

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

ALISIA COMPTON, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

TONAWANDA VALLEY FEDERAL
CREDIT UNION,

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY DEMAND

CLASS ACTION COMPLAINT

Plaintiff Alisia Compton (“Plaintiff”) brings this Class Action Complaint against Defendant Tonawanda Valley Federal Credit Union (“TVFCU” or “Defendant”), and alleges as follows:

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution, and declaratory relief from Defendant, arising from its improper assessment and collection of \$30 overdraft fees (“OD Fees”) on transactions that did not actually overdraw checking accounts and the improper assessment of multiple fees on an item.

2. Besides being deceptive, unfair, and unconscionable, this practice breaches express promises made in Defendant’s adhesion contracts.

3. Plaintiff and other Defendant customers have been injured by Defendant’s improper fee maximization practices. Plaintiff, individually and on behalf of the class of individuals preliminarily defined below, brings claims for Defendant’s breach of contract and violations of New York General Business Law § 349, *et seq.*

PARTIES

4. Plaintiff is a citizen of Batavia, NY, and has maintained a checking account at TVFCU at all times relevant hereto.

5. Defendant Tonawanda Valley Federal Credit Union is a credit union with more than \$150 million in assets. Defendant maintains its headquarters and principal place of business in this District in Batavia, NY. Defendant is engaged in the business of providing retail banking services to consumers, including Plaintiff and members of the Class, in this District.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332(d)(2), because the matter in controversy exceeds \$5,000,000, exclusive of interest and costs, and is a class action in which at least one member of the class (including Plaintiff) is a citizen of a State different from the Defendant. The number of members of the proposed Class in aggregate exceeds 100 accountholders. 28 U.S.C. § 1332(d)(5)(B).

7. This Court has personal jurisdiction over the Defendant because it resides in, regularly conducts and/or solicits business in, engages in other persistent courses of conduct in, and/or derives substantial revenue from products and/or services provided to persons in this District and in New York.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this District—where TVFCU maintains its headquarters and where Plaintiff conducts banking business with TVFCU.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

I. Defendant Improperly Charges Two Or More Fees on an Item

9. Overdraft fees and insufficient funds fees (“NSF fees”) are among the primary fee generators for banks. According to a banking industry market research company, Moebs Services,

in 2018 alone, banks generated an estimated \$34.5 billion from overdraft fees. *Overdraft Revenue Inches Up in 2018*, <https://bit.ly/3cbHNKV>.

10. Unfortunately, the customers who are assessed these fees are the most vulnerable customers. Younger, lower-income, and non-white account holders are among those who were more likely to be assessed overdraft fees. *Overdrawn: Consumer Experiences with Overdraft*, Pew Charitable Trusts 8 (June 2014), <https://bit.ly/3ksKD0I>.

11. Because of this, industry leaders like Bank of America, Capital One, Wells Fargo, Alliant, and Ally have made plans to end the assessment of OD or NSF fees entirely. See Hugh Son, *Capital One to Drop Overdraft Fees for All Retail Banking Customers*, NBC News (Dec. 1, 2021), <https://nbcnews.to/3DKSu2R>; Paul R. La Monica, *Wells Fargo Ends Bounced Check Fees*, CNN (Jan. 12, 2022), <https://bit.ly/3iTAN9k>.

12. In line with this industry trend, the New York Attorney General recently asked other industry leading banks to end the assessment of all OD Fees by the summer of 2022. *NY Attorney General asks banks to end overdraft fees*, Elizabeth Dilts Marshall, Reuters (April 6, 2022).

13. Through the imposition of these fees, Defendant has made substantial revenue to the tune of tens of millions of dollars, seeking to turn its customers' financial struggles into revenue.

14. Defendant unlawfully maximizes its already profitable fees through its deceptive and contractually-prohibited practice of charging multiple NSF fees, or an NSF fee followed by an overdraft fee, on an item.

15. Unbeknownst to consumers, when Defendant reprocesses an electronic payment item, ACH item, or check for payment after it was initially rejected for insufficient funds, Defendant chooses to treat it as a new and unique item that is subject to yet another fee. But Defendant's contract never states that this counterintuitive and deceptive result could be possible

and, in fact, says nothing at all about how overdraft fees or NSF fees are assessed.

16. The Federal Deposit Insurance Corporation (the “FDIC”) has expressed concern with the practice of assessing multiple fees on an item. In 2012, the FDIC determined that one bank’s assessment of more than one NSF Fee on the same item was a “deceptive and unfair act.” *In the Matter of Higher One, Inc., Consent Order*, Consent Order, FDIC-1 1-700b, FDIC-1 1-704k, 2012 WL 7186313.

17. This abusive practice is not universal in the financial services industry. Indeed, major banks like Chase—the largest consumer bank in the country—do not undertake the practice of charging more than one fee on the same item when it is reprocessed. Instead, Chase charges one fee even if an item is reprocessed for payment multiple times.

18. Defendant, however, engages in this abusive and deceptive practice in violation of its own contract and against the reasonable expectations of its customers.

A. The Imposition of Multiple Fees on a Single Item Violates Defendant’s Contract

19. Plaintiff has a Defendant checking account, which is governed by the “In the Event a Service Transaction is Returned and/or Overdraws Your Payment Account” Disclosure, attached as Ex. A, and the “Fees and Free Services” Disclosure (“Fee Schedule”), attached as Ex. B hereto (collectively, the “Contract”).

20. The Contract states:

If we are unable to complete the transaction for any reason associated with your Payment Account (for example, there are not sufficient funds in your Payment Account to cover the transaction), the transaction may not be completed. In some instances you will receive a return notice by secure electronic message via the Tonawanda Valley Federal Credit Union Internet Home Banking Service. In these cases, you agree that **a non-sufficient funds (NSF) fee** will be charged in accordance with Tonawanda Valley Federal Credit Union’s established and published fees. Further, you also agree that **a NSF fee** may be charged to your account even if the payment is not returned but is paid and overdraws your Payment Account.

Exhibit A at 10 (emphasis added).

21. The Fee Schedule sets forth the fees TVFCU may charge, and states:

Share Draft Non-sufficient Funds Fee	\$30.00
Share Draft Uncollected Funds Fee	\$30.00
Courtesy Pay Fee	\$30.00

Ex. B (emphasis added).

22. Taken together, the Contract promises to assess “a” (singular) \$30 nonsufficient funds (NSF) “fee” (singular).

23. In breach of this promise, Defendant assesses multiple fees per item.

24. Further, “a NSF condition” can only be created by the accountholder’s original order or instruction to pay the item (*e.g.*, the “check,” the “in-person withdrawal,” the “ATM withdrawal,” or other “electronic” item).

25. Defendant cannot recreate “a NSF condition” by repeatedly reprocessing the same item.

26. The Contract never discusses a circumstance where Defendant may assess multiple fees for a single check, electronic payment item, or ACH item that was returned for insufficient funds and later reprocessed one or more times and returned again.

27. The same item on an account cannot conceivably become a new one when it is rejected for payment then reprocessed, especially when—as here—Plaintiff took no action to resubmit it.

28. Even if Defendant reprocesses an instruction for payment, it is still the same item. Its reprocessing is simply another attempt to effectuate the original order or instruction created by the accountholder.

29. There is zero indication anywhere in the Contract that the same item is eligible to incur multiple fees.

30. Reasonable consumers understand any given authorization for payment to be one, singular item, or instruction from the customer to the bank for payment to a merchant.

31. Nowhere do Defendant and its customers agree that Defendant will treat each reprocessing of a check, electronic payment item, or ACH item as a separate item, subject to additional fees.

32. Customers reasonably understand that Defendant's reprocessing of checks, electronic payment items, and ACH items are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger fees. In other words, it is always the same item.

33. Banks and credit unions like Defendant that employ this abusive practice require their accountholders to expressly agree to it—something Defendant did not do.

34. Community Bank, NA, discloses its fee practice in its online banking agreement, in all capital letters, as follows:

We cannot dictate whether or not (or how many times) a merchant will submit a previously presented item. **You may be charged more than one Overdraft or NSF Fee if a merchant submits a single transaction multiple times after it has been rejected or returned.**

Overdraft and Unavailable Funds Practices Disclosure, Community Bank N.A. 5 (Nov. 12, 2019), <https://bit.ly/3uQafe7> (emphasis added).

35. Defendant's Contract provides no such authorization.

B. Plaintiff's Experience

36. In support of Plaintiff's claim, Plaintiff offers examples of fees that should not have been assessed against Plaintiff's checking account. As alleged below, Defendant: (a) reprocessed a previously declined item; and (b) charged a fee upon reprocessing.

37. On or around November 19, 2020, Plaintiff attempted a single payment.

38. Defendant rejected payment of that item and charged Plaintiff a \$30 fee for doing so.

39. Unbeknownst to Plaintiff and without Plaintiff's request to Defendant to reprocess the item, on or around November 23, 2020, Defendant processed the same item again, rejected the item again, and charged Plaintiff a *second* \$30 fee for doing so.

40. *In sum, Defendant charged Plaintiff \$60 in fees on an item.*

41. Plaintiff understood the payment to be a single item, capable of receiving, at most, a single fee.

42. Defendant also assessed Plaintiff multiple fees on an item on October 22, 2020 and October 27, 2020; December 2, 2020, December 3, 2020, and December 7, 2020 (\$90 in fees on an item); February 1, 2021 and February 2, 2021; and April 19, 2021 and April 22, 2021.

43. The improper fees charged by Defendant were not errors, but rather intentional charges made by Defendant as part of its standard processing of items.

44. Plaintiff therefore had no duty to report the fees as errors.

45. Moreover, any such reporting would have been futile as Defendant had made a decision to charge fees in this specific manner to maximize profits at the expense of customers.

II. Defendant Assesses OD Fees on Transactions That Do Not Overdraw the Account

A. The Contract

46. The Contract states:

If we are unable to complete the transaction for any reason associated with your Payment Account (for example, there are not sufficient funds in your Payment Account to cover the transaction), the transaction may not be completed. In some instances you will receive a return notice by secure electronic message via the Tonawanda Valley Federal Credit Union Internet Home Banking Service. In these cases, you agree that a non-sufficient funds (NSF) fee will be charged in accordance with Tonawanda Valley Federal Credit Union's established and published fees.

Further, you also agree that a NSF fee may be charged to your account even if the payment is not returned but is paid and overdraws your Payment Account.

Exhibit A at 10.

47. In breach of this promise, TVFCU assesses OD Fees when, as shown by TVFCU's own account statements, there are "sufficient funds in [a customer's] Payment Account to cover [a] transaction."

B. Plaintiff's Experience

48. On March 8, 2021, TVFCU charged Plaintiff a \$30 OD Fee on a purchase, even though, according to TVFCU's own account statements, the balance in Plaintiff's account was \$19.31 after the transaction cleared.

49. On April 9, 2021, TVFCU charged Plaintiff a \$30 OD Fee on a purchase, even though, according to TVFCU's own account statements, the balance in Plaintiff's account was \$1,520.10 after the transaction cleared. Indeed, even after TVFCU assessed this fee, Plaintiff's account balance was \$1,490.10.

50. The improper fees charged by TVFCU were also not "errors" by TVFCU, but rather were intentional charges made by TVFCU as part of its standard processing of transactions.

51. Plaintiff therefore had no duty to report the fees as "errors" because they were not "errors," but were part of the systemic and intentional assessment of fees according to TVFCU's standard practices.

52. Moreover, any such reporting would have been futile as TVFCU's own contract admits that TVFCU made a decision to charge the fees.

III. The Imposition of These Fee Practices Breaches Defendant's Duty of Good Faith and Fair Dealing

53. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are invested with a discretionary power over the

other party. This creates an implied promise to act in accordance with the parties' reasonable expectations and means that Defendant is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Defendant has a duty to honor payment requests in a way that is fair to Plaintiff and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties on the depositor. Here—in the adhesion agreements Defendant foisted on Plaintiff and its other customers— Defendant has provided itself numerous discretionary powers affecting customers' accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, Defendant abuses that discretion to take money out of consumers' accounts without their permission and contrary to their reasonable expectations that they will not be charged multiple fees for the same item or assessed fees on transactions that did not overdraw the account.

54. Defendant exercises its discretion in its own favor and to the prejudice of Plaintiff and its other customers when it reprocesses an item when it knows a customer's account lacks funds and then charges additional fees on the same item and when it assesses fees on transactions that do not overdraw the account. Further, Defendant abuses the power it has over customers and their bank accounts and acts contrary to their reasonable expectations under the Contract. This is a breach of Defendant's duty to engage in fair dealing and to act in good faith.

55. It was bad faith and totally outside of Plaintiff's reasonable expectations for Defendant to use its discretion to assess two or more fees on an item and assess fees on transactions that did not overdraw the account.

56. Defendant abuses its discretion and acts in bad faith by charging multiple fees on the same item and assessing fees on transactions that did not overdraw the account.

CLASS ALLEGATIONS

57. Plaintiff brings this action individually and as a class action on behalf of the following proposed Classes:

The OD Fee Class: All consumers of TVFCU who, during the applicable statute of limitations, were assessed overdraft fees on transactions that did not overdraw their checking account.

The Multiple Fee Class: All consumers of TVFCU who, during the applicable statute of limitations, were charged more than one fee on an item on a TVFCU checking account.

58. Plaintiff reserves the right to modify or amend the definition of the Classes as this litigation proceeds.

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

60. The time period for the Classes is the number of years immediately preceding the date on which this Complaint was filed as allowed by the applicable statute of limitations, going forward into the future until such time as Defendant remedies the conduct complained of herein.

61. The members of the Classes are so numerous that joinder is impractical. The Classes consist of thousands of members, the identities of whom are within the exclusive knowledge of Defendant and can be readily ascertained only by resort to Defendant's records.

62. The claims of the representative Plaintiff are typical of the claims of the Classes in that the representative Plaintiff, like all members of the Classes, was charged improper fees as set forth herein. The representative Plaintiff, like all members of the Classes, has been damaged by Defendant's misconduct. Furthermore, the factual basis of Defendant's misconduct is common to all members of the Classes and represents a common thread of unlawful and unauthorized conduct

resulting in injury to all members of the Classes. Plaintiff has suffered the harm alleged and have no interests antagonistic to the interests of any other members of the Classes.

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

64. Among the questions of law and fact common to the Classes include:

- a. Whether Defendant charged multiple fees on an item;
- b. Whether Defendant assessed OD Fees on transactions that did not overdraw the account;
- c. Whether these fee practices breached the Contract;
- d. Whether Defendant violated New York General Business Law § 349;
- e. The proper method or methods by which to measure damages; and
- f. The declaratory and injunctive relief to which the Classes are entitled.

65. Plaintiff is committed to the vigorous prosecution of this action and have retained competent counsel experienced in the prosecution of class actions, particularly on behalf of consumers and against financial institutions. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Classes.

66. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual class member's claim is small relative to the complexity of the litigation, no class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members of the Classes will continue to suffer losses and Defendant's misconduct will proceed without remedy.

67. Even if class members themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized

litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows for the consideration of claims which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale, and comprehensive supervision by a single court.

68. Plaintiff suffers a substantial risk of repeated injury in the future. Plaintiff, like all Class members, is at risk of additional improper fees. Plaintiff and the Class members are entitled to injunctive and declaratory relief as a result of the conduct complained of herein. Money damages alone could not afford adequate and complete relief, and injunctive relief is necessary to restrain Defendant from continuing to commit its unfair and illegal actions.

FIRST CLAIM FOR RELIEF
Breach of Contract
(On Behalf of Plaintiff and The OD Fee Class)

69. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

70. Plaintiff and Defendant have contracted for banking services, as embodied in Defendant's account documents. *See* Exs. A & B.

71. All contracts entered by Plaintiff and the OD Fee Class are identical or substantively identical because Defendant's form contracts were used uniformly.

72. Defendant has breached the express terms of its own agreements as described herein.

73. Plaintiff and members of the OD Fee Class have performed all, or substantially all, of the obligations imposed on them under the agreements.

74. Plaintiff and members of the OD Fee Class have sustained damages as a result of Defendant's breaches of the Contract.

SECOND CLAIM FOR RELIEF
Breach of Contract
(On Behalf of Plaintiff and The Multiple Fee Class)

75. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

76. Plaintiff and Defendant have contracted for banking services, as embodied in Defendant's account documents. *See* Exs. A & B.

77. All contracts entered by Plaintiff and the Multiple Fee Class are identical or substantively identical because Defendant's form contracts were used uniformly.

78. Defendant has breached the express terms of its own agreements as described herein.

79. Plaintiff and members of the Multiple Fee Class have performed all, or substantially all, of the obligations imposed on them under the agreements.

80. Plaintiff and members of the Multiple Fee Class have sustained damages as a result of Defendant's breaches of the Contract.

THIRD CLAIM FOR RELIEF
Violations of New York General Business Law § 349, et seq.
(On behalf of Plaintiff and the Classes)

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

82. TVFCU's fee practices as alleged herein violate NYGBL § 349.

83. NYGBL § 349 prohibits deceptive acts or practices in the conduct of any business, trade, or commerce, or in the furnishing of any service in the New York State.

84. TVFCU conducts business, trade or commerce in New York State.

85. In the conduct of its business, trade, and commerce, and in furnishing services in New York State, TVFCU's actions were directed at consumers.

86. In the conduct of its business, trade, and commerce, and in furnishing services in New York State, TVFCU engaged in deceptive, unfair, and unlawful trade, acts or practices, in violation of NYGBL § 349(a), including but not limited to the following:

- a. TVFCU misrepresented material facts pertaining to the sale and/or furnishing of banking services to Plaintiff and the Class by representing that it would only assess fees on transactions that overdraw the account and a single fee on an item; and
- b. TVFCU omitted, suppressed, and concealed the material fact that it would charge such fees.

87. TVFCU systematically engaged in these deceptive, misleading, and unlawful acts and practices, to the detriment of Plaintiff and members of the Class.

88. TVFCU willfully engaged in such acts and practices and knew that it violated NYGBL § 349 or showed reckless disregard for whether it violated NYGBL § 349.

89. As a direct and proximate result of TVFCU's deceptive banking practices, members of the Class suffered injury and/or damages, including the payment of deceptive fees, as described herein, and the loss of the benefit of their respective bargains with TVFCU.

90. The unfair and deceptive practices by TVFCU, as described herein, were immoral, unethical, oppressive, and unscrupulous. These acts caused substantial injury to consumers that these consumers could not reasonably avoid; this substantial injury outweighed any benefits to consumers or to competition.

91. Further, TVFCU's conduct was substantially injurious to Plaintiff and members of the putative Classes in that they were forced to pay fees they were told they would not incur.

92. TVFCU's actions in engaging in the above-described unfair practices and deceptive acts were negligent, knowing and willful, and/or wanton and reckless with respect to the rights of members of the Classes.

93. Had Plaintiff and members of the Classes known they could be charged the above-described deceptive fees, they would have attempted to avoid incurring such fees.

94. As a result of the TVFCU's violations of NYGBL § 349, Plaintiff and members of the Classes have paid and will continue to pay improper fees. Accordingly, Plaintiff and the Classes have suffered and will continue to suffer actual damages.

95. Accordingly, Plaintiff and the members of the Classes are entitled to relief under NYGBL § 349(h), including, but not limited to, actual damages, treble damages, statutory damages, injunctive relief, and/or attorneys' fees and costs.

REQUEST FOR RELIEF

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

- a. Certification for this matter to proceed as a class action;
- b. Designation of Plaintiff as the Class Representative and designation of the undersigned as Class Counsel;
- c. Restitution of all improper fees paid to Defendant by Plaintiff and the Classes because of the wrongs alleged herein in an amount to be determined at trial;
- d. Actual damages in amount according to proof;
- e. Pre- and post-judgment interest at the maximum rate permitted by applicable law;
- f. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law; and
- g. Such other relief as the Court deems just and proper.

JURY DEMAND

Plaintiff, by counsel, demands trial by jury.

Dated: April 25, 2022

Respectfully submitted,

/s/ James J. Bilborrow

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** pro hac vice applications to be submitted*

Counsel for Plaintiff and the Proposed Classes