overdraft
14 program must be clearly and accurately disclosed. Whether the financial institution uses
15 the actual money in the account or an internal artificial available balance to assess
16 overdraft fees, is information the customer needs to understand the overdraft program.

17 45. Many financial institutions use the “available balance” for overdraft
18 assessment purposes as it is consistent with these institutions’ self-interest because the
19 available balance is always the same or lower, by definition, than the actual balance. The
20 actual balance includes all money in the account. The available balance, on the other
21 hand, always subtracts any holds placed on the funds in the account that may affect the
22 money in the account in the future. It never adds funds to the account. To be clear, even
23 when a financial institution has put a hold on funds in an account, the funds remain in the
24 account. The financial institution’s “hold” is merely an internal characterization the bank
25 or credit union uses to categorize some of the money. All of the accountholder’s money
26

27 ¹⁰ Some financial institutions use a third balance called the collected balance,
28 which is also an internal calculated balance that is the actual account balance minus only
deposit holds, and does not include debit holds.

1 remains in the account, even the money Defendant has defined as “held.” The fact that
2 the money has a “hold” on it does not mean it has been removed from the account.

3 46. The difference between which of the two balances a financial institution may
4 use to calculate overdraft transactions is material to both the financial institution and
5 accountholders. Prior investigation in similar lawsuits demonstrates that financial
6 institutions using the available balance, instead of actual balance, increase the number of
7 transactions that are assessed overdraft fees approximately 10-20%. What happens in
8 those 10-20% of transactions is that sufficient funds are in the account to pay the
9 transaction and therefore the bank or credit union has not advanced any funds to the
10 customer. At all times, the financial institution uses the customer’s own money to pay
11 the transaction, which really means there has never been an overdraft at all—yet the
12 financial institution charges an overdraft fee on the transaction anyway.

13 47. A hypothetical demonstrates what the financial institution is doing under
14 these circumstances. Suppose that an individual has \$1,000. The individual intends to
15 use \$800 of this amount to pay rent. The individual then intends to use the other \$200 to
16 make his monthly car payment. But before the rent and car payment come due, the
17 individual receives a \$40 water bill which informs that the bill must be paid immediately,
18 or water service will be cut off. The individual now takes \$40 from the money he has
19 earmarked for his car payment to pay the water bill. This individual has not spent more
20 money that he has on hand—but he does need to find an additional \$40 before the car
21 payment comes due. And if the individual does find the additional \$40 before paying the
22 car payment, there will never be a problem. If he falls short, he may choose to proceed
23 with the transaction anyway, for example, by writing a check for the car payment when
24 he does not have funds to cover the bill. He would then create a potential “overdraft” of
25 his funds for the car payment, but not the rent payment and the water bill.

26 48. The same pattern holds for financial institutions that calculate overdrafts
27 using the actual (or ledger or current) balance of an account. Suppose the same
28 individual put the \$1,000 in his checking account under similar circumstances on the 27th

1 of the month. That day, he also authorizes his \$800 rent to be paid on the first of the next
2 month, and his \$200 car payment to be paid on the third of the next month. The
3 individual then realizes that the \$40 payment on his water bill must be paid that day—the
4 27th of the month—or he will incur a fee. He approves the water bill payment, and it
5 posts immediately. Then, a few days later, he transfers an additional \$40 into the account
6 which is enough to offset the water bill payment before the initial \$800 rent and \$200 car
7 payments post and clear the account. All three payments are made with the individual’s
8 own account funds. The financial institution never uses its own funds as an advance, and
9 there is no “overdraft” of the account because the balance always remains positive.
10 However, even if the customer does not transfer the \$40, it is only the car payment which
11 posts last that is paid without sufficient money in the account to cover it. Thus, there is
12 only one transaction (*i.e.*, the car payment) eligible for an overdraft fee.

13 49. A financial institution that uses the “available balance” method of
14 calculating overdrafts would come to a different conclusion. Because the available
15 balance subtracts from the account the amount of money that the financial institution is
16 “holding” for other pending transactions, the financial institution considers the money set
17 aside and unavailable, even though it is still in the account. This means that after the
18 \$800 and \$200 transactions are scheduled, the “available balance” of the account is \$0
19 even though \$1,000 still remains in the account. Under these circumstances, when the
20 individual makes the additional \$40 payment and it posts first, the “available balance” is
21 negative and the accountholder is charged an overdraft fee—even though the original
22 \$1,000 is still in the account. And what is worse, even if the accountholder deposits \$40
23 in the account before the original \$800 and \$200 payments post and clear, he is still
24 subject to the overdraft fee for the \$40 transaction even though the financial institution
25 never “covered” any portion of the payment with its own funds. Finally, what is worse
26 still, if the customer does not make a deposit to cover the overdraft, the customer will be
27 assessed an overdraft fee for all three transactions. Thus, using the available balance,
28 although the financial institution only has to advance its own funds for one transaction

1 (*i.e.*, the car payment), the financial institution will assess three overdraft fees tripling its
2 profits from the same transactions.

3 50. Financial institutions have been put on notice by regulators, banking
4 associations, their insurance companies and risk management departments, and from
5 observing litigation and settlements that the practice of using the available balance
6 instead of the actual amount of money in the account (*i.e.*, the actual, ledger, or current
7 balance) to calculate overdrafts without clear disclosure of that practice likely violates
8 Reg E and state consumer laws. For instance, the FDIC stated in 2019:

9
10 Institutions' processing systems utilize an "available balance"
11 method or a "ledger balance" method to assess overdraft fees.
12 The FDIC identified issues regarding certain overdraft
13 programs that used an available balance method to determine
14 when overdraft fees could be assessed. Specifically, FDIC
15 examiners observed potentially unfair or deceptive practices
16 when institutions using an available balance method assessed
17 more overdraft fees than were appropriate based on the
18 consumer's actual spending or when institutions did not
19 adequately describe how the available balance method works in
20 connection with overdrafts.¹¹

21 The CFPB provided in its Winter 2015 Supervisory Highlights, that:

22 A ledger-balance method factors in only settled transactions in
23 calculating an account's balance; an available-balance method
24 calculates an account's balance based on electronic transactions
25 that the institutions have authorized (and therefore are obligated
26 to pay) but not yet settled, along with settled transactions. An
27 available balance also reflects holds on deposits that have not
28 yet cleared. Examiners observed that in some instances,
29 transactions that would not have resulted in an overdraft (or an
30 overdraft fee) under a ledger-balance method did result in an
31 overdraft (and an overdraft fee) under an available-balance
32 method. At one or more financial institutions, examiners noted
33 that these changes to the balance calculation method used were
34 not disclosed at all, or were not sufficiently disclosed, resulting
35 in customers being misled as to the circumstances under which
36 overdraft fees would be assessed. Because these misleading
37 practices could be material to a reasonable consumer's decision

28 ¹¹<https://www.fdic.gov/regulations/examinations/consumercompsupervisoryhighlights.pdf> (last visited Nov. 10, 2020).

1 making and actions, they were found to be deceptive.¹²

2
3 51. Under Regulation E, the financial institution may decide which balance it
4 chooses to use for overdraft fees on one-time debit card and ATM transactions, but it is
5 also very clear that it must disclose this practice accurately, clearly and in a way that is
6 easily understood. As the Regulation E opt-in disclosure agreement must include this
7 information in a stand-alone document, the use of available balance must be stated in the
8 opt-in disclosure agreement to conform to Regulation E and permit the financial
9 institution from charging that customer overdraft fees on one-time debit card and ATM
10 transactions. Either inaccurately or failing to describe the use of available balance as part
11 of its overdraft practice violates the plain language of Regulation E.

12 **D. Cabrillo's Regulation E Practices**

13 52. Cabrillo opted members into its overdraft practices using a document
14 describing the credit union's Regulation E overdraft service, known as the "Debit Card
15 Option." The document describes "**How...the Debit Card Option work[s].**" (Ex. A.)
16 A reasonable consumer reading a disclosure agreement requiring a signature or
17 acknowledgement, and which relates to overdrafts and overdraft fees and represents in
18 bold language that it contains information the member needs to know about overdrafts
19 and overdraft fees relating to ATM and one-time debit card transactions, would rely on
20 the opt-in disclosure agreement without supplementing that knowledge with reference to
21 other marketing materials and or account agreement language relating to overdrafts.

22 53. The opt-in disclosure agreement explained that an overdraft occurs when
23 "you do not have the money in your checking account at the time of your debit card
24 purchase or ATM withdrawal" but the transaction is paid by Cabrillo anyway. The
25 agreement makes no reference to "available" balance" or any description of how
26 Cabrillo's internal hold policies affect the balance. The opt-in disclosure agreement

27
28 ¹² https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf, p. 8 (last visited Nov. 10, 2020).

1 instead only explains that an overdraft occurs when there is not “money in [the] account”
2 and Cabrillo covers or pays the transaction with its own funds.

3 54. By defining overdrafts in this way, it is reasonable and expected for
4 accountholders to understand that Cabrillo uses the actual balance and money in the
5 account to calculate whether an overdraft has occurred. Many courts have already found
6 that this same or similar language is at least ambiguous as to whether it means the actual
7 balance or available balance is used in determining overdraft fees.¹³ By using ambiguous
8 language to describe what constitutes an overdraft, Cabrillo has failed to provide a clear
9 and easily understandable description of its overdraft services in its opt-in disclosure
10 agreement as Regulation E demands.

11 55. Many financial institutions that use the available balance to calculate
12 overdrafts have specifically addressed the practice in their opt-in disclosure agreements.
13 San Diego County Credit Union, for example, defines an “overdraft” as when “the
14 available balance in your account is nonsufficient to cover a transaction at the time that
15 the transaction posts to your account, but we pay it anyway.” Synovus Bank defines an
16 overdraft similarly to Cabrillo, but adds the additional caveat that it “authorize[s] and
17 pay[s] transactions using the Available Balance in [the] account,” and then specifically
18 defines the Available Balance. TD Bank’s opt-in disclosure agreement states as follows:
19

20 ¹³ *Tims v. LGE Cmty. Credit Union*, 935 F.3d 1228, 1237-38; 1243-45 (11th Cir.
21 2019); *Bettencourt v. Jeanne D’Arc Credit Union*, 370 F. Supp. 3d 258, 261-66 (D. Mass.
22 2019); *Pinkston-Poling v. Advia Credit Union*, 227 F. Supp. 3d 848, 855-57 (W.D. Mich.
23 2016); *Walbridge v. Northeast Credit Union*, 299 F. Supp. 3d 338, 343-46; 348 (D.N.H.
24 2018) (holding that terms such as “enough money,” “insufficient funds,” “nonsufficient
25 funds,” “available funds,” “insufficient available funds,” and “account balance” were
26 ambiguous such that the Reg E claim was not dismissed); *Smith v. Bank of Hawaii*, No.
27 16-00513 JMS-RLP, 2017 WL 3597522, at *6–8 (D. Haw. Apr. 13, 2017) (“sporadic” use
28 of terms such as “available” funds or balances insufficiently explained to consumer when
overdraft fee could be charged and ambiguous use of terms in opt-in agreement constituted
a proper allegation of a Reg E violation); *Walker v. People’s United Bank*, 305 F. Supp. 3d
365, 375-76 (D. Conn. 2018) (holding that allegations were sufficient to state a cause of
action for violation of Reg E where opt-in form failed to provide customers with a valid
description of overdraft program); *Ramirez v. Baxter Credit Union*, No. 16-CV-03765-SI,
2017 WL 1064991, at *4-8 (N.D. Cal. Mar. 21, 2017); *Gunter v. United Fed. Credit
Union*, No. 315CV00483MMDWGC, 2016 WL 3457009, at *3-4 (D. Nev. June 22, 2016).

1 “An overdraft occurs when your available balance is not sufficient to cover a transaction,
2 but we pay it anyway. Your available balance is reduced by any ‘pending’ debit card
3 transactions (purchases and ATM withdrawals) and includes any deposited funds that
4 have been made available pursuant to our Funds Availability Policy.” Similarly,
5 Communication Federal Credit Union’s opt-in disclosure agreement states, “[a]n
6 overdraft occurs when you do not have enough money in your account to cover a
7 transaction, or the transaction exceeds your available balance, but we pay it anyway.
8 ‘Available Balance’ is your account balance less any holds placed on your account.”

9 56. In addition, many financial institutions that use the actual balance to
10 determine whether an account is in overdraft (meaning they look strictly at the amount of
11 funds in an account), as does, *e.g.*, MidFlorida Credit Union, use similar language as
12 Cabrillo to reference the actual balance, not the available balance. *See*
13 <https://www.midflorida.com/terms-and-conditions/overdraft-agreement/> (last visited Nov.
14 10, 2020) (explaining that the language “[a]n overdraft occurs when you do not have
15 enough money in your account to cover a transactions, but MIDFLORIDA pays it
16 anyway” refers to the “[a]ctual balance.”) Thus, if there is sufficient money in the
17 account to cover a transaction—even if the money is subject to a hold for pending
18 transactions—then the financial institution will not charge an overdraft fee.

19 57. Cabrillo’s opt-in disclosure agreement fails to comply with Regulation E in
20 numerous other ways. It fails to disclose Cabrillo’s full array of overdraft services,
21 including its policies regarding the payment of overdrafts for other transactions such as
22 checks, ACH transactions, and automatic bill payments. *See* 12 C.F.R. §1005.17 (d).
23 And while the opt-in disclosure agreement makes reference to “Overdraft Protection,” it
24 does not describe what that protection is or does, thus failing to meet Regulation E’s
25 requirement that alternative plans for covering overdrafts, such as through lines of credit
26 or transfers of funds from other accounts, be stated in the agreement. *Id.* The opt-in
27 disclosure agreement fails to state the maximum number of overdraft fees or charges that
28 may be assessed per day, or that there is no limit. *Id.* And the opt-in disclosure

1 agreement as a whole fails to meet Regulation E’s requirement that it be “substantially
2 similar” to Model Form A-9.¹⁴ *Id.*

3 58. Here, Cabrillo’s opt-in disclosure agreement fails to accurately, clearly, and
4 in an easily understandable way identify the balance Cabrillo uses to assess overdraft fees
5 in the stand-alone opt-in disclosure agreement. Cabrillo’s failure to fully describe its
6 overdraft services as Regulation E requires subsequently resulted in its failure to obtain
7 the appropriate affirmative consent necessary to opt members into its overdraft program.
8 Cabrillo has and continues to charge members overdraft fees for non-recurring debit card
9 and ATM transactions in violation of Regulation E. Further, Cabrillo continues to “opt-
10 in” new checking account members into its overdraft program using its improper opt-in
11 disclosure agreement.

12 **VI FACTUAL ALLEGATIONS AGAINST DEFENDANT**

13 59. At all relevant times, Cabrillo used the “available balance,” and not the
14 actual account balance, to determine whether to assess overdraft fees on one-time debit
15 card and ATM transactions.

16 60. At all relevant times, Cabrillo knew or should have known, that in order to
17 legally charge its members overdraft fees, it was required to first obtain affirmative
18 consent from the member using a Regulation E compliant stand-alone opt-in disclosure.
19 Regulation E compliance requires, at a minimum, that a financial institution accurately
20 disclose all material parts of its overdraft program and policies in the opt-in disclosure
21 agreement in clear and easily understood language before obtaining consent from a
22 member to “opt in” to those programs.

23 61. At all relevant times, Cabrillo used an identical opt-in disclosure agreement
24 with Plaintiff and all putative class members that defined an overdraft as occurring when
25 “you do not have the money in your checking account at the time of your debit card
26 purchase or ATM withdrawal” but Cabrillo approves and pays it anyway.

27
28

¹⁴ See Ex. B.

1 62. This definition of overdraft would disclose and be interpreted by reasonable
2 members to mean as follows: (1) “do not have the money in your checking account”
3 means the Actual balance/Current Balance/Ledger Balance in the account, and (2) “we
4 will still pay the item” means that Defendant has advanced or loaned the member its
5 own money to pay the transaction. However, as Cabrillo determines overdraft fees based
6 on the “available balance” that factors in credit and debit holds, approximately 10-20% of
7 overdraft fees are assessed on transactions when there was money in the account to cover
8 the transaction at the time it was posted and paid, and Cabrillo did not advance or loan
9 the member any money to pay the transaction.

10 63. The opt-in disclosure agreement did not accurately and in a clear and easily
11 understandable way describe what constitutes an overdraft and under what circumstances
12 the member would be assessed an overdraft fee, and as such the opt-in disclosure
13 agreement did not comply with Regulation E’s requirements.

14 64. Likewise, Cabrillo’s opt-in disclosure agreement fails to disclose its full
15 array of overdraft services, including its policies regarding the payment of overdrafts for
16 other transactions such as checks, ACH transactions, and automatic bill payments. *See*
17 C.F.R. §1005.17 (d). It does not disclose that lines of credit or transfers of funds from
18 other accounts, are also available to cover overdrafts on Regulation E transactions. *Id.*
19 The opt-in disclosure agreement fails to state the maximum number of overdraft fees or
20 charges that may be assessed per day, or that there is no limit. *Id.* And the opt-in
21 disclosure agreement as a whole fails to meet Regulation E’s requirement that it be
22 “substantially similar” to Model Form A-9. *Id.*

23 65. Because Cabrillo uses an opt-in disclosure agreement that inaccurately
24 describes its overdraft practices and thus is not compliant with Regulation E, Cabrillo is
25 not permitted to charge members overdraft fees on one-time debit card and ATM
26 transactions.

27 66. At all relevant times, Cabrillo knew it was using the available balance to
28 assess overdraft fees, and further knew or should have known that as a stand-alone

1 document, its opt-in disclosure agreement was not providing an accurate, clear and easily
2 understandable definition of an overdraft when it identified an overdraft as when “you do
3 not have the money in your checking account” but the item is approved and paid by
4 Cabrillo anyway.

5 67. At all relevant times, Cabrillo knew or should have known that its opt-in
6 disclosure agreement failed to comply with Regulation E’s disclosure and opt-in
7 requirements in numerous ways.

8 68. At all relevant times, Cabrillo charged Plaintiff and the putative class
9 overdraft fees on one-time debit card and ATM transactions even though it had not
10 complied with Regulation E to first obtain members affirmative consent using a
11 Regulation E compliant opt-in disclosure agreement before it charged these fees.

12 69. Based on information and belief, Cabrillo continues to “opt-in” to its
13 overdraft program members using a non-compliant opt-in disclosure agreement, and then
14 charges those members overdraft fees on one-time debit card and ATM transactions.

15 70. Based on information and belief, Cabrillo continues to charge existing
16 members overdraft fees on one-time debit card and ATM transactions who had “opted-
17 in” using that same non-compliant opt-in disclosure agreement.

18 VII CLASS ACTION ALLEGATIONS

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

21 72. Plaintiff brings this case, and each of the respective causes of action, as a
22 class and representative action.

23 73. The “Class” is composed of one of the following:

24 The Regulation E Class:

25 All California members of Defendant who have or have had
26 accounts with Defendant who were assessed an overdraft fee on
27 a one-time debit card or ATM transaction beginning one-year
28 preceding the filing of this complaint and ending on the date the
Class is certified. Following discovery, this definition will be
amended as appropriate.

The UCL, Section 17200 Class:

1 All California members of Defendant who have or have had
2 accounts with Defendant who were assessed an overdraft fee on
3 a one-time debit card or ATM transaction beginning four-years
4 preceding the filing of this complaint and ending on the date the
5 Class is certified. Following discovery, this definition will be
6 amended as appropriate.

7 74. Excluded from the Classes are: 1) any entity in which Defendant has a
8 controlling interest; 2) officers or directors of Defendant; 3) this Court and any of its
9 employees assigned to work on the case; and 4) all employees of the law firms
10 representing Plaintiff and the Class Members.

11 75. This action has been brought and may be properly maintained on behalf of
12 each member of the Class pursuant to Fed. R. Civ. P. 23(a), (b)(2), and (b)(3).

13 76. **Numerosity** – The members of the Class (“Class Members”) are so
14 numerous that joinder of all Class Members would be impracticable. While the exact
15 number of Class Members is presently unknown to Plaintiff, and can only be determined
16 through appropriate discovery, Plaintiff believes based on the percentage of customers
17 that are harmed by these practices with banks and credit unions with similar practices,
18 that the Class is likely to include thousands of Cabrillo members.

19 77. Upon information and belief, Defendant has databases, and/or other
20 documentation, of its members’ transactions and account enrollment. These databases
21 and/or documents can be analyzed by an expert to ascertain which of Defendant’s
22 members has been harmed by its practices and thus qualify as a Class Member. Further,
23 the Class definitions identify groups of unnamed plaintiffs by describing a set of common
24 characteristics sufficient to allow a member of that group to identify himself or herself as
25 having a right to recover. Other than by direct notice through mail or email, alternative
26 proper and sufficient notice of this action may be provided to the Class Members through
27 notice published in newspapers or other publications.

28 78. **Commonality** – This action involves common questions of law and fact.
The questions of law and fact common to both Plaintiff and the Class Members include,
but are not limited to, the following:

- Whether Defendant used the available balance for making a

1 determination of whether to assess overdraft fees on one-time debit
2 card and ATM transactions;

- 3 • Whether the opt-in disclosure agreement Defendant used to opt-in
4 Class Members violated the mandate of Regulation E that the opt-in
5 disclosure agreement must accurately, clearly, and in an easily
6 understandable way describe the overdraft services of Defendant;
- 7 • Whether Defendant breached Regulation E when it assessed overdraft
8 fees on one-time debit card and ATM transactions against Class
9 Members;
- 10 • Whether Defendant's conduct in violating Regulation E also violated
11 the Section 17200; and
- 12 • Whether Defendant continues to violate Regulation E and Section
13 17200 by opting in members and the public using an opt-in disclosure
14 agreement that violates Regulation E and continuing to assess
15 members overdraft fees on one-time debit card and ATM transactions
16 based on an opt-in disclosure agreement that violates Regulation E.

17 79. **Typicality** – Plaintiff's claims are typical of all Class Members. The
18 evidence and the legal theories regarding Defendant's alleged wrongful conduct
19 committed against Plaintiff and all of the Class Members are substantially the same
20 because the opt-in disclosure agreement used to opt-in Plaintiff is the same as the opt-in
21 disclosure agreement used by Defendant to opt-in the Class Members and the general
22 public. Further, Plaintiff and the Class Members have each been assessed overdraft fees
23 on one-time debit card and ATM transactions. Accordingly, in pursuing his own self-
24 interest in litigating his claims, Plaintiff will also serve the interests of the other Class
25 Members and the general public.

26 80. **Adequacy** – Plaintiff will fairly and adequately protect the interests of the
27 Class Members. Plaintiff has retained competent counsel experienced in class action
28 litigation, and specifically financial institution overdraft class action cases to ensure such

1 protection. There are no material conflicts between the claims of the representative
2 Plaintiff and the members of the Class that would make class certification inappropriate.
3 Plaintiff and counsel intend to prosecute this action vigorously.

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

27 82. Plaintiff does not believe that any other Class Members’ interests in
28 individually controlling a separate action are significant, in that Plaintiff has

1 demonstrated above that his claims are typical of the other Class Members and that he
2 will adequately represent the Class. This particular forum is desirable for this litigation
3 because Plaintiff's claims arise from activities that occurred largely therein. Plaintiff
4 does not foresee significant difficulties in managing the class action in that the major
5 issues in dispute are susceptible to class proof.

6 83. Plaintiff anticipates the issuance of notice, setting forth the subject and
7 nature of the instant action, to the proposed Class Members. Upon information and
8 belief, Defendant's own business records and/or electronic media can be utilized for the
9 contemplated notices. To the extent that any further notices may be required, Plaintiff
10 anticipates using additional media and/or mailings.

11 84. This matter is properly maintained as a class action pursuant to Fed. R. Civ.
12 P. 23 in that without class certification and determination of declaratory, injunctive,
13 statutory and other legal questions within the class format, prosecution of separate actions
14 by individual members of the Class will create the risk of:

- 15 • inconsistent or varying adjudications with respect to individual
16 members of the Class which would establish incompatible standards
17 of conduct for the parties opposing the Class; or
- 18 • adjudication with respect to individual members of the Class would,
19 as a practical matter, be dispositive of the interests of the other
20 members not parties to the adjudication or substantially impair or
21 impede their ability to protect their interests.

22 Common questions of law and fact exist as to the members of the Class and predominate
23 over any questions affecting only individual members, and a class action is superior to
24 other available methods of the fair and efficient adjudication of the controversy,
25 including consideration of:

- 26 • the interests of the members of the Class in individually controlling
27 the prosecution or defense of separate actions;
- 28 • the extent and nature of any litigation concerning the controversy

1 already commenced by or against members of the Class;

- 2 • the desirability or undesirability of concentrating the litigation of the
3 claims in the particular forum; and the difficulties likely to be
4 encountered in the management of a class action.

5 85. Defendant has acted or refused to act on grounds generally applicable to the
6 class, thereby making appropriate final declaratory and injunctive relief with respect to
7 the class as a whole under Federal Rule of Civil Procedure 23(b)(2). Moreover, on
8 information and belief, Plaintiff alleges that Defendant’s use of a non-compliant
9 Regulation E opt-in disclosure agreement is substantially likely to continue in the future
10 if an injunction is not entered.

11 **FIRST CAUSE OF ACTION**
12 **(Violation of Regulation E)**

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

15 87. By charging overdraft fees on ATM and non-recurring debit card
16 transactions, Defendant violated Regulation E, 12 C.F.R. §§ 1005, *et seq.*, whose
17 “primary objective” is “the protection of individual consumers,” 12 C.F.R. § 1005.1(b),
18 and which “carries out the purposes of the Electronic Fund Transfer Act, 15 U.S.C. §§
19 1693, *et seq.*, the ‘EFTA,’” 12 C.F.R. § 1005.1(b)).

20 88. Specifically, the charges violated what is known as the “Opt In Rule” of
21 Regulation E. 12 C.F.R. § 1005.17. The Opt In Rule states: “a financial institution . . .
22 *shall not assess a fee or charge . . . pursuant to the institution’s overdraft service, unless*
23 *the institution: (i) [p]rovides the consumer with a notice in writing [the opt-in notice] . . .*
24 *describing the institution’s overdraft service”* and (ii) “[p]rovides a reasonable
25 opportunity for the consumer to *affirmatively consent*” to enter into the overdraft
26 program. *Id.* (emphasis added). The notice “shall be clear and readily understandable.”
27 12 C.F.R. § 1005.4(a)(1). To comply with the affirmative consent requirement, a
28 financial institution must provide a segregated description of its overdraft practices that is

1 accurate, non-misleading and truthful and that conforms to 12 C.F.R. § 1005.17 prior to
2 the opt-in, and must provide a reasonable opportunity to opt-in after receiving the
3 description. The affirmative consent must be provided in a way mandated by 12 C.F.R. §
4 1005.17, and the financial institution must provide confirmation of the opt-in in a manner
5 that conforms to 12 C.F.R. § 1005.17. Furthermore, choosing not to “opt-in” cannot
6 adversely affect any other feature of the account.

7 89. The intent and purpose of this opt-in disclosure agreement is to “assist
8 customers in understanding how overdraft services provided by their institutions operate .
9 . . by explaining the institution’s overdraft service . . . in a clear and readily
10 understandable way”—as stated in the Official Staff Commentary, 74 Fed. Reg. 59033,
11 59035, 59037, 5940, 5948, which is “the CFPB’s official interpretation of its own
12 regulation,” “warrants deference from the courts unless ‘demonstrably irrational,’” and
13 should therefore be treated as “a definitive interpretation” of Regulation E. *Strubel v.*
14 *Capital One Bank (USA)*, 179 F. Supp. 3d 320, 324 (S.D.N.Y. 2016) (quoting *Chase*
15 *Bank USA v. McCoy*, 562 U.S. 195, 211 (2011)) (so holding for the CFPB’s Official Staff
16 Commentary for the Truth In Lending Act’s Reg Z).

17 90. Defendant failed to comply with Regulation E, 12 C.F.R. § 1005.17, which
18 requires affirmative consent before a financial institution may assess overdraft fees
19 against customers’ accounts through an overdraft program for ATM withdrawals and
20 non-recurring debit card transactions. Defendant has failed to comply with the 12 C.F.R.
21 § 1005.17 opt-in requirements, including failing to provide its members in a “clear and
22 readily understandable way” a valid description of the overdraft program which meets the
23 strictures of 12 C.F.R. § 1005.17. Defendant has selected an opt-in method that fails to
24 satisfy 12 C.F.R. § 1005.17 because, *inter alia*, it states in the non-conforming disclosure
25 agreement that an overdraft occurs when there is not money in the account to cover a
26 transaction but Defendant pays it anyway. But, in fact, Defendant assesses overdraft fees
27 even when there is enough money in the account to pay for the transaction and Defendant
28 needs to advance no funds at all. This is accomplished by using the internal bookkeeping

1 available balance to assess overdraft fees, rather than the actual and official balance of
2 the account. Defendant failed to use language to describe the overdraft service that
3 identified that it was using the available balance to assess overdraft fees, which meant
4 that in a significant percentage of the transactions that were the subject of the overdraft
5 fee, there was money in the account to cover the transaction and Defendant did not have
6 to advance any money – yet Defendant assessed an overdraft fee anyway.

7 91. Defendant commits numerous other Regulation E violations, including (1)
8 failing to disclose its full array of overdraft services, including its policies regarding the
9 payment of overdrafts for other transactions such as checks, ACH transactions, and
10 automatic bill payments; (2) failing to disclose alternative plans for covering overdrafts,
11 such as through lines of credit or transfers of funds from other accounts; (3) failing to
12 state the maximum number of overdraft fees or charges that may be assessed per day, or
13 that there is no limit; and (4) failing to use an opt-in disclosure agreement it is
14 “substantially similar” to Model Form A-9. *See* 12 C.F.R. §1005.17 (d).

15 92. As a result of violating Regulation E’s prohibition against assessing
16 overdraft fees on ATM and non-recurring debit card transactions without obtaining valid
17 affirmative consent to do so, Defendant was not legally permitted to assess any overdraft
18 fees on one-time debit card or ATM transactions, and it has harmed Plaintiff and the
19 Class Members by assessing overdraft fees on one-time debit card and ATM transactions.

20 93. As a result of Defendant’s violations of Regulation E, 12 C.F.R. § 1005, *et*
21 *seq.*, Plaintiff and members of the Class are entitled to statutory damages, as well as
22 attorneys’ fees and costs of suit, pursuant to 15 U.S.C. § 1693m.

23 **SECOND CAUSE OF ACTION**

24 **(Violation of California Unfair Competition Law, Business & Professions Code**
25 **Section 17200, *et seq.*)**

26 94. The preceding allegations are incorporated by reference and re-alleged as if
27 fully set forth herein.
28

1 95. Defendant’s conduct described herein violates California’s Unfair
2 Competition Law (the “UCL”), codified at Business and Professions Code section 17200,
3 *et seq.* The UCL prohibits, and provides civil remedies for, unfair competition. Its
4 purpose is to protect both consumers and competitors by promoting fair competition in
5 commercial markets for goods and services. In service of that purpose, the Legislature
6 framed the UCL’s substantive provisions in broad, sweeping language. By defining
7 unfair competition to include any “any unlawful, unfair or fraudulent business act or
8 practice,” the UCL permits violations of other laws to serve as the basis of an
9 independently actionable unfair competition claim, and sweeps within its scope acts and
10 practices not specifically proscribed by any other law.

11 96. The UCL expressly provides for injunctive relief, and contains provisions
12 denoting its public purpose. A claim for injunctive relief under the UCL is brought by a
13 plaintiff acting in the capacity of a private attorney general. Although the private litigant
14 controls the litigation of an unfair competition claim, he or she is not entitled to recover
15 compensatory damages for his or her own benefit, but only disgorgement of profits made
16 by the defendant through unfair competition in violation of the statutory scheme, or
17 restitution to victims of the unfair competition.

18 97. As further alleged herein, Defendant’s conduct violates the UCL’s
19 “unlawful” prong because that conduct violates public policy and/or the text of
20 Regulation E. Defendant’s conduct was not motivated by any legitimate business or
21 economic need or rationale. The harm and adverse impact of Defendant’s conduct on
22 members of the general public was neither outweighed nor justified by any legitimate
23 reasons, justifications, or motives. The harm to Plaintiff and Class Members arising from
24 Defendant’s unlawful practices relating to the imposition of the improper fees outweighs
25 the utility, if any, of those practices.

26 98. Defendant’s unlawful business practices as alleged herein are immoral,
27 unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to
28 Plaintiff and Class Members, and the general public. Defendant’s conduct was

1 substantially injurious to Plaintiff and the Class Members as they have been forced to pay
2 millions of dollars in improper fees, collectively.

3 99. Moreover, as described herein, Defendant’s conduct also violates the UCL’s
4 “unfairness” prong.

5 100. As a direct and proximate result of Defendant’s violations of the UCL,
6 Plaintiff and Class Members have been assessed improper and illegal overdraft fees and
7 those funds were removed from their account, and Defendant has received, or will
8 receive, income, profits, and other benefits, which it would not have received if it had not
9 engaged in the violations of Section 17200 described in this Complaint.

10 101. Further, absent injunctive relief forcing Defendant to disgorge itself of its ill-
11 gotten gains and public injunctive relief prohibiting Defendant from misrepresenting and
12 omitting material information concerning its overdraft fee policy at issue in this action in
13 the future and requiring Defendant to immediately stop charging illegal overdraft fees
14 unless and until it re-opts-in current members using a Regulation E complaint opt-in
15 disclosure agreement, Plaintiff and other existing accountholders, and the general public,
16 will suffer from and be exposed to Defendant’s conduct violative of the UCL.

17 102. Plaintiff requests that he be awarded all other relief as may be available by
18 law, pursuant to California Business & Professions Code § 17203, including an order of
19 this court compelling Defendants to cease all future unlawful and unfair business
20 practices related to its overdraft practices.

21 **VIII PRAYER FOR RELIEF**

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

- 23 a. for an order certifying this action as a class action;
24 b. for an order requiring Defendants to disgorge, restore, and return all
25 monies wrongfully obtained together with interest calculated at the maximum legal
26 rate;
27 c. for statutory damages;
28 d. for civil penalties;

- 1 e. for an order enjoining the continued wrongful conduct alleged herein;
- 2 f. for costs;
- 3 g. for pre-judgment and post-judgment interest as provided by law;
- 4 h. for attorneys' fees under the Electronic Fund Transfer Act, the
- 5 common fund doctrine, and all other applicable law; and
- 6 i. for such other relief as the Court deems just and proper.

7
8 Dated: December 4, 2020

Respectfully Submitted,

9
10 /s/ David C. Wright

Richard D. McCune (State Bar No. 132124)

rdm@mccunewright.com

David C. Wright (State Bar No. 177468)

dcw@mccunewright.com

MCCUNE WRIGHT AREVALO, LLP

3281 E. Guasti Road, Suite 100

Ontario, California 91761

Telephone: (909) 557-1250

Facsimile: (909) 557 1275

Emily J. Kirk, IL Bar No. 6275282*

ejk@mccunewright.com

McCUNE WRIGHT AREVALO, LLP

231 N. Main Street, Suite 20

Edwardsville, IL 62025

Telephone: (618) 307-6116

Facsimile: (618) 307-6161

Attorneys for Plaintiff Cesar Cortes
and the Putative Class

**Pro Hac Vice* application to be submitted

DEMAND FOR JURY TRIAL

Plaintiff and the Class Members demand a trial by jury on all issues so triable.

Dated: December 4, 2020 Respectfully Submitted,

/s/ David C. Wright

Richard D. McCune (State Bar No. 132124)

rdm@mccunewright.com

David C. Wright (State Bar No. 177468)

dcw@mccunewright.com

MCCUNE WRIGHT AREVALO, LLP

3281 E. Guasti Road, Suite 100

Ontario, California 91761

Telephone: (909) 557-1250

Facsimile: (909) 557 1275

Emily J. Kirk, (IL Bar No. 6275282)

ejk@mccunewright.com

McCUNE WRIGHT AREVALO, LLP

231 N. Main Street, Suite 20

Edwardsville, IL 62025

Telephone: (618) 307-6116

Facsimile: (618) 307-6161

Attorneys for Plaintiff Cesar Cortes
and the Putative Class

**Pro Hac Vice* application to be submitted