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10 Attorneys for Plaintiff Cesar Cortes  
and the Putative Class  
11  
12

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **COUNTY OF SAN DIEGO**  
15

16 CESAR E. CORTES, individually, and on behalf  
of all others similarly situated,  
17

18 Plaintiff,

19 v.

20 UNIVERSITY & STATE EMPLOYEES  
CREDIT UNION, and DOES 1 through 100,  
inclusive,  
21

22 Defendants.  
23  
24  
25  
26

Case No. 37-2020-00018182-CU-BC-CTL

**FIRST AMENDED COMPLAINT FOR:**

1. Breach of Account Agreement
2. Breach of Opt-in Agreement
3. Breach of the Implied Covenant of Good Faith and Fair Dealing
4. Unjust Enrichment/Restitution
5. Money Had and Received
6. Violation of the California Unfair Competition Law (Bus. & Prof. Code, § 17200, *et seq.*)
7. Violation of Electronic Fund Transfer Act (Regulation E, 12 C.F.R. §§ 1005, *et seq.*)

**CLASS ACTION**

**DEMAND FOR JURY TRIAL**

1 Plaintiff Cesar E. Cortes (“Plaintiff”), by his attorneys, hereby brings this class and  
2 representative action against University & State Employees Credit Union and DOES 1 through 100  
3 (collectively “USE Credit Union” or “Defendant”).

4 **NATURE OF THE ACTION**

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

10 2. Plaintiff has brought this class and representative action to assert claims in his own right,  
11 and as the class representative of all other persons similarly situated, and in his capacity as a private  
12 attorney general on behalf of the members of the general public. Defendant wrongfully and without  
13 authorization, unilaterally and without warning, withdrew money from Plaintiff and the Class Members’  
14 share (“checking”) accounts when it was not authorized to do so. Defendant falsely claimed that the  
15 funds it unilaterally took from Plaintiff’s account were properly assessed overdraft fees (a fee for a  
16 transaction item that was advanced and paid by Defendant on behalf of Plaintiff) or Non-Sufficient  
17 Funds (“NSF”) fees (a fee for a transaction that was returned unpaid). That was not true. Defendant was  
18 not authorized by its contracts to assess or collect these supposed overdraft fees or NSF fees.

19 3. Defendant’s assessment of such overdraft/NSF fees also violated federal and state law.  
20 Defendant failed to describe its actual overdraft practice in its Opt-in Agreement by, *inter alia*, failing to  
21 describe accurately in its Opt-in Agreement the actual method by which Defendant calculates its  
22 overdraft fees, and because Defendant also violated or did not fulfill other prerequisites of Regulation E,  
23 12 C.F.R. §§ 1005, *et seq.*, of the Electronic Fund Transfer Act, 15 U.S.C.A. §§ 1693 *et seq.*, before  
24 charging overdraft fees on ATM and one-time debit card transactions, 12 C.F.R. § 1005.17(b)(1).  
25 Defendant’s violations are also actionable under California’s Unfair Competition Law, California  
26 Business & Professions Code § 17200.

27 4. This class action seeks monetary damages, restitution, and injunctive relief due to, *inter*  
28 *alia*, Defendant’s policy and practice of unlawfully assessing and unilaterally collecting overdraft fees

1 and NSF fees as set forth herein, in violation of its contract(s) with Plaintiff and the Class, as well as  
2 regulations, statutes, and/or equities.

3 **PARTIES**

4 5. Plaintiff Cesar E. Cortes is a resident of Chula Vista, California, and a member of  
5 Defendant at all relevant times.

6 6. Based on information and belief, Defendant is and has been a state-chartered credit union  
7 with its headquarters located in San Diego, California. Defendant is a “financial institution” within the  
8 meaning of Regulation E, 12 C.F.R. § 1005.2(i).

9 7. Without limitation, defendants DOES 1 through 100, include agents, partners, joint  
10 ventures, subsidiaries, and/or affiliates of Defendant and, upon information and belief, also own and/or  
11 operate Defendant’s branch locations. As used herein, where appropriate, the term “Defendant” is also  
12 inclusive of Defendants DOES 1 through 100.

13 8. Plaintiff is unaware of the true names of Defendants DOES 1 through 100. Defendants  
14 DOES 1 through 100 are thus sued by fictitious names, and the pleadings will be amended as necessary  
15 to obtain relief against Defendants DOES 1 through 100 when the true names are ascertained, or as  
16 permitted by law or the Court.

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

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

27 11. Whenever reference is made in this Complaint to any act, deed, or conduct of Defendant,  
28 the allegation means that Defendant engaged in the act, deed, or conduct by or through one or more of

1 its officers, directors, agents, employees, or representatives who was actively engaged in the  
2 management, direction, control, or transaction of Defendant’s ordinary business and affairs.

3 12. As to the conduct alleged herein, each act was authorized, ratified or directed by  
4 Defendant’s officers, directors, or managing agents.

5 **JURISDICTION AND VENUE**

6 13. This Court has subject matter jurisdiction over this case because Plaintiff is informed and  
7 believes Defendant is qualified to do business, and regularly conducts business, in California.

8 14. Venue is proper in this judicial district and in the County of San Diego, California  
9 because Defendant maintains offices and transacts business within the district; Plaintiff, and similarly  
10 situated persons, entered into contracts with Defendant within the district; and Defendant executed its  
11 unlawful policies and practices in breach of those contracts, which are the subject of this action, in San  
12 Diego County.

13 **BACKGROUND**

14 **DEFENDANT**

15 15. Defendant is a credit union with approximately eight branches. According to its financial  
16 filings, as of December 31, 2019, Defendant has 61,777 members, 179 full-time employees, and holds  
17 \$1,023,696,056 in assets. Defendant’s members consist of California State and University employees,  
18 along with others who live, work, or worship in the five counties of San Diego, Sacramento, Yolo,  
19 Alameda, and Santa Clara. On its website, Defendant describes itself as “a cooperative, not-for-profit,  
20 financial institution.” (<https://www.usecu.org/home/our-story/who-we-are> [last visited May 26, 2020].)  
21 It markets and sells itself as superior to banks, in no small part through claims that it is not motivated by  
22 profit, but instead by service to its member owners. *Id.* As will be discussed in the following, that  
23 statement is false relating to its overdraft practices.

24 **CHECKING ACCOUNTS DEFENDANT OFFERS TO MEMBERS**

25 16. One of the main services Defendant offers to its members is a checking account. The  
26 checking account can increase or be credited in a variety of ways, including automatic payroll deposits;  
27 electronic deposits; incoming transfers; deposits at the branch; and deposits at ATM machines. Debits  
28 decreasing the amount in the checking account can be made by using a debit card for purchases of goods

1 and services (point of sale purchases) that can be one-time purchases or recurring automatic purchases;  
2 through withdrawal of money at an ATM; or by electronic purchases. Additionally, some of the other  
3 ways to debit the account include writing checks; issuing electronic checks; scheduling Automated  
4 Clearing House (ACH) transactions (which can include recurring automatic payments or one-time  
5 payments); transferring funds; and other types of transactions that debit from a checking account. As of  
6 December 31, 2019, Defendant reported holding 39,001 checking accounts with a total balance of  
7 \$264,565,930.

8 **CHECKING ACCOUNT OVERDRAFT AND NSF FEES GENERATE SIGNIFICANT PROFIT**  
9 **FOR DEFENDANT**

10 17. In connection with its processing of debit transactions (debit card, ATM, check, ACH,  
11 and other similar transactions), Defendant assesses overdraft and NSF fees to member accounts when it  
12 claims to have determined that an account has been overdrawn. While Defendant does not publicly  
13 disclose the amount of overdraft fees and NSF fees it collects from its members, in 2019 it reported  
14 collecting from all members \$6,005,175 in service fee income. Based on information and belief, a  
15 significant portion of those service fees consist of overdraft fees and NSF fees that are collected from a  
16 small percentage of the overall credit union members.

17 **THE DETRIMENTAL EFFECT OF OVERDRAFT AND NSF FEES**

18 18. This case is about when and under what circumstances Defendant may charge an  
19 overdraft or NSF fee.

20 19. The underlying principle for charging overdraft fees is that when the credit union pays a  
21 transaction by advancing the credit union's own funds instead of using a member's insufficient funds, it  
22 may charge a *contracted* fee, provided that charging the fee is not prohibited by some legal regulation.

23 The fee Defendant charges here constitutes very expensive credit. According to the FDIC:

24 For almost all study population banks operating an automated overdraft  
25 program, the main fee associated with the program was an NSF usage fee.  
26 Usage fees reported by these banks ranged from \$10 to \$38; the median  
27 fee was \$27, charged on a per-transaction basis in almost all cases. **In this**  
28 **context, a \$27 fee charged for a single advance of \$60 that was repaid**  
**in two weeks roughly translated into an APR of 1,173 percent.** Many  
surveyed banks (24.6 percent) assessed additional fees on accounts that  
remained in negative balance status in the form of flat fees or interest  
charged on a percentage basis.

1 (FDIC Study of Bank Overdraft Programs, 2008,  
2 [https://www.fdic.gov/bank/analytical/overdraft/fdic138\\_report\\_final\\_v508.pdf](https://www.fdic.gov/bank/analytical/overdraft/fdic138_report_final_v508.pdf) [last viewed April 22,  
3 2020] (emphasis added).)

4 20. Financial institutions can also charge a *contracted* NSF fee when a customer’s checking  
5 account purportedly lacks sufficient funds to cover an item and the financial institution opts to return the  
6 transaction item unpaid rather than cover it. Although there is very little, if any, risk to financial  
7 institutions when they return an item unpaid, they still charge customers a very expensive fee for this  
8 purported “service.”

9 21. The Consumer Financial Protection Bureau (“CFPB”) has noted that, as opposed to  
10 overdraft program coverage, financial institutions’ return of items as unpaid, which often results in the  
11 assessment and collection of insufficient funds fee charges (which the CFPB refers to as “NSF fees”),  
12 confers little, if any, benefit to customers:

13 An important consumer outcome of any overdraft program is the  
14 percentage of negative transactions that are paid (*i.e.*, result in overdrafts)  
15 or returned unpaid (*i.e.*, were NSFs). Paying overdraft transactions may  
16 confer some benefit (in exchange for the associated fees and other costs)  
17 to consumers by helping them make timely payments and avoid late  
18 penalty fees and/or interest charges from a merchant or biller. **In**  
19 **contrast, returning an item generally confers little benefit to the**  
**consumer (other than perhaps deterring future overdrafting and any**  
**subsequent consequences) and can result in an NSF fee as well as**  
**additional related fees, such as a returned check fee charged by the**  
**institution to whom the check was presented or a late fee charged by**  
**the entity to whom payment was due.**

20 (CFPB, CFPB Study of Overdraft Programs (June 2013), p. 26 (internal footnote omitted) (emphasis  
21 added), [https://files.consumerfinance.gov/f/201306\\_cfpb\\_whitepaper\\_overdraft-practices.pdf](https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf) [last  
22 viewed April 22, 2020].)

23 22. Overdraft and NSF fees constitute a primary revenue generator for banks and credit  
24 unions. According to one banking industry market research company, Moeb's Services, banks and credit  
25 unions in 2018 alone generated an estimated \$34.5 billion on overdraft fees. (Moeb's Services,  
26 [Overdraft Revenue Inches Up in 2018 \(March 27, 2019\)](http://www.moeb's.com/Portals/0/pdf/Articles/Overdraft%20Revenue%20Inches%20Up%20in%202018%200032719-1.pdf?ver=2019-03-27-115625-283),  
27 [http://www.moeb's.com/Portals/0/pdf/Articles/Overdraft%20Revenue%20Inches%20Up%20in%202018](http://www.moeb's.com/Portals/0/pdf/Articles/Overdraft%20Revenue%20Inches%20Up%20in%202018%200032719-1.pdf?ver=2019-03-27-115625-283)  
28 [%200032719-1.pdf?ver=2019-03-27-115625-283](http://www.moeb's.com/Portals/0/pdf/Articles/Overdraft%20Revenue%20Inches%20Up%20in%202018%200032719-1.pdf?ver=2019-03-27-115625-283) [last viewed April 22, 2020].) A 2010 report by

1 Georgetown University Law Professor Adam Levitin concluded that overdraft fees comprise 6% to 7%  
2 of the gross revenue of credit unions. (Filene Research Institute Report, *Overdraft Regulation A Silver*  
3 *Lining In The Clouds?* (Filene Research Institute 2010), <https://ssrn.com/abstract=1544888> [last viewed  
4 April 22, 2020].)

5 23. While credit unions portray themselves as more overdraft and fee friendly than banks—  
6 and that may have been historically true—it is not true now. Moebs Services reported that 2018 credit  
7 union overdraft revenue jumped \$500 million, even as bank overdraft revenue declined by \$400 million.  
8 Further, the same study showed that credit unions generated significantly more revenue per customer in  
9 service fees than banks did. (See Credit Union Times, *Overdraft Revenue Surges at Credit Unions:*  
10 *Moebs* (Jan. 7, 2019), [https://www.cutimes.com/2019/01/07/overdraft-revenue-surges-at-credit-unions-](https://www.cutimes.com/2019/01/07/overdraft-revenue-surges-at-credit-unions-moebs/)  
11 [moebs/](https://www.cutimes.com/2019/01/07/overdraft-revenue-surges-at-credit-unions-moebs/) [last viewed April 22, 2020].) And none of this is any surprise, because from 2000 to 2017 the  
12 average credit union overdraft fee increased from \$15 to \$29. (MarketWatch, *The Average Credit*  
13 *Union Overdraft Fee Has Almost Doubled Since 2000* (March 27, 2017)  
14 [https://www.marketwatch.com/story/credit-unions-charge-almost-as-much-as-major-banks-in-overdraft-](https://www.marketwatch.com/story/credit-unions-charge-almost-as-much-as-major-banks-in-overdraft-fees-2017-03-24)  
15 [fees-2017-03-24](https://www.marketwatch.com/story/credit-unions-charge-almost-as-much-as-major-banks-in-overdraft-fees-2017-03-24) [last viewed April 22, 2020].)

16 24. Defendant's financial filings and practices reveal that it has followed these trends to the  
17 letter. Defendant charges an overdraft/NSF fee of \$27 per item for each of the first 1-5 items it claims  
18 result in an account being overdrawn, and \$33 per item for each additional alleged overdrafting item  
19 within a 12 month period. Even if Defendant had been properly charging overdraft fees, the \$27 and  
20 \$33 overdraft fees bear no relation to the credit union's minute risk of loss or cost for administrating the  
21 Defendant's overdraft services. Nevertheless, the practical effect of the fee is to charge those who pay it  
22 an interest rate with an APR in the thousands.

23 25. Accordingly, the overdraft fee is a punitive fee rather than a service fee, which makes it  
24 even more unfair because most account overdrafts are accidental and involve a small amount of money  
25 in relation to the fee. Further, in a 2012 study, more than 90% of customers who were assessed overdraft  
26 fees overdrew their accounts by mistake. (Pew Charitable Trust Report, *Overdraft America: Confusion*  
27 *and Concerns about Bank Practices*, at p. 4 (May 2012), <https://www.pewtrusts.org/->  
28 [/media/legacy/uploadedfiles/pcs\\_assets/2012/sciboverdraft20america1pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/sciboverdraft20america1pdf.pdf) [last viewed April 22,

2020].) More than 60% of the transactions that resulted in a large overdraft fee were for less than \$50. (Pew Charitable Trust Report, *Overdrawn*, at p. 8 (June 2014), [https://www.pewtrusts.org/-/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 viewed April 22, 2020].)

More than 50% of those who were assessed overdraft fees do not recall opting into an overdraft program, (*id.* at p. 5), and more than two-thirds of customers would have preferred the financial institution decline their transaction rather than being charged a very large fee, (*id.* at p. 10).

26. Finally, the financial impact of these fees falls on the most vulnerable among the banking population with the least ability to absorb the overdraft fees. Younger, lower-income, and non-white account holders are among those most likely to be assessed overdraft fees. (*Id.* at p. 1.) A 25-year-old is 133% more likely to pay an overdraft penalty fee than a 65-year-old. (*Id.* at p. 3.) More than 50% of the customers assessed overdraft fees earned under \$40,000 per year. (*Id.* at p. 4.) And non-whites are 83% more likely to pay an overdraft fee than whites. (*Id.* at p. 3.)

**ACCOUNTING TRICKS TO CHARGE OVERDRAFT AND NSF FEES ON AN ACCOUNT WITH SUFFICIENT FUNDS TO PAY THE TRANSACTION**

27. As a matter of background and to understand the banks and credit unions' improper overdraft practices, the various balances affecting customer checking accounts must be understood. Either unknown to customers or confusing even if known by customers, there are three balances associated with a checking account: the "balance"; the "collected available balance"; and, the artificial "available balance."

28. Not all these balances are equal. There is one official and real balance. It is often referred to just as the "balance," or a credit union may call it the "actual balance," "current balance," or "ledger balance." Whatever it is called, it is the money actually in the account without bookkeeping adjustments for either upcoming authorized charges or holds the credit union may place on deposits already made and placed in the account. It is the official balance of the account. It is the balance provided to members in monthly statements, which are the official records of any account's activity. It is the balance used to determine interest on deposits and any minimum balance requirements. It is the balance used by Defendant to report its deposits to regulators, shareholders, and the public. It is the balance used in financial reports to shareholders and the balance used for internal financial reporting.



1 And it is the balance used by credit reporting agencies when they decide Defendant’s credit ratings.

2 29. The “collected balance” or “collected funds balance” is the “balance” less holds placed  
3 on certain deposits pursuant to the financial institution’s “Funds Availability Policy” (“FAP”).

4 30. The “available balance” is a completely different calculation from the “collected balance”  
5 or the real “balance.” It is an artificially created internal risk management calculation developed to  
6 determine which transactions to process and which to return in line with likely upcoming debit charges  
7 and deposits that did not clear the bank or credit union’s FAP.

8 31. Over time, as credit unions jumped on the overdraft train for revenue purposes, they  
9 decided to use the internal and artificial “available” balance not only for its legitimate use of managing  
10 pay or return decisions based on activities that they anticipated in the future, but also to assess overdraft  
11 and NSF fees on this artificial balance, rather than the real “balance.” Generally, the result is that 10-  
12 20% of overdraft fees are assessed on transactions where sufficient money was in the account and, thus,  
13 should not have been considered overdrawn.

14 32. This practice is not only unfair on its face but, more importantly for this case, Defendant  
15 did not contract with Plaintiff to authorize it to charge overdraft or NSF fees on transactions when the  
16 account had sufficient money to cover a transaction. In fact, Defendant’s agreement with members  
17 specifically stated that such fees would be assessed only when there was insufficient money in the  
18 account to cover the transaction (“balance”). Defendant did not contract with its members to use the  
19 artificial “available balance” for assessing overdraft and NSF fees.

20 **REPEAT FEES ON A SINGLE RETURNED TRANSACTION ALSO JUICES PROFITS**

21 33. Charging overdraft and NSF fees when there is money in an account to cover a  
22 transaction is just one way that banks and credit unions manipulate checking accounts to increase  
23 profits. They also contract and disclose to customers that they will only charge a single NSF fee when  
24 they opt to return a check or ACH due to a lack of funds in the account. For ACH charges, the rejection  
25 of the electronic requested charge is completely automated and results in no risk cost to the financial  
26 institution. There is also virtually no cost to administer the rejection as it is an automated computer  
27 function. However, the NSF fee is the same as if the transaction was paid into overdraft by the financial  
28 institution. What is even worse, financial institutions like Defendant not only charge one NSF fee for a

1 returned item (\$27 or \$33 here), they charge multiple fees for insufficient funds on the same item and  
2 attempt to justify the practice as caused by a merchant submitting the same item for payment multiple  
3 times.

4 34. Not only is this an unfair charge, it is not authorized by banks and credit unions'  
5 contracts with customers. Those contracts, like Defendant's, do not disclose or permit the charging of  
6 multiple NSF fees based on the same transaction with the same merchant. Nor do they permit charging  
7 an NSF fee followed by an overdraft fee on the same item if the item is paid into overdraft on a second  
8 presentment. Instead, the agreements identify an NSF fee as being singular on a per item basis.

9 **THE REGULATORY RESPONSE TO THE HARM CAUSED TO CUSTOMERS BY**  
10 **OVERDRAFT AND NSF FEES**

11 35. In response to financial institutions' use of overdraft and NSF fees as profit centers at the  
12 expense of vulnerable customers, the federal government stepped in to provide additional protections to  
13 customers with respect to overdraft policies. The regulations relevant to overdraft fees are found in the  
14 Truth in Savings Act ("TISA") directed specifically at credit unions, found at 12 C.F.R. § 707.1, *et seq.*  
15 and the Electronic Fund Transfer Act ("Regulation E"), 12 C.F.R. § 1005, *et seq.*

16 **TISA REQUIREMENTS**

17 36. The purpose of TISA is to allow credit unions and potential members to make informed  
18 decisions about accounts. (12 C.F.R. § 707.1(b).) Disclosures must be presented in a format allowing  
19 members to readily review the terms of the account and use consistent terminology to describe terms,  
20 which would include the overdraft terms in the account disclosure, fee agreement, and monthly  
21 statements. (12 C.F.R. § 707.3.)

22 37. When a credit union promotes the payment of overdrafts in advertisements, it must do so  
23 accurately, clearly, and conspicuously. (12 C.F.R. § 707.8; 12 C.F.R. § 707.11 (b).) In its account  
24 disclosure, a credit union must specifically authorize the fee it is charging, (12 C.F.R. § 707.4(b)(4)),  
25 and it must *list the conditions* under which the fee may be imposed. (*Id.* (emphasis added).) It must also  
26 list the various types of transactions that may be subject to an overdraft. (12 C.F.R. § 707, App. C.)

27 38. Defendant has violated TISA in regard to Plaintiff by, among other things, providing  
28 inaccurate disclosures and agreements and failing to clearly and conspicuously identify its true overdraft

1 practices.

2 **REGULATION E REQUIREMENTS**

3 39. In 2010, the Federal Reserve Board enacted regulations giving financial institutions the  
4 authority to charge overdraft fees on ATM and one-time debit card transactions **only** if the institution  
5 first obtained the customer’s affirmative consent. (12 C.F.R. § 1005.17 (Regulation E’s “Opt-in Rule”).)  
6 The special treatment provided for these transactions was supported by the CFPB study of actual  
7 practices that found: 1) ATM and debit card transactions are by far the most frequently-occurring  
8 transactions; 2) overdraft fee policies entail expensive fees at very little risk to the financial institutions;  
9 and 3) opted-in accounts have seven times as many overdrafts that result in fees as not opted-in  
10 accounts. (CFPB, *Data Point: Checking Account Overdraft*, (July 2014),  
11 [https://files.consumerfinance.gov/f/201407\\_cfpb\\_report\\_data-point\\_overdrafts.pdf](https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf) [last viewed April  
12 22, 2020].)

13 40. The Federal Reserve’s regulations specified what banks and credit unions had to do in  
14 order to comply with Regulation E and charge overdraft fees on one-time debit card and ATM  
15 transactions. They must obtain affirmative consent from the customer to charge the fees, and the  
16 affirmative consent must be obtained strictly in compliance with the Regulation E requirements. First,  
17 the customer must be provided the Opt-in Agreement before agreeing to opt-in. To qualify as  
18 affirmative consent, the Opt-in Agreement must accurately describe the overdraft program and include  
19 specific features of the overdraft program, including the standard overdraft practice and the enhanced  
20 overdraft program for debit card and ATM transactions.

21 41. When the customer is provided with the Opt-in Agreement, it must be presented as a  
22 standalone document and consent must be obtained separately from other consents and  
23 acknowledgements. The customer’s consent cannot serve any purpose other than opting into the  
24 overdraft program. The consent cannot be given through a default pre-selected, checked box and the  
25 financial institution may not provide different terms for the account depending on whether or not the  
26 customer opted into the overdraft program. The customer’s affirmative consent must be documented  
27 either with the customer’s signature, or by mailing the customer a confirmation that he or she opted in  
28 pursuant to their request 1) after being provided the Opt-in Agreement, and 2) after being notified of the

1 option to opt-out at any time.

2 42. Financial institutions are not permitted to include any additional information in the Opt-in  
3 Agreement unless specifically authorized by Regulation E, and financial institutions must ensure these  
4 procedures are followed no matter the medium used to offer customers the option to opt-in, whether  
5 online, by telephone, or in person at a branch. Furthermore, financial institutions are also prevented from  
6 aggressively marketing the benefits of Regulation E overdraft coverage, promoting their overdraft  
7 coverage as short-term credit programs, or otherwise encouraging customers to opt into their programs.

8 43. If the financial institution fails to obtain proper, affirmative consent from the customer in  
9 a manner that meets all of Regulation E’s requirements, it may not charge any overdraft fees on ATM  
10 and one-time debit card transactions.

11 44. Here, Defendant committed numerous Regulation E violations including, but not limited  
12 to, using an Opt-in Agreement that misinformed members about both its standard overdraft policies and  
13 the Regulation E-specific overdraft policies by falsely stating that overdrafts were assessed only when  
14 there was not enough money in an account to cover a transaction and Defendant paid the transaction  
15 anyway (actual “balance”), when instead, the Defendant used the bookkeeping artificial “available  
16 balance” to assess overdraft fees; improperly marketing its overdraft program, and failing to properly  
17 opt-in members to the program via certain mediums.

18 **HOW SOME BANKS AND CREDIT UNIONS HAVE DISCLOSED THEIR USE OF**  
19 **AVAILABLE BALANCE TO ASSESS OVERDRAFT AND NSF FEES IN THE ACCOUNT**  
20 **AGREEMENT**

21 45. Financial institutions have the ability to contract and disclose their actual practice of  
22 assessing overdraft and NSF fees on the artificial “available balance” rather than the actual “balance.”  
23 Other banks and credit unions have done so.

24 46. For example, Affinity Federal Credit Union’s account agreement states, in bold, that “[a]  
25 temporary debit authorization hold affects your account balance.” The language beneath this header  
26 explains that “the amount of funds in your account available for other transactions will be reduced by  
27 the amount of the temporary hold.”

28

1           47.     Likewise, GTE Federal Credit Union’s account agreement contains the following  
2 language:

3                   YOUR CHECKING ACCOUNT BALANCE: . . . Any purchases, holds,  
4 fees, charges, or deposits made on your account that have not yet posted  
5 will not appear in your actual balance . . . . Your available balance is the  
6 amount of money in your account that is available to you to use without  
7 incurring an overdraft or NSF fee. The available balance takes into  
8 account things like holds placed on deposits and pending transactions  
9 (such as pending debit card purchases) that the Credit Union has  
10 authorized but have not yet posted to your account . . . .

8           48.     Logix Credit Union has also adopted an account agreement specifically stating debit  
9 holds can cause overdrafts:

10                   The available balance takes into account things like holds placed on  
11 deposits and payments that have been authorized but have not yet posted  
12 to your account (such as pending debit card purchases). For example,  
13 assume you have an actual balance of \$50 and an available balance of \$50.  
14 If you were to swipe your debit card at a restaurant to buy lunch for \$20,  
15 then that merchant could ask us to pre-authorize the payment. In that case,  
16 we will reduce your available balance by \$20. Your actual balance would  
17 still be \$50 because this transaction has not yet posted, but your available  
18 balance would be \$30 because you have committed to pay the restaurant  
19 \$20. When the restaurant submits the transaction to us (which could be a  
20 few days later), we will post the payment transaction to your account and  
21 your actual balance will be reduced by \$20.

17           49.     Baxter Credit Union has an account agreement stating that “[a]vailable balance is used to  
18 determine when there are insufficient funds to pay an item presented for payment from the account” and  
19 describes the available balance as:

20                   generally equal to the actual balance, less the amount of any holds placed  
21 on recent deposits, holds for other reasons, and holds for pending  
22 transactions (such as pending debit card purchases) that the Credit Union  
23 has authorized but that have not yet posted to your account.

23           50.     Southland Credit Union’s account agreement also states that for purposes of determining  
24 whether to assess an overdraft fee, it:

25                   takes into account factors such as holds placed on deposits and pending  
26 transactions (such as pending debit card purchases) that the Credit Union  
27 has authorized but that have not yet posted to your account.

27           51.     Similarly, State Employees Credit Union of Maryland discloses that for purposes of  
28 assessing an overdraft fee, it:

1 takes into account things such as holds placed on deposits and decreases in  
2 your Available Balance (such as pending debit card purchases) that you  
initiated and SECU has authorized but that have not yet posted to your  
account.

3 52. MidFlorida Credit Union has also put forward a separate Overdraft Agreement which  
4 states that it:

5 takes into account things like holds placed on deposits and pending  
6 transactions (such as pending debit card purchases) that the Credit Union  
7 has authorized but that have not yet posted to your account.

8 53. Point Loma Credit Union explains in its account agreement that for purposes of assessing  
9 overdraft fees:

10 [a]ny purchases, holds, fees, other charges, or deposits made on my  
account that have not yet posted will not appear in my actual balance.

11 54. San Diego County Credit Union’s account agreement states that in determining whether  
12 an overdraft fee will be assessed against a member, “[w]e will consider all transactions that have posted  
13 to your account, any holds that may be in place on deposits you have made, and pending transactions  
14 (such as pending debit card purchases) that the Credit Union has authorized but that have not yet posted  
15 to your account.” It also contains a section on authorization holds, titled, “Authorization Holds for  
16 Debit Card Transaction,” which states:

17 [w]e generally place a temporary hold against some or all of the funds in  
18 the account linked to your debit card if and when an authorization request  
19 is obtained, [and that] [t]he amount of the authorization hold will be  
subtracted from your available balance.”

20 **HOW SOME BANKS AND CREDIT UNIONS HAVE DISCLOSED THAT A SINGLE NSF**  
21 **ITEM CAN RESULT IN MULTIPLE OVERDRAFT FEES**

22 55. Similarly, banks and credit unions have been able to properly contract and disclose the  
23 practice of charging multiple fees for the representation of the same item. For example, Air Academy  
24 Federal Credit Union clearly states: an NSF fee is “\$32.00 per presentment.”

25 56. Central Pacific Bank contracts unambiguously:

26 Items and transactions (such as, for example, checks and electronic  
27 transactions/payments) returned unpaid due to insufficient/non-sufficient  
28 (“NSF”) funds in your account, may be resubmitted one or more times for  
payment, and a \$32 fee will be imposed on you each time an item and

transaction resubmitted for payment is returned due to insufficient/nonsufficient funds.

57. Delta Community Credit Union states its NSF fee is “\$35 per presentment.” Further, in its Account Agreement, Delta unambiguously states as follows:

The Credit Union reserves the right to charge you an overdraft/insufficient funds fee if you write a check or initiate an electronic transaction that, if posted, would overdraw your Checking Account. Note that you may be charged an NSF fee each time a check or ACH is presented to us, even if it was previously submitted and rejected.

58. Glendale Federal Credit Union lists its NSF fee as “\$30 per presentment.”

59. First Financial Bank contracts unambiguously:

Merchants or payees may present an item multiple times for payment if the initial or subsequent presentment is rejected due to insufficient funds or other reason (representation). Each presentment is considered an item and will be charged accordingly.”

60. First Northern Credit Union lists its NSF fee as “\$22.00 per each presentment and any subsequent presentment(s).” Further, in its Account Agreement, First Northern unambiguously states as follows:

You further agree that we may charge a NSF fee each time an item is presented for payment even if the same item is presented for payment multiple times. For example, if you wrote a check to a merchant who submitted the payment to us and we returned the item (resulting in a NSF fee), the merchant may re-present the check for payment again. If the second and any subsequent presentments are returned unpaid, we may charge a NSF fee for each time we return the item. You understand this means you could be charged multiple NSF fees for one check that you wrote as that check could be presented and returned more than once. Similarly, if you authorize a merchant (or other individual or entity) to electronically debit your account, such as an ACH debit, you understand there could be multiple submissions of the electronic debit request which could result in multiple NSF fees.

61. Liberty Financial states its NSF fee is “27.00 per presentment.”

62. Los Angeles Federal Credit Union lists its NSF fee as “\$29 per presentment.”

63. Members First Credit Union states:

We reserve the right to charge an Non-Sufficient Funds Fee (NSF Fee) each time a transaction is presented if your account does not have sufficient funds to cover the transaction at the time of presentment and we decline the transaction for that reason. This means that a transaction may incur more than one Non-Sufficient Funds Fee (NSF Fee) if it is presented more than once...we reserve the right to charge a Non-Sufficient Funds (NSF Fee) for both the original presentment and the representation . . . .

64. Meriwest Credit Union lists its fee as “\$35.00/item per presentment.”

65. Partners 1<sup>st</sup> Federal Credit Union states:

Consequently, because we may charge a fee for an NSF item each time it is presented, we may charge you more than one fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

66. Regions Bank states:

If an item is presented for payment on your account at a time when there is an insufficient balance of available funds in your account to pay the item in full, you agree to pay us our charge for items drawn against insufficient or unavailable funds, whether or not we pay the item. If any item is presented again after having previously been returned unpaid by us, you agree to pay this charge for each time the item is presented for payment and the balance of available funds in your account is insufficient to pay the item.

67. Tyndall Federal Credit Union lists its NSF fee as “\$28.00 per presentment (maximum 5 per day).”

**HOW SOME BANKS AND CREDIT UNIONS HAVE DISCLOSED THEIR USE OF AVAILABLE BALANCE RATHER THAN THE ACTUAL BALANCE TO ASSESS OVERDRAFT FEES IN THE REGULATION E OPT-IN AGREEMENTS**

68. Numerous banks and credit unions that utilize the artificial “available balance” rather than the money in the account (“balance”) to assess overdraft fees contract and affirmatively disclose this practice in their Opt-in Agreements. As just one example, TD Bank’s Opt-in Agreement states as follows: “An overdraft occurs when your available balance is not sufficient to cover a transaction, but we pay it anyway. Your available balance is reduced by any ‘pending’ debit card transactions (purchases and ATM withdrawals), and includes any deposited funds that have been made available pursuant to our Funds Availability Policy.”

69. As another example, Credit Union 1, a credit union with over 87,000 members, states in its Opt-in Agreement, “[a]n overdraft occurs when you do not have enough available money (i.e., less any holds) in your checking account to cover a transaction, but we pay it anyway.”

70. Similarly, Communication Federal Credit Union’s Opt-in Agreement states, “[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, or the



1 transaction exceeds your available balance, but we pay it anyway. ‘Available Balance’ is your account  
2 balance less any holds placed on your account.”

3 71. Further, the Opt-in Agreement for San Diego County Credit Union, recognizing that  
4 “available balance” is at best an ambiguous term, explains on the same page, as follows: “In determining  
5 the available balance in your account, we will consider all transactions that have posted to your account,  
6 any holds that may be in place on deposits you have made and pending transactions (such as pending  
7 debit card purchases) that [have been] authorized but that have not yet posted to your account.”

8 72. The Opt-in Agreement for EECU explains for five-pages on the same form requiring  
9 signature, pursuant to Regulation E for overdraft coverage, including on page two, that “Your available  
10 balance takes into account holds that have been placed on deposits and pending transactions (such as  
11 pending debit card transactions) that the credit union has authorized but that have not yet posted to your  
12 account. **In other words, the available balance is [your] actual balance less any pending ATM  
13 withdrawals, debit card purchases, ACH transaction, checks being processed or other pending  
14 withdrawals from [your] account and less any deposits that are not yet available due to the credit  
15 union’s funds availability policy.**” (Emphasis in original.)

16 73. There are countless other examples of financial institutions accurately explaining the  
17 basis for imposing overdraft fees in their Opt-in Agreements. Financial institutions can accurately  
18 describe their overdraft programs in their Opt-in Agreements and Regulation E does not preclude them  
19 from doing so. When they fail to accurately describe, mislead, or misrepresent their overdraft policies in  
20 their Opt-in Agreements, financial institutions breach those contracts, as well as violate Regulation E.  
21 Further, financial institutions that fail to comply with other requirements of Regulation E as laid out in  
22 Paragraphs 39-44, *supra*, have not obtained the affirmative consent needed to assess any overdraft fees  
23 as governed by Regulation E, not just those assessed on a positive balance.

24 74. The importance of transparent checking account fee disclosures for both comparison  
25 shopping prior to opening an account, and avoiding overdraft and other fees after opening an account,  
26 are foremost:

27 Bank accounts are an essential financial product, used by 9 in 10  
28 American households, and need to be safe and transparent. Account  
agreements and fee schedules provide customers with account costs,  
terms, and conditions. Among the largest U.S. banks, however, the

1 median length of checking account disclosure documents is 40 pages, and  
2 the information is presented in varied formats with inconsistent wording,  
3 making it difficult for consumers to easily find the information they need  
4 to comparison shop, avoid overdraft and other fees, and manage their  
5 money.

6 (The Pew Charitable Trusts, *The Benefits of Uniform Checking Account Disclosures*, at p. 1 (Nov.  
7 2015), (internal footnotes omitted), [https://www.pewtrusts.org/-](https://www.pewtrusts.org/-/media/assets/2015/11/consumerbanking_accountdisclosurebrief.pdf)  
8 [/media/assets/2015/11/consumerbanking\\_accountdisclosurebrief.pdf](https://www.pewtrusts.org/-/media/assets/2015/11/consumerbanking_accountdisclosurebrief.pdf) [last viewed April 22, 2020].)

9 Accordingly, courts have come down heavy on banks and credit unions that have failed to accurately  
10 describe and misrepresent their overdraft and NSF fee practices.

11 **FACTUAL ALLEGATIONS AGAINST DEFENDANT**

12 75. At all relevant times, Defendant has had an overdraft and NSF fee program in place  
13 which, *inter alia*, is: 1) contrary to the express and implied terms of its contracts with members;  
14 2) contrary to Defendant’s representations about its overdraft and NSF fee program to its members; and  
15 3) contrary to its members’ expectations regarding the assessment of such fees.

16 76. Defendant entered into a uniform written contract with Plaintiff and the other Class  
17 Members titled “Deposit Account & Services Agreement” (hereinafter “Account Agreement”). (The  
18 Account Agreement attached hereto as Ex. 1, dated January 1, 2014, is believed to be one of the  
19 operative agreements during the class period and representative of the account agreements in the class  
20 period regarding overdraft policies.) The Account Agreement promised that Defendant would not  
21 charge overdraft or NSF fees for any type of transaction when there was enough money in the account to  
22 pay for the transaction. It stated in a section called “Overdraft and Courtesy Clearing:” “If a check,  
23 preauthorized withdrawal, ACH, ATM or debit/check card transaction drawn on your account attempts  
24 to clear and there are not sufficient funds in the account to pay the item . . . ,” Overdraft Protection or  
25 Courtesy Pay may apply. Specifically, under “Courtesy Pay Overdraft Services,” it stated: “USECU  
26 offers Courtesy Pay Overdraft Services which allow the account to go into a negative status to pay items  
27 which would otherwise be returned unpaid. A fee applies for each item.” In the Account Agreement,  
28 Defendant described an overdraft as occurring when an item would “overdraw the account balance,” or  
when the account goes “into negative status” or there is a “negative balance,” and that an account would  
remain overdrawn “until the negative balance is paid” or the account is brought “positive.”

1           77.     The language “overdraw the account balance,” “account into negative status,” “not  
2 sufficient funds,” and “negative balance” refer to the “balance” or all of the money in the account. In  
3 other words, the Account Agreement did not authorize Defendant to assess an overdraft or NSF fee—  
4 because an overdraft or NSF situation had not occurred—unless there was a negative account balance or  
5 a transaction exceeded the account’s actual balance. Nowhere did the Account Agreement state that to  
6 determine whether there was money in an account to cover a transaction, Defendant would not look to  
7 the actual amount of money in the account but, instead, to the money in the account only *after deducting*  
8 *holds placed on deposits and after also deducting holds placed on pending debit card transactions.*  
9 Despite the Account Agreement’s express language, Defendant charged overdraft and NSF fees not  
10 based on the money in the account, but instead based on the money in the account after deducting for  
11 deposit holds and pending debit transactions (the artificial “available balance”).

12           78.     The Account Agreement, at most, stated in a separate section pertaining to deposits rather  
13 than overdraft and NSF fees, that temporary holds might be placed on certain deposited items before  
14 they could be withdrawn (the “collected balance”). But this section did not state that such holds could  
15 result in fees, and it certainly did not state the holds placed on funds earmarked for pending debit card  
16 transactions (the artificial “available balance”) could result in an overdraft or NSF fee.

17           79.     Here, Defendant charges expensive overdraft and NSF fees when the artificial “available  
18 balance” is negative but the account contains as much or more money than has been requested.  
19 Defendant’s practice of charging overdraft and NSF fees, even when there is enough money in the  
20 account to cover a transaction presented for payment, is inconsistent with the Account Agreement. And  
21 Defendant’s practices are inconsistent with its representations to its members, including where  
22 Defendant sells its members on the fact that it is a “not-for-profit” cooperative. This is despite the fact  
23 that Defendant charges a \$27 or \$33 fee that is in no way related to an overdraft.

24           80.     Defendant also has an improper practice of charging multiple fees for the same electronic  
25 transaction or item. Defendant charges a \$27 or \$33 fee when an electronic transaction or item is first  
26 processed for payment and Defendant determines that there is not enough money in the account to cover  
27 the transaction. Defendant then charges an *additional* NSF or overdraft fee if the same item is presented  
28 for processing again by the payee.

1 81. Defendant’s practice of charging additional NSF or overdraft fees for the representment  
2 of the same item violates its Account Agreement. The Account Agreement states under Courtesy Pay,  
3 subsection “Returned Items”: “Items may be returned unpaid. A fee may apply.” In other words, the  
4 Account Agreement drafted by Defendant states, in the singular, “ a fee” may apply, not plural  
5 “multiple fees” will apply. And the term “item” means a single electronic transaction, and a  
6 “representment” or “retry” of an “item” does not change it into a new or different item. It is still the  
7 same “item” being presented by the same merchant in the same dollar amount; not a new “item.” An  
8 electronic item reprocessed after an initial return for insufficient funds, especially through no action by  
9 the customer, cannot and does not fairly become a new, unique additional “item” for fee assessment  
10 purposes.

11 82. Moreover, Defendant’s Fee Schedule during the operative class periods also refers to an  
12 NSF fee as “27.00/ea” for “1-5 items (within a 12-month period)” or “\$33.00/ea” for “6+ items (within a  
13 12-month period).” It does not state the Defendant can assess multiple fees per item each time, or for  
14 the retry or representment of an item. (See Fee Schedule, dated February 1, 2014, Ex. 2.)

15 Overdraft/Non-sufficient Funds (NSF):

16 Applies to checks, Bill Pay, ACH, ATM/POS and other electronic  
debits that are paid or returned.

17 • Overdraft paid by Courtesy Pay:

(waived if resulting balance is less than \$10 negative)

- 18 ▶ 1-5 items (within a 12-month period) ..... \$27.00/ea
- 19 ▶ 6+ items (within a 12-month period) .....\$33.00/ea

20 • Overdraft paid by transfer:

(from savings, checking, line of credit or credit card): ..... \$10.00/ea

21 • Non-sufficient Funds (NSF):

22 Applies to checks, Bill Pay, ACH, ATM/POS and other electronic  
debits that are paid or returned.

- 23 ▶ 1-5 items (within a 12-month period) ..... \$27.00/ea
- ▶ 6+ items (within a 12-month period) .....\$33.00/ea

24 83. Defendant’s standardized Account Agreement and Fee Schedule did not disclose this  
25 practice and misrepresented to customers that Defendant would only charge a single fee for a returned  
26 item. Further, because Defendant charged NSF fees improperly, and because Defendant’s improper  
27 deduction of the additional, improper fees from a member’s account further decreased the member’s  
28 “balance” or “available balance,” it likely generated even more NSF fees or overdraft fees to the

1 account.

2 84. On October 1, 2019, Defendant added language to its Fee Schedule disclosing its  
3 assessment of multiple fees on a single item. However, Defendant did not provide its revised Fee  
4 Schedule to members. The language was not provided to members until it was added to the Account  
5 Agreement on July 1, 2020.

6 85. Courts in various jurisdictions have recognized that when banks and credit unions charge  
7 multiple NSF fees on the same item while failing to clearly disclose such practice, it gives rise to claims  
8 and causes of action on a class wide basis. (See e.g., *Morris v. Bank of America* (W.D.N.C., March 29,  
9 2019) No. 3:18-cv-00157-RJC-DSC, 2019 WL 1274928 (Order denying motion to dismiss allegations  
10 regarding improper repeat NSF claims); *Tannehill v. Simmons Bank* (E.D. Ark., Oct. 21, 2019) No.  
11 3:19-cv-140-DPM, Docket No. 23 (Order denying motion to dismiss repeat NSF claims); *Garcia v.*  
12 *UMB Bank NA* (Jackson Co., Missouri, Circuit Court, Oct. 18, 2019) No. 1916-CV01874 (Order  
13 denying motion to dismiss repeat NSF claims); *Tisdale v. Wilson Bank and Trust* (Davidson Co. Tenn.,  
14 Chancery Court, Oct. 17, 2019) No. 19-400-BC (Order denying motion to dismiss repeat NSF claims);  
15 *Noe v. City National Bank of West Virginia* (S.D.W.V. Feb. 19, 2020) Civil Action No. 3:19-0690  
16 (Order denying motion to dismiss repeat NSF claims); *Ingram v. Teachers Credit Union* (Indiana  
17 Commercial Court, Marion County Superior Court) Cause No. 49D01-1908-PL-035431 (Order denying  
18 motion to dismiss repeat NSF claims); *Perks, et al. v. TD Bank, N.A.* (S.D.N.Y. Mar. 17, 2020) Civil  
19 Action No. 18-CV-11176 (Order denying motion to dismiss breach of contract claim for repeat NSF  
20 fees); and *Coleman, et al. v. Alaska USA Federal Credit Union*, (D. Alaska Apr. 14, 2020) Civil Action  
21 No. 3:19-cv-0229-HRH (Order denying motion to dismiss plaintiffs’ breach of contract and good faith  
22 and fair dealing claims for repeat NSF fees.)

23 86. In addition to the Account Agreement, Defendant entered into an identical Regulation E  
24 Opt-in Agreement with Plaintiff and all putative Class Members who wanted to join Defendant’s  
25 Regulation E overdraft program. The Opt-in Agreement defined an overdraft as occurring when “you  
26 do not have enough money in your account to cover a transaction, but [Defendant] pay[s] it anyway.”  
27 [Ex. 3 – USE Opt-in Agreement.]

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

9           88. The Opt-in Agreement did not accurately and in a clear and easily understandable way  
10 describe what constitutes an overdraft and under what circumstances the member would be assessed an  
11 overdraft fee, and as such the Opt-in Agreement does not comply with Regulation E’s requirements.

12           89. Several of Defendant’s other practices also violate Regulation E. Regulation E  
13 discourages financial institutions from aggressively marketing their overdraft programs, or for making  
14 them appear as credit lines. But in total disregard for Regulation E, Defendant’s training materials for  
15 member-facing employees actively encourage employees to promote Defendant’s overdraft program.  
16 These materials focus solely on the benefits of the overdraft coverage but not the costs, including the  
17 exorbitant fees. Defendant also improperly markets its overdraft program as a line of credit. Defendant  
18 discloses its overdraft coverage limit to members (which ranges from \$250-\$2,000 depending on  
19 account type), which encourages members to utilize the coverage like a credit line. Notably, the Office  
20 of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System  
21 (Board); Federal Deposit Insurance Corporation (FDIC); and National Credit Union Administration  
22 (NCUA) issued a Joint Guidance cautioning financial institutions from “promoting overdrafts in a  
23 manner that leads consumers to believe that it is a line of credit by informing consumers that their  
24 account includes an overdraft protection limit of a specified dollar amount.” *See* Joint Guidance on  
25 Overdraft Protection Programs, 70 FR 9127-01. If a limit is included, the Joint Guidance counseled that  
26 disclosures should also “clearly disclos[e] the terms and conditions of the service, including how fees  
27 reduce overdraft protection dollar limits, and how the service differs from a line of credit.” *Id.* Further,  
28 Defendant’s overdraft program allows members 14 days to repay, making it appear as a short-term credit

1 facility rather than a fee-based courtesy. In addition, before a member qualifies for courtesy pay, they  
2 must have a certain score assigned by the Chex System, which takes into account at least certain aspects  
3 of traditional credit scoring, further increasing the similarity to a credit line.

4 90. Regulation E also requires financial institutions to follow certain procedures when they  
5 opt-in customers to Regulation E overdraft coverage for one-time debit card and ATM transactions. For  
6 instance, members must be provided the Opt-in Agreement prior to a customer opting-in. However, for  
7 at least those members of Defendant who opt into Regulation E coverage by telephone,  
8 Defendant does not read or otherwise provide them the language in the Opt-in Agreement before they  
9 affirmatively consent to be included in the program. And when members opt-in online, there is no  
10 requirement that they have to open the Opt-in Agreement and read its provisions before opting-in. Both  
11 of these violate Regulation E's requirement that customers be provided the Opt-in Agreement prior to  
12 opt-in. Moreover, on information and belief, Defendant does not routinely provide members with a  
13 copy of their signed Opt-in Agreements or confirmation letters, as required by Regulation E.<sup>1</sup> Discovery  
14 is ongoing and further Regulation E violations may be discovered and included in Plaintiff's claim  
15 against Defendant for violation of Regulation E.

16 91. Plaintiff and the Class Members have performed all conditions, covenants, and promises  
17 required by each of them in accordance with the terms and conditions of the contracts.

18 92. Meanwhile, Plaintiff and the Class Members could not reasonably have anticipated the  
19 harm resulting from Defendant's practice throughout the class period. The money in the account,  
20 without deductions for holds on pending transactions or on deposits, as already stated, is known as the  
21 "balance," and is considered the official balance of the account. It is the balance provided to members  
22 in monthly statements, which is the official record of activity in the account. It is the balance Defendant  
23 uses to determine interest on deposits and any minimum balance requirements; the balance Defendant  
24 uses to report its deposits to regulators, shareholders, and the public; the balance Defendant provides to  
25 regulators in call reports and reserve reports; the balance Defendant uses in financial reports to  
26 shareholders; and the balance Defendant uses for internal financial reporting. When Defendant refers to

27 <sup>1</sup> Defendant has not provided Plaintiff with a copy of his signed Opt-in Agreement or the  
28 confirmation letter that purportedly would have been sent to him, thus raising concern that this may not  
have been a routine practice in further violation of Regulation E.

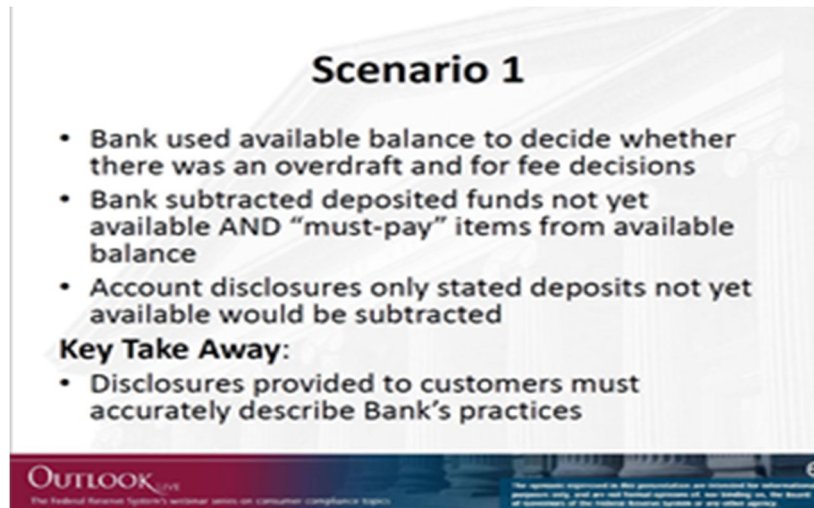
1 an account in “negative status” or “account balance” or “negative balance” it is reasonable to interpret  
2 and understand these terms as referring to the account’s official balance—the balance without deducting  
3 for pending debit card transactions or holds on deposits. Further, the Account Agreement and Fee  
4 Schedule specifically stated that only a singular fee would be charged for a returned item. Moreover,  
5 the Opt-in Agreement fails to accurately describe Defendant’s overdraft policies which are based on use  
6 of the “available balance” when the Opt-in Agreement describes use of the actual balance for overdraft  
7 fee assessments. Thus, by assessing overdraft fees on one-time debit card and ATM transactions using  
8 the available balance, Defendant breached the terms of its Opt-in Agreement. Further, by using an  
9 inaccurate Opt-in Agreement, failing to follow proper opt-in procedures, and by aggressively marketing  
10 the benefits of the overdraft program (including promoting it like a credit line), Defendant violated  
11 Regulation E and was not entitled to assess any overdraft fees on one-time debit card and ATM  
12 transactions, not just those assessed on a positive balance

13 93. In its study, the CFPB concluded that when a financial institution creates the “overall  
14 impression” that it will determine overdraft transactions and fees based on the balance in the account  
15 rather than an artificially created balance deducting pending transactions, then the “disclosures were  
16 misleading or likely to mislead, and because such misimpressions could be material to a reasonable  
17 consumer’s decision-making and actions, examiners found the practice to be deceptive.” The CFPB  
18 further found that “consumers could not reasonably avoid the fees (given the misimpressions created by  
19 the disclosures).” (CFPB, *Supervisory Highlights*, at p. 9 (Winter 2015),  
20 [https://files.consumerfinance.gov/f/201503\\_cfpb\\_supervisory-highlights-winter-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf) [last viewed  
21 April 22, 2020].)

22 94. Yet contrary to the Account Agreement and Opt-in Agreement, Defendant’s policy and  
23 practice during the class period was to ignore whether there was money in the account or a negative  
24 balance for purposes of assessing overdraft or NSF fees. Instead, Defendant assessed overdraft and NSF  
25 fees based on the artificial “available balance,” rather than using the actual money in the account as the  
26 Account Agreement required.



1 95. In a recent Federal Interagency Compliance Discussion regarding improper overdraft  
2 fees, the CFPB condemned exactly the conduct Plaintiff challenges in this lawsuit, and called what  
3 Defendant is doing here during the relevant class period an “Unfair Practice”:



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12 (Excerpts from Interagency Overdraft Services Consumer Compliance Discussion Presentation Slides,  
13 dated Nov. 9, 2016, [https://www.consumercomplianceoutlook.org/outlook-live/2016/interagency-  
14 overdraft-services-consumer-compliance-discussion/](https://www.consumercomplianceoutlook.org/outlook-live/2016/interagency-overdraft-services-consumer-compliance-discussion/) [last viewed April 22, 2020].)

15 96. At the time of the overdrafts and NSF fees that predated the applicable statute of  
16 limitations, Plaintiff did not and could not have discovered he had been injured or known the actual  
17 cause of his injuries, even exercising reasonable diligence. While Plaintiff understood that he was  
18 assessed fees, he did not understand the cause of those fees within the statute of limitations period  
19 because Defendant hid its actual practice from its members by describing a different practice in its  
20 contracts and other materials disseminated to its members. This not only reasonably delayed discovery,  
21 but Defendant’s affirmative representations and actions also equitably toll any statute of limitations, and  
22 additionally equitably estop Defendant.

23 97. Therefore, Plaintiff, on behalf of himself and all others similarly situated, seeks relief as  
24 set forth below.

25 **PLAINTIFF HAS BEEN DAMAGED AND HAS STANDING TO BRING THIS LAWSUIT**

26 98. Plaintiff and the Class Members were harmed by Defendant’s policy and practice of  
27 charging overdraft or NSF fees when there was money in the account to cover the transaction and other  
28 illegal overdraft and NSF practices as set forth here and established in discovery. By doing so,

1 Defendant breached its contracts with Plaintiff and the absent Class Members and/or violated  
2 regulations and statutes. It will be necessary to obtain Defendant's records to determine each instance of  
3 such a wrongful overdraft or NSF fee. As just a few examples, on or about November 30, 2018,  
4 Plaintiff had a positive balance of \$1,093.46 in his account. He made a payment in the amount of  
5 \$685.63, which left him with a positive balance of \$407.83. Yet, Defendant charged Plaintiff a \$27.00  
6 "Courtesy Pay Overdraft Fee" anyway. On or about December 4, 2018, Plaintiff had a positive balance  
7 of \$200.93 in his account. He made a payment in the amount of \$187.68, which left him with a positive  
8 balance of \$13.25. Yet, Defendant charged Plaintiff a \$27.00 "Courtesy Pay Overdraft Fee." Likewise,  
9 on December 31, 2018, Plaintiff had a positive balance of \$159.97 in his account. He made a payment  
10 in the amount of \$145.95, which left him with a positive balance of \$14.02, but he was charged a \$27.00  
11 "Courtesy Pay Overdraft Fee" anyway. Additionally, on May 25, 2020, Plaintiff made a card purchase  
12 for \$160.00, leaving him with a positive balance of \$40.00, but Defendant charged him a \$27.00  
13 "Courtesy Pay Overdraft Fee." And on August 26, 2019, Plaintiff made a POS card purchase at 7-  
14 Eleven for \$27.01 leaving him with a positive balance of \$543.67. Yet, Defendant charged him a \$27.00  
15 "Courtesy Pay Overdraft Fee" anyway. Plaintiff has a reasonable belief that discovery and a complete  
16 review of Defendant's records, including Plaintiff's monthly statements and transaction history, will  
17 show multiple instances in which Defendant improperly charged Plaintiff overdraft and NSF fees for  
18 transactions despite the fact that he had enough money in his account to cover the transactions.

19 99. In addition, Plaintiff and the Class Members were harmed by Defendant's policy and  
20 practice of charging an NSF fee more than once for the same "item." By doing so, Defendant breached  
21 its contracts with Plaintiff and the absent Class Members. It will be necessary to obtain Defendant's  
22 records to determine each instance of such a wrongful NSF fee; however, Plaintiff has already  
23 uncovered at least one example. Specifically, on August 9, 2019, Defendant charged Plaintiff a \$27.00  
24 NSF fee for a transaction item with BARCLAYCARD US. This fee is not in dispute as it was a \$27.00  
25 NSF fee for that item. However, what was not authorized by the Account Agreement was Defendant  
26 charging Plaintiff another \$27.00 in NSF fees on August 13 when BARCLAYCARD US resubmitted  
27 the same item listed as "RETRY" for payment and Defendant again returned it unpaid. In charging a  
28 second \$27.00 fee for the same item, Defendant increased the fee for the returned item from \$27.00 to

1 \$54.00. That was not authorized and is in direct conflict with the Account Agreement and Fee Schedule  
2 that identifies a \$27 fee for a NSF returned item—not a \$54.00 fee.

3 100. Moreover, Defendant’s assessment and unilateral taking of improper overdraft and NSF  
4 fees further reduced the balance and amount of funds in members’ accounts, resulting in and  
5 aggressively causing subsequent, otherwise non-overdraft or non-NSF transactions to be improperly  
6 treated as transactions for which Defendant assessed further overdraft or NSF fees. This practice was  
7 deemed to be deceptive and substantially harmful to customers by the CFPB, which concluded in its  
8 studies:

9 Examiners also observed at one or more institutions the following  
10 sequence of events after the institutions switched balance-calculation  
11 methods: a financial institution authorized an electronic transaction, which  
12 reduced a customer’s available balance but did not result in an overdraft at  
13 the time of authorization; settlement of a subsequent unrelated transaction  
14 that further lowered the customer’s available balance and pushed the  
15 account into overdraft status; and when the original electronic transaction  
16 was later presented for settlement, because of the intervening transaction  
17 and overdraft fee, the electronic transaction also posted as an overdraft and  
18 an additional overdraft fee was charged. Because such fees caused harm  
19 to consumers, one or more supervised entities were found to have acted  
20 unfairly when they charged fees in the manner described above.  
21 Consumers likely had no reason to anticipate this practice, which was not  
22 appropriately disclosed. They therefore could not reasonably avoid  
23 incurring the overdraft fees charged. Consistent with the deception  
24 findings summarized above, examiners found that the failure to properly  
25 disclose the practice of charging overdraft fees in these circumstances was  
26 deceptive.

27 (*Infra*, Supervisory Highlights, Winter 2015, at pp. 8-9.) A complete evaluation of Defendant’s records  
28 is necessary to determine the full extent of Plaintiff’s harm from this practice.

29 **CLASS ACTION ALLEGATIONS**

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

32 102. Plaintiff brings this case, and each of his respective causes of action, as a class action.

33 103. The “Class” is composed of one of the following:

34 **The Sufficient Funds Class:**

35 **All members of Defendant who have or have had accounts with**  
36 **Defendant who incurred an overdraft fee(s) or NSF fee(s) when the**  
37 **balance in the checking account was sufficient to cover the**  
38

1 transaction(s) during the period beginning four years preceding the  
2 filing of this Complaint and ending on the date the class is certified.

3 **The Repeat NSF Class:**

4 All members of Defendant who have or have had accounts with  
5 Defendant who incurred more than one NSF fee or an NSF fee  
6 followed by an overdraft fee for the same item during the period  
7 beginning four years preceding the filing of this Complaint and  
8 ending on June 30, 2020.

9 **The UCL Class:**

10 All members of Defendant who have been assessed overdraft and/or  
11 NSF fees that were in violation of the Account Agreement, Opt-in  
12 Agreement, TISA, and/or Regulation E, pursuant to California Unfair  
13 Competition Law, Bus. & Prof. Code, §§ 17200, *et seq.*, during the  
14 class period beginning four years preceding the filing of this  
15 Complaint and ending on the date the Class is certified. Following  
16 discovery, this definition will be amended as appropriate.

17 **The Regulation E Class:**

18 All members of Defendant who have or have had accounts with  
19 Defendant who incurred an overdraft fee(s) for ATM or non-  
20 recurring debit card transaction(s) during the period beginning June  
21 2, 2019, and ending on the date the Class is certified.

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

25 105. This action has been brought and may be properly maintained on behalf of each member  
26 of the Class pursuant to Code of Civil Procedure section 382, *et seq.*

27 106. **Numerosity** – The members of the Classes are so numerous that joinder of all members  
28 would be impracticable. While the exact number of Class Members is presently unknown to Plaintiff,  
and can only be determined through appropriate discovery, Plaintiff believes based on the percentage of  
customers that are harmed by these practices with credit unions with similar practices, that the Classes  
are likely to include thousands of members.

107. Upon information and belief, Defendant has databases, and/or other documentation, of its  
members' transactions and account enrollment. These databases and/or documents can be analyzed by  
an expert to ascertain which of Defendant's members has been harmed by its practices and thus qualify  
as a Class Member. Further, the Class(es) definitions identify groups of unnamed plaintiffs by

1 describing a set of common characteristics sufficient to allow a member of that group to identify himself  
2 or herself as having a right to recover. Other than by direct notice through mail or email, alternative  
3 proper and sufficient notice of this action may be provided to the Class Members through notice  
4 published in newspapers or other publications.

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

- 8 • whether, pursuant to the Account Agreement, Defendant promised to Plaintiff and the  
9 Class Members that it would not charge an overdraft or NSF fee when there was enough  
10 money in the account to cover the transaction;
- 11 • whether Defendant breached the Account Agreement by assessing overdraft or NSF fees  
12 for transactions when members’ accounts contained enough money to cover the  
13 transactions;
- 14 • whether, pursuant to the Account Agreement and/or Fee Schedule, Defendant contracted  
15 that it would only charge a single fee for an NSF item rather than charge repeat fees for  
16 the same item;
- 17 • whether Defendant breached the Account Agreement and/or Fee Schedule by assessing  
18 repeat fees on the same item;
- 19 • whether Defendant breached the Account Agreement, Opt-in Agreement, TISA or  
20 Regulation E when it assessed overdraft and NSF fees on its members;
- 21 • whether the language in the Account Agreement and/or Fee Schedule is ambiguous;
- 22 • whether Defendant is liable for breach of the covenant of good faith and fair dealing,  
23 unjust enrichment and money had and received; and
- 24 • whether Defendant’s conduct violated state consumer protection laws.

25 109. **Typicality** – Plaintiff’s claims are typical of all Class Members. The evidence and the  
26 legal theories regarding Defendant’s alleged wrongful conduct committed against Plaintiff and all of the  
27 Class Members are substantially the same because all of the relevant agreements between Defendant and  
28 its members were identical as to all relevant terms, and also because, *inter alia*, the challenged practices

1 of charging members for overdraft fees or NSF fees when there were sufficient funds in the accounts to  
2 pay for the transactions at issue and charging members multiple fees for the same item are uniform for  
3 Plaintiff and all Class Members. Accordingly, in pursuing his own self-interest in litigating his claims,  
4 Plaintiff will also serve the interests of the other Class Members.

5 110. **Adequacy** – Plaintiff will fairly and adequately protect the interests of the Class  
6 Members. Plaintiff has retained competent counsel experienced in class action litigation to ensure such  
7 protection. There are no material conflicts between the claims of the representative Plaintiff and the  
8 members of the Classes that would make class certification inappropriate. Plaintiff and his counsel  
9 intend to prosecute this action vigorously.

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

1 112. Plaintiff is not aware of any separate litigation instituted by any of the Class Members  
2 against Defendant. Plaintiff does not believe that any other Class Members' interests in individually  
3 controlling a separate action are significant, in that Plaintiff has demonstrated above that his claims are  
4 typical of the other Class Members and that he will adequately represent the Class. This particular  
5 forum is desirable for this litigation because Defendant's headquarters are located in this County and the  
6 claims arose from activities that occurred largely in this County. Plaintiff does not foresee significant  
7 difficulties in managing the class action in that the major issues in dispute are susceptible to class proof.

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

12 114. This matter is properly maintained as a class action pursuant to Code of Civil Procedure  
13 section 382, *et seq.*, in that without class certification and determination of declaratory, injunctive,  
14 statutory and other legal questions within the class format, prosecution of separate actions by individual  
15 members of the Classes will create the risk of:

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

22 115. Common questions of law and fact exist as to the members of the Classes and  
23 predominate 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, including consideration  
25 of:

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

1 or against members of the Classes;

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

5 **FIRST CAUSE OF ACTION**

6 **(Breach of Contract – Account Agreement)**

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

9 117. Plaintiff and each of the Class Members entered into the Account Agreement, attached  
10 hereto as Ex. 1, with Defendant covering the subject of overdraft and NSF fees. This contract was  
11 drafted by and binding on Defendant.

12 118. Among other promises Defendant made in the Account Agreement, Defendant promised  
13 that it would not assess overdraft and NSF fees for any type of transaction when there was enough  
14 money in the account to pay for the transaction. It stated in a section called “Overdrafts” and a  
15 subsection called “Overdraft and Courtesy Clearing:” “If a check, preauthorized withdrawal, ACH,  
16 ATM or debit/check card transaction drawn on your account attempts to clear and there are not  
17 sufficient funds in the account to pay the item . . . ,” Overdraft Protection or Courtesy Pay may apply.  
18 Specifically, under Courtesy Pay, it stated: “USECU offers Courtesy Pay Overdraft Services which  
19 allow the account to go into a negative status to pay items” and “[a] fee applies for each item.” In the  
20 Account Agreement, Defendant described an overdraft as occurring when an item would “overdraw the  
21 account balance,” or when the account goes “into negative status,” and that an account would remain  
22 overdrawn “until the negative balance is paid” or the account is brought “positive.”

23 119. Nowhere did the Account Agreement explain that Defendant would create an artificial  
24 system by which it would deduct pending debit transactions or holds on deposits for purposes of  
25 determining whether an account was overdrawn such that an overdraft or NSF fee would be assessed.

26 120. Defendant also promised in the Account Agreement that it would only assess a single  
27 NSF fee for an unpaid, returned item due to purported insufficient funds when, in practice, it charged a  
28 \$27 or \$33 fee when an electronic transaction or item was first processed for payment and Defendant



1 determined there was not enough money in the account to cover the transaction, and then charged an  
2 *additional* NSF or overdraft fee if the same item was presented for processing again by the payee, even  
3 though the account holder took no action to resubmit the item for payment.

4 121. Defendant’s practice violates the Account Agreement which states under Courtesy Pay,  
5 subsection “Returned Items”: “Items may be returned unpaid” and “[a]” fee may apply.” This means  
6 that Defendant can charge a singular fee for an item. Yet Defendant wrongfully treated a “retry” or  
7 “representment” of an item as a new and separate “item” justifying additional NSF or overdraft fees in  
8 violation of the Account Agreement.

9 122. Plaintiff and the Class Members have performed all conditions, covenants, and promises  
10 required by each of them on their part to be performed in accordance with the terms and conditions of  
11 the Account Agreement, except for those they were prevented from performing or which were waived or  
12 excused by Defendant’s misconduct.

13 123. Defendant breached the terms of the Account Agreement by, *inter alia*, assessing  
14 overdraft or NSF fees when there was enough money in the account to cover the transaction and by  
15 assessing multiple fees for the same electronic transaction or item.

16 124. As a proximate result of Defendant’s breaches, Plaintiff and the Class Members have  
17 been damaged in an amount to be proven at trial and seek relief as set forth in the Prayer below.

18 **SECOND CAUSE OF ACTION**

19 **(Breach of Contract – Opt-in Agreement)**

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

22 126. Plaintiff and Class Members entered into the Opt-in Agreement with Defendant covering  
23 the subject of overdraft fees. This contract was drafted by and is binding upon Defendant.

24 127. In the Opt-in Agreement, Defendant promised it would assess overdraft fees only when  
25 there was not enough money in the account to cover the transaction.

26 128. The contract incorporated by reference all applicable laws regarding its subject matter,  
27 including 12 C.F.R. § 1005.17, which mandates that all Opt-in Agreements for assessing overdraft fees  
28 for ATM and non-recurring debit card transactions be separate from the Account Agreement and

1 accurately describe the overdraft fee practice, and bars financial institutions from assessing fees for non-  
2 recurring debit card and ATM transactions if they have not fully complied with that section's  
3 requirements.

4 129. Plaintiff and Class Members have performed all conditions, covenants, and promises  
5 required by each of them on their part to be performed in accordance with the terms and conditions of  
6 the Opt-in Agreement, except for those they were prevented from performing or which were waived or  
7 excused by Defendant's misconduct.

8 130. Defendant breached the express terms of the Opt-in Agreement by, *inter alia*, assessing  
9 overdraft fees when there was money in the account to cover the transaction or transactions at issue.

10 131. As a proximate of Defendant's breach of the Opt-in Agreement, Plaintiff and the Class  
11 Members have been damaged in an amount to be proven at trial and seek relief as set forth in the Prayer  
12 below.

13 **THIRD CAUSE OF ACTION**

14 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

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

17 133. Plaintiff and each of the Class Members entered into contracts with Defendant covering  
18 the subject of overdraft and/or NSF transactions, which have been identified herein as the Account  
19 Agreement and Opt-in Agreement. The Account Agreement and Opt-in Agreement were drafted by and  
20 are binding upon Defendant.

21 134. In the contracts, Defendant promised that it would only assess overdraft or NSF fees  
22 when there was not enough money in the account to cover the transaction. Yet Defendant assessed such  
23 fees when Plaintiff and Class Members had enough money in the account to cover the transaction.  
24 Defendant also promised that it would only charge a single NSF fee for an item, when in reality  
25 Defendant assessed NSF and/or overdraft fees multiple times for the same electronic item.

26 135. Further, good faith is an element of every contract. Whether by common law or statute,  
27 all contracts impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing,  
28 in connection with executing contracts and discharging performance and other duties according to their

1 terms, means preserving the spirit—not merely the letter—of the bargain. Thus, the parties to a contract  
2 are mutually obligated to comply with the substance of their contract in addition to its form. Evading  
3 the spirit of the bargain and abusing the power to specify terms, constitute examples of bad faith in the  
4 performance of contracts.

5 136. The material terms of the contracts therefore include the implied covenant of good faith  
6 and fair dealing, whereby Defendant covenanted that it would, in good faith and in the exercise of fair  
7 dealing, deal with Plaintiff and each Class Member fairly and honestly and do nothing to impair,  
8 interfere with, hinder, or potentially injure Plaintiff and the Class Members’ rights and benefits under  
9 the contracts.

10 137. Plaintiff and the Class Members have performed all conditions, covenants, and promises  
11 required by each of them on their part to be performed in accordance with the terms and conditions of  
12 the contracts, except for those they were prevented from performing or which were waived or excused  
13 by Defendant’s misconduct.

14 138. Defendant breached the implied covenant of good faith and fair dealing based, *inter alia*,  
15 on its practices of assessing fees when there was enough money in the account to cover the transaction.  
16 Defendant could easily have avoided acting in this manner by simply changing the programming in its  
17 software to charge overdraft and NSF fees only when there really was not enough money in the account  
18 to cover the transaction in question and to only charge a fee once per item. Instead, Defendant  
19 unilaterally elected to and did program its software to create an accounting gimmick, the artificial  
20 “available balance,” which would maximize its overdraft and NSF fees. It also programmed the  
21 software to charge multiple fees each time the same item was represented for payment by a merchant.  
22 In so doing, and in implementing its overdraft and NSF fee programs for the purpose of increasing and  
23 maximizing overdraft and NSF fees, Defendant executed its contractual obligations, including any  
24 discretion it had, in bad faith, depriving Plaintiff and the Class Members of the full benefit of the  
25 contracts.

26 139. As a proximate result of Defendant’s breach of the implied covenant of good faith and  
27 fair dealing, Plaintiff and the Class Members have been damaged in an amount to be proven at trial and  
28 seek relief as set forth in the Prayer below.

**FOURTH CAUSE OF ACTION**

**(Unjust Enrichment/Restitution)**

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

141. As a result of the wrongful misconduct alleged above, Defendant unjustly received millions of dollars in overdraft and NSF fees.

142. Because Plaintiff and the Class Members paid the erroneous overdraft and NSF fees assessed by Defendant, Plaintiff and the Class Members have conferred a benefit on Defendant, albeit undeservingly. Defendant has knowledge of this benefit, as well as the wrongful circumstances under which it was conveyed, and yet has voluntarily accepted and retained the benefit conferred. Should it be allowed to retain such funds, Defendant would be unjustly enriched. Therefore, Plaintiff and the Class Members seek relief as set forth in the Prayer below.

**FIFTH CAUSE OF ACTION**

**(Money Had and Received)**

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

144. Defendant has obtained money from Plaintiff and the Class Members by the exercise of undue influence, menace or threat, compulsion or duress, and/or mistake of law and/or fact.

145. As a result, Defendant has in its possession money which, in equity, belongs to Plaintiff and the Class Members, and thus, this money should be refunded to Plaintiff and the Class Members. Therefore, Plaintiff and the Class Members seek relief as set forth in the Prayer below.

**SIXTH CAUSE OF ACTION**

**(Violation of California Unfair Competition Law, Bus. & Prof. Code, §§ 17200, et seq.)**

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

147. Defendant’s conduct described herein violates California’s Unfair Competition Law (the “UCL”), codified at Business and Professions Code section 17200, et seq. The UCL prohibits, and provides civil remedies for, unlawful and unfair competition. Its purpose is to protect both consumers

1 and competitors by promoting fair competition in commercial markets for goods and services. In  
2 service of that purpose, the Legislature framed the UCL’s substantive provisions in broad, sweeping  
3 language. By defining unfair competition to include any “any unlawful, unfair or fraudulent business  
4 act or practice,” the UCL permits violations of other laws to serve as the basis of an independently  
5 actionable unfair competition claim, and sweeps within its scope acts and practices not specifically  
6 proscribed by any other law.

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

13 149. As further alleged herein, Defendant’s conduct violates the UCL’s “unfair” prong insofar  
14 as Defendant charges overdraft or NSF fees when there is enough money in an account to cover a  
15 transaction or by charging multiple fees for the same electronic item, in violation of the public policy  
16 and/or text of TISA and/or Regulation E. Defendant’s conduct was not motivated by any legitimate  
17 business or economic need or rationale. The harm and adverse impact of Defendant’s conduct on  
18 members of the general public was neither outweighed nor justified by any legitimate reasons,  
19 justifications, or motives. The harm to Plaintiff and Class Members arising from Defendant’s unfair  
20 practices relating to the imposition of the improper fees outweighs the utility, if any, of those practices.

21 150. Defendant’s unfair business practices as alleged herein are immoral, unethical,  
22 oppressive, unscrupulous, unconscionable, and/or substantially injurious to Plaintiff, Class Members,  
23 and the general public. Defendant’s conduct was substantially injurious to consumers in that they have  
24 been forced to pay improper, abusive, and/or unconscionable NSF or overdraft fees.

25 151. Moreover, Defendant’s conduct also violates the UCL’s unlawful prong to the extent  
26 Defendant violated Regulation E and TISA by failing to accurately describe the circumstances when  
27 Plaintiff and Class Members would be assessed an overdraft fee and/or NSF fee.

28

1           152. Regulation E provides: “a financial institution . . . *shall not assess a fee or charge* . . .  
2 pursuant to the institution’s overdraft service, *unless* the institution: (i) [p]rovides the consumer with a  
3 notice in writing [the opt-in notice] . . . *describing the institution’s overdraft service,*” and  
4 (ii) “[p]rovides a reasonable opportunity for the consumer to *affirmatively consent*” to enter into the  
5 overdraft program. (*Id.*) The notice “shall be clear and readily understandable.” (12 C.F.R.  
6 § 205.4(a)(1).) To comply with the affirmative consent requirement, a financial institution must provide  
7 a segregated description of its overdraft practices that is accurate, non-misleading and truthful and that  
8 conforms to 12 C.F.R. § 1005.17 prior to the opt-in, and must provide its customers a reasonable  
9 opportunity to opt-in after receiving the description. The affirmative consent must be provided in a way  
10 mandated by 12 C.F.R. § 1005.17, and the financial institution must provide confirmation of the opt-in  
11 in a manner that conforms to 12 C.F.R. § 1005.17. The intent and purpose of this is to “assist customers  
12 in understanding how overdraft services provided by their institutions operate . . . by explaining the  
13 institution’s overdraft service . . . in a clear and readily understandable way”—as stated in the Official  
14 Staff Commentary, (74 Fed. Reg. 59033, 59035, 59037, 5940, 5948), which is “the CFPB’s official  
15 interpretation of its own regulation,” and “warrants deference from the courts unless ‘demonstrably  
16 irrational,’” and should therefore be treated as “a definitive interpretation” of Regulation E. (*Strubel v.*  
17 *Capital One Bank (USA)* (S.D. N.Y. 2016) 179 F.Supp.3d 320 (quoting *Chase Bank USA v. McCoy*  
18 (2011) 562 U.S. 195, 211) (so holding for the CFPB’s Official Staff Commentary for the Truth In  
19 Lending Act’s Reg Z).)

20           153. Here, Defendant has violated the unlawful prong of California’s UCL as a result of  
21 violating Regulation E’s prohibitions against using an Opt-in Agreement that misinformed customers  
22 about both the standard overdraft policies and the Regulation E specific overdraft policies by falsely  
23 stating that overdrafts were assessed only when there was not enough money to cover the transaction  
24 (actual “balance”) when instead the Defendant used the bookkeeping artificial “available balance” to  
25 assess overdraft fees. Defendant further improperly advertised/marketed its overdraft program in  
26 violation of Regulation E and did not follow proper procedures when opting-in members by telephone  
27 and online. Further, Defendant may not have routinely provided members with proper confirmation of  
28 their decision to opt-in.



1 pursuant to the institution’s overdraft service, unless the institution: (i) [p]rovides the consumer with a  
2 notice in writing [the opt-in notice] . . . *describing the institution’s overdraft service*” and (ii)  
3 “[p]rovides a reasonable opportunity for the consumer to *affirmatively consent*” to enter into the  
4 overdraft program. *Id.* (emphasis added). The notice “shall be clear and readily understandable.” 12  
5 C.F.R. § 1005.4(a)(1). To comply with the affirmative consent requirement, a financial institution must  
6 provide a segregated description of its overdraft practices that is accurate, non-misleading and truthful  
7 and that conforms to 12 C.F.R. § 1005.17 prior to the opt-in, and must provide a reasonable opportunity  
8 to opt-in after receiving the description. The affirmative consent must be provided in a way mandated by  
9 12 C.F.R. § 1005.17, and the financial institution must provide confirmation of the opt-in in a manner  
10 that conforms to 12 C.F.R. § 1005.17. Furthermore, choosing not to “opt-in” cannot adversely affect any  
11 other feature of the account.

12 160. The intent and purpose of this Opt-in Agreement is to “assist customers in understanding  
13 how overdraft services provided by their institutions operate . . . by explaining the institution’s overdraft  
14 service . . . in a clear and readily understandable way”—as stated in the Official Staff Commentary, 74  
15 Fed. Reg. 59033, 59035, 59037, 59040, 59048, which is “the CFPB’s official interpretation of its own  
16 regulation,” “warrants deference from the courts unless ‘demonstrably irrational,’” and should therefore  
17 be treated as “a definitive interpretation” of Regulation E. *Strubel v. Capital One Bank (USA)*, 179 F.  
18 Supp. 3d 320, 324 (S.D. N.Y. 2016) (quoting *Chase Bank USA v. McCoy*, 562 U.S. 195, 211 (2011)) (so  
19 holding for the CFPB’s Official Staff Commentary for the Truth In Lending Act’s Reg Z).

20 161. Defendant failed to comply with Regulation E, 12 C.F.R. § 1005.17, which requires  
21 affirmative consent before a financial institution is permitted to assess overdraft fees against customers’  
22 accounts through an overdraft program for ATM and non-recurring debit card transactions. Defendant  
23 has failed to comply with the 12 C.F.R. § 1005.17 opt-in requirements, including failing to provide its  
24 customers in a “clear and readily understandable way” a valid description of the overdraft program  
25 which meets the strictures of 12 C.F.R. § 1005.17. Defendant’s opt-in method fails to satisfy 12 C.F.R. §  
26 1005.17 because, *inter alia*, it states that an overdraft occurs when there is not enough money in the  
27 account to cover a transaction but Defendant pays it anyway, when, in fact, Defendant assesses overdraft  
28 fees when there is enough money in the account to pay for the transaction at issue and Defendant needs



1 to advance no funds at all. This is accomplished by using the internal bookkeeping available balance to  
2 assess overdraft fees, rather than the actual and official balance of the account. Defendant failed to use  
3 language to describe the overdraft service that identified that it was using the available balance to assess  
4 overdraft fees, which meant that in a significant percentage of transactions that were the subject of the  
5 overdraft fee, there was money in the account to cover the transaction and Defendant did not have to  
6 advance any money – yet Defendant assessed an overdraft fee anyway.

7 162. Defendant commits numerous other Regulation E violations including, but not limited to,  
8 aggressively marketing its overdraft program touting only its benefits without disclosing the detriments  
9 and making it appear as though use of the program operated as a credit line. Defendant also failed to use  
10 proper opt-in procedures by failing to provide those members who opted in by telephone or online with  
11 a copy of the Opt-in Agreement before they provided affirmative consent to be included in the program.  
12 Finally, Defendant may have failed to provide its members with proper confirmation of their decision to  
13 opt-in as required by Regulation E.

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

19 164. As the result of Defendant’s violation of Regulation E, 12 C.F.R. § 1005, *et seq.*, Plaintiff  
20 and members of the Class are entitled to actual damages, including all overdraft fees improperly  
21 assessed as a result of violating Regulation E, statutory damages of up to \$500,000.00 for each failure to  
22 comply, as well as attorneys’ fees and costs of suit, pursuant to 15 U.S.C.A. § 1693m. The actual and  
23 statutory damages based on the number of violations per person will be proven and decided at trial.

24 **PRAYER**

25 WHEREFORE, PLAINTIFF and CLASS MEMBERS pray for judgment as follows:

- 26 a. For an order certifying this action as a class action;  
27 b. For compensatory damages on all applicable claims and in an amount to be proven at  
28 trial;

- 1 c. For an order requiring Defendant to disgorge, restore, and return all monies wrongfully
- 2 obtained together with interest calculated at the maximum legal rate;
- 3 d. For monetary and/or actual damages;
- 4 e. For statutory damages;
- 5 f. For an order enjoining the wrongful conduct alleged herein;
- 6 g. For costs;
- 7 h. For pre-judgment and post-judgment interest as provided by law;
- 8 i. For attorneys’ fees under the Civil Code section 1021.5 and the Electronic Fund Transfer
- 9 Act, the common fund doctrine, and all other applicable law; and
- 10 j. For such other relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

11  
12 PLAINTIFF, on behalf of himself, and all others similarly situated, demands a jury trial with  
13 respect to all issues triable of right by jury.

14 DATED: March 17, 2022

Respectfully submitted,

MCCUNE WRIGHT AREVALO, LLP

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16  
17 By: 

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22 Attorneys for CESAR E. CORTES individually,  
23 and on behalf of all others similarly situated