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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STEVE R. MARICAL; EMILY J. ANDERSON, on
behalf of themselves and all others similarly
situated,

Plaintiff,

v.

BOEING EMPLOYEES' CREDIT UNION,

Defendant.

NO.

CLASS ACTION COMPLAINT

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I. NATURE OF THE ACTION

1. Plaintiffs Steve Marical and Emily Anderson, on their own behalf and on behalf of all others similarly situated, bring this action against Defendant Boeing Employees' Credit Union (BECU). Plaintiffs allege that BECU engages in unfair and deceptive acts and practices and has breached its contractual promises to its members with respect to the ways in which BECU charges Non Sufficient Funds (NSF) fees. Plaintiffs also allege that BECU engages in unfair and deceptive practices in the way it imposes overdraft fees on checking accounts.

2. Plaintiffs specifically challenge three practices: First, BECU's operative Account Agreement delineates that when an item is presented for payment while there are insufficient

1 funds in an account to cover the transaction, BECU will charge an NSF fee only when it elects
2 to honor the item and not when it rejects the item for payment. In fact, though, BECU charges
3 its member an NSF fee both when it honors *and* when it rejects the item. Second, after an
4 item such as a check or Automated Clearing House (ACH) transaction is rejected, BECU
5 engages in a practice of charging a new NSF fee each time that same transaction is
6 resubmitted for payment. Consequently, BECU often charges a member multiple NSF fees
7 based on a single member transaction. Third, BECU charges overdraft fees based on an
8 artificially calculated internal amount known as the “available balance.” BECU does not base
9 overdraft fees on the member’s actual balance or “ledger balance,” despite the fact that BECU
10 displays the member’s actual balance on its online banking service and on its members’
11 monthly account statements.

12 3. Each of the three above practices is inconsistent with BECU’s message to its
13 members that, as a not-for-profit credit union, it is committed to minimizing fees and to
14 minimizing the number of transactions that may trigger fees. BECU repeatedly makes this
15 commitment to its members not only in various advertising and marketing campaigns but also
16 in the Account Agreements that govern the terms of its members’ checking accounts.

17 4. BECU’s practice of charging an NSF fee upon rejecting a transaction breaches
18 the terms of its contractual agreements with its members. Its practice of charging multiple
19 NSF fees based on the same transaction breaches the terms of its contractual agreements and
20 constitutes an unfair and deceptive practice under Washington’s Consumer Protection Act.
21 BECU’s practice of using the “available balance” to trigger overdraft fees while showing a
22 different, ledger balance, on the monthly account statements and on its online banking
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1 system it provides its members similarly constitutes an unfair and deceptive practice under
2 the Washington Consumer Protection Act. All three practices have unjustly enriched BECU at
3 the expense of its members. Plaintiffs seek actual damages based on BECU's breach of its
4 contract and seek actual and exemplary damages, injunctive relief, and attorneys' fees and
5 costs based on its violations of the Washington Consumer Protection Act.

6 II. PARTIES

7 5. At all times relevant, Plaintiff Steve Marical was a resident of Marysville,
8 Washington, and a member of BECU.

9 6. At all times relevant, Plaintiff Emily Anderson was a resident of Puyallup,
10 Washington, and a member of BECU.

11 7. Defendant BECU is a Washington credit union headquartered in Tukwila, King
12 County, Washington. BECU has a total of 55 branches, 54 of which are in Washington State.

13 III. VENUE AND JURISDICTION

14 8. This Court has jurisdiction under the Washington Constitution, Article IV,
15 Section 6; RCW 4.12.020; and RCW 19.86.090.

16 9. Venue is proper under RCW 4.12.020; RCW 4.28.185(a) & (b). BECU's Account
17 Agreement specifies that its agreements are governed by the laws and regulations of the state
18 of Washington and that any disputes regarding its Agreements "must be brought in and are
19 subject to the jurisdiction of a court in King County, Washington."

20 10. The claims of the named Plaintiffs and of the members of the Class are brought
21 under state law causes of action. No federal question exists in this matter.

1 11. Federal jurisdiction is inappropriate under the Class Action Fairness Act, 28
2 U.S.C. § 1332(d)(4)(B), because two-thirds or more of the members of the proposed plaintiff
3 class in the aggregate and the primary Defendant BECU are citizens of the state of
4 Washington.

5 **IV. FACTS COMMON TO THE PLAINTIFFS AND CLASSES**

6 12. Defendant BECU is a Washington credit union with approximately \$19.6 billion
7 in assets. BECU provides banking services to more than 1.16 million customers that it refers to
8 as “members.” The vast majority of these members are residents of Washington. With some
9 discrete exceptions, living or working in Washington State is a condition to becoming a BECU
10 member.

11 13. Like most retail banks and credit unions, BECU members can initiate
12 transactions from their checking accounts in various ways. These include paper and electronic
13 checks, scheduled ACH payments, and debit cards that allow BECU members electronic access
14 to their checking accounts and to debit funds directly from their accounts at “Point of Sale”
15 (POS) transactions, and withdraw cash or make deposits at Automated Teller Machines
16 (ATMs).

17 14. When a BECU determines that a transaction or “item” exceeds the balance in a
18 member’s checking account, it reserves the option to pay (or “honor”) that transaction by
19 creating an overdraft or by drawing funds from another of the member’s linked accounts
20 (such as a savings account or a line of credit). Alternatively, BECU may reject (or “dishonor”)
21 the transaction. BECU’s various account agreements, all of which it drafted and provided to its
22 members on a take-it-or-leave-it basis as a condition of maintaining an account, make various,
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1 often unclear, and sometimes conflicting representations regarding when it will honor or
2 dishonor a transaction and when it will charge NSF or overdraft fees as a result.

3 Inconsistencies notwithstanding, the language in BECU's agreements make it reasonable for a
4 member to understand that BECU will only charge an NSF fee if it chooses to pay the
5 transaction despite there not being sufficient funds in the account. The language in BECU's
6 agreements only charge a single NSF fee for a transaction and will not charge a new fee each
7 time a payee tries to re-present the same transaction for payment.

8 15. In conflict with the terms in its agreements, BECU charges a \$25 NSF fee each
9 time it rejects a transaction. Moreover, BECU regularly assesses two or more \$25 NSF fees on
10 the same item or transaction in cases when the merchant or other payee presents the
11 previously declined transaction a second or a third time. As a result, a BECU member may
12 ultimately be charged \$75 or more based on a single check or ACH, no matter the size of the
13 single transaction they initiated.

14 16. BECU knows it is charging multiple fees on a single transaction. When a
15 resubmitted item is based on a previously submitted transaction, BECU's member account
16 statements specifically identify the subsequent attempts as being the same transaction by
17 noting the transaction with the legend "RETRY PYMT."

18 17. This abusive practice is far from universal. Major banks such as Chase—the
19 largest consumer bank in the country—do not charge repeated NSF fees on the same item or
20 transaction when it is reprocessed. Instead, Chase and others charge one NSF fee even if an
21 item is processed for payment multiple times.

1 **A. BECU’s commitments and instructions on minimizing and avoiding fees.**

2 18. As a member-owned credit union, BECU actively markets itself as being more
3 consumer friendly to its members than banks and other financial institutions. On its website,
4 BECU claims “[b]ecause credit unions do well when members do well, we have a vested
5 interest in the financial health of our members Compared to average bank customers,
6 BECU members may save more as a result of our lower rates and fewer fees.”¹ And BECU’s
7 advertising campaign boasts that “[a]s a member owned credit union, we’ve always believed
8 in people over profit. People over everything actually.”²

9 19. BECU’s operative Agreements make similar representations. For example, in
10 describing its procedure for processing and paying checks in section I.5(d) of a document
11 entitled “Account Agreements,” BECU states “[w]e do this to minimize the number of
12 transactions that m[a]y trigger NSF fees.” Similarly, in an incorporated document entitled
13 “BECU Consumer Account Disclosure,” under its “Fee Schedule” and in highlighted print, BECU
14 states: “[a]s a not-for-profit credit union we are committed to offering fewer-to-no fees.”

15 20. BECU’s Agreements also instruct its members as to the best way to avoid NSF
16 and Overdraft fees. Section I.6(b) and III.1(d) of BECU’s “Account Agreements” both state that
17 the best way to “avoid paying NSF fees, is to record and track all your transactions closely.”
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21 ¹ BECU, *Credit Union Difference*, <https://www.becu.org/members-matter/about-membership/credit-unions-vs-banks> (last visited June 25, 2019).

22 ² See, e.g., BECU Credit Union, *All Together Different: BECU* (2019),
23 <https://www.youtube.com/watch?v=CHykeHdQH20> (last visited June 25, 2019).

1 We are required to permit a withdrawal, honor any item,
2 complete a POS transfer, or pay any other EFT or ATM/bit [sic]
3 transaction only if you have sufficient available funds in your
4 Account to cover the full amount of the transaction or you have
5 funds available to cover the transaction as described in the
6 “Overdrafts” section. ***In our sole discretion, we may honor any
7 item, in which case you agree to pay the NSF fee set forth in the
8 Consumer Account Disclosure,*** regardless of whether we decide
9 to pay or dishonor the item. (emphasis added).

6 26. Consistent with its stated commitment to minimizing fees, this section
7 delineates that even though BECU retains the discretion to honor or to not honor an item
8 when the account does not have sufficient available funds, the member will pay an NSF fee
9 only when BECU honors (and therefore pays) the item. The conflicting last clause
10 notwithstanding, the clear corollary is that BECU will not charge the member an NSF fee in
11 cases in which BECU chooses to dishonor the item.

12 27. BECU breaches this contractual clause by charging members NSF fees even
13 when BECU chooses not to honor an item (i.e., chooses to reject a transaction).

14 **D. BECU states that it will charge a single NSF fee per dishonored item or
15 declined transaction.**

16 28. In a conflicting statement, section I. 10(b) of BECU’s Account Agreement states,
17 “If we return an item or decline a transaction for nonsufficient funds, you will be charged an
18 NSF fee.” Notably, this statement regarding when a member will be subject to an NSF fee
19 refers to only a *single* NSF fee. This means that BECU is only authorized to charge a single NSF
20 fee for any single customer transaction that it chooses to decline.

21 29. Similarly, in its incorporated Consumer Account Disclosure, BECU states that it
22 will charge an NSF fee of “\$25.00 per transaction for which the available balance is not
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1 sufficient for checks and/or ACH payments” As in the Account agreement, this language
2 also refers only to a *single* fee for a *single* customer transaction.

3 30. Neither BECU’s Account Agreements nor any incorporated document gives
4 BECU the right to impose a second or third NSF fee in connection with a single member
5 transaction that has been declined and is then resubmitted for payment.

6 31. BECU breaches its contract when it charges more than one NSF fee on the
7 same transaction, since the contract states, and a reasonable member understands, that each
8 member transaction can only cause a single NSF fee.

9 32. BECU also breaches its duty of good faith and fair dealing when it charges
10 multiple NSF fees based on a single member transaction.

11 33. Moreover, a BECU member who followed BECU’s instructions of recording and
12 tracking all their transactions closely would have no way to avoid being charged multiple NSF
13 fees based on a single transaction that was re-submitted for payment multiple times since the
14 member only initiated a single transaction and often has no way of knowing that BECU chose
15 not to honor the item or that the payee subsequently resubmitted the same item for
16 payment.

17 34. This practice of charging multiple NSF fees based on a single transaction that is
18 re-submitted for payment not only violates BECU’s contracts and its duty of good faith and fair
19 dealing, it is also unfair and deceptive under the Washington Consumer Protection Act.

20 **E. BECU assesses overdraft fees based on a member’s “available balance” while**
21 **showing the member’s “ledger balance” on monthly account statements.**

22 35. BECU assesses overdraft fees based on an artificial amount known as the
23 “available balance” rather a member’s actual balance or “Ledger Balance.” BECU calculates

1 the “available balance” by subtracting *anticipated* debits and credits, which may or may not
2 occur, from the member’s actual balance. BECU calculates the “available balance” based on
3 transactions that have yet to clear the member’s account, which may never clear the
4 member’s account, and/or which may clear the member’s account *after* subsequent
5 transactions initiated by the member. BECU’s use of the artificial “available balance” rather
6 than the actual balance to determine whether a transaction is overdrawn and subject to an
7 overdraft fee is unfair and deceptive. The result of BECU’s use of the “available balance” is
8 that BECU assesses overdraft fees despite there being sufficient funds in member checking
9 accounts at the time of the members’ transactions.

10 36. According to the Consumer Financial Protection Bureau, “[the] ledger-balance
11 method factors in only settled transactions in calculating an account’s balance,” whereas
12 “[the] available-balance method calculates an account’s balance based on electronic
13 transactions that the institutions have authorized (and therefore are obligated to pay) but not
14 yet settled, along with settled transactions. An available balance also reflects holds on
15 deposits that have not yet cleared.” Consumer Financial Protection Bureau, *Supervisory*
16 *Highlights 8* (Winter 2015).³

17 37. Whereas BECU’s Account Agreements accurately state that an overdraft could
18 occur when there are not sufficient funds available in an account to cover checks, debits, or
19 other items when they are presented for payment, BECU shows the customer the ledger
20 balance in the monthly account statements and in the online banking system it provides.

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22 ³ https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf.

1 38. Members who do what BECU advises and track their balance using the tools
2 BECU provides is likely to be calculating their account balance using their actual ledger
3 balance rather than the “available balance” that BECU uses to determine whether a
4 transaction will trigger an overdraft fee.

5 39. A reasonable consumer would expect BECU to avoid assessing overdraft fees
6 when there are sufficient funds in the account to cover a transaction at the time that
7 transaction occurs. A reasonable consumer would not expect BECU impose a series of
8 cascading overdraft fees on all subsequent transactions when an account is overdrawn.
9 Instead, based on the information BECU provides, including its claims that it seeks to minimize
10 fees, a reasonable consumer would, at most, expect a single overdraft fee followed by a denial
11 of subsequent transactions.

12 40. The Consumer Financial Protection Bureau recognizes that financial
13 institutions’ use of the available-balance method causes substantial harm to customers in the
14 form of overdraft fees. *Id.* (“Examiners observed that in some instances, transactions that
15 would not have resulted in an overdraft (or an overdraft fee) under a ledger-balance method
16 did result in an overdraft (and an overdraft fee) under an available-balance method.”).

17 41. The Bureau concluded that overdraft fee practices like BECU’s are damaging to
18 consumers based on a study of actual practices by financial institutions. *See* Consumer
19 Financial Protection Bureau, *Data Point: Checking account overdraft* (July 2014).⁴ That study
20 shows, among other things, that ATM and debit card transactions trigger the greatest number
21 of overdraft fees; that account holders who opt-in to an overdraft program have seven times

22 ⁴ http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

1 as many overdrafts as account holders who do not opt-in to the program; and that overdraft
2 fee practices based on available balance (rather than the ledger balance) substantially harm
3 consumers. *See generally id.*

4 42. Bureau examiners observed that the following scenario has often occurred with
5 the available-balance method: “a financial institution authorized an electronic transaction,
6 which reduced a customer’s available balance but did not result in an overdraft at the time of
7 authorization; settlement of a subsequent unrelated transaction that further lowered the
8 customer’s available balance and pushed the account into overdraft status; and when the
9 original electronic transaction was later presented for settlement, because of the intervening
10 transaction and overdraft fee, the electronic transaction also posted as an overdraft and an
11 additional overdraft fee was charged.” *Supervisory Highlights* at 8.

12 43. The Bureau has determined that when a financial institution uses the available-
13 balance method, consumers are routinely “misled as to the circumstances under which
14 overdraft fees [will] be assessed.” *Id.* at 8. Specifically, consumers “ha[ve] no reason to
15 anticipate th[e] practice” identified in the previous paragraph because it “[is] not
16 appropriately disclosed.” *Id.*

17 44. Where “misleading practices” are “material to a reasonable consumer’s
18 decision-making and actions,” the Bureau has found those practices to be “deceptive.” *Id.* The
19 Bureau also found the practice of assessing overdraft fees under these circumstances to be
20 “unfair” because consumers are substantially injured “by overdraft fees assessed contrary to
21 the overall net impression created by the disclosures (in a manner not outweighed by
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1 countervailing benefits to consumers or competition), and because consumers [can]not
2 reasonably avoid the fees (given the misimpressions created by the disclosures)...” *Id.* at 9.

3 45. BECU uses the ledger balance to report its deposits to regulators, members,
4 and the public. The ledger balance is the deposit balance BECU provides to regulators in call
5 reports and reserve reports. BECU also uses the ledger balance in financial reports to
6 shareholders and internal financial reporting. The ledger balance is the balance that credit
7 reporting agencies use to determine and provide credit ratings that apply to BECU itself.

8 46. In contrast, BECU uses the available-balance accounting method to assess
9 overdraft fees. BECU’s use of the available balance method for the purpose of assessing
10 overdraft fees misleads its members.

11 **F. Plaintiffs’ experiences.**

12 **Steve Marical’s experience**

13 47. Mr. Marical opened a personal checking account at BECU in approximately
14 2010. Mr. Marical served in active duty in the U.S. Navy for eight years before being honorably
15 discharged, including combat tours in the war in Afghanistan. As a result of combat, Mr.
16 Marical is currently disabled and draws disability payments from the Veterans Administration
17 that are deposited directly into his BECU account.

18 48. On June 27, 2016, BECU charged Mr. Marical a \$25 overdraft fee and
19 unilaterally withdrew this charge from Mr. Marical’s account. According to his monthly
20 account statement, this fee was triggered by a transaction when he used his debit card to
21 make a \$3.49 purchase online (a 716% charge). According to the monthly account statement
22 BECU provided, Mr. Marical’s ledger balance was \$45.53 at the time he made the \$3.49 online
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1 purchase. He received no notification at the time of the transaction that triggered these
2 charges that the transaction would subject him to a fee.

3 49. On July 25, 2016, Mr. Marical's account started the day at a balance of \$650.45.
4 BECU then processed a \$60 ACH payment followed by a \$250 ACH payment. Though his ledger
5 balance exceeded both transactions combined, BECU unilaterally withdrew \$25 from Mr.
6 Marical's account as an NSF fee based on the \$250 ACH payment.

7 50. Mr. Marical made three additional transactions during July 25 for a total
8 withdrawal of \$113.27. Then, at the end of that day, Mr. Marical made a \$2.00 online debit
9 card transaction which brought his ledger balance down to \$200.18. The following day, on July
10 26, Mr. Marical made a \$287.50 debit card transaction. BECU withdrew \$25 from Mr.
11 Marical's account based on the July 26 transaction that exceeded both his available balance
12 and his ledger balance. BECU withdrew a second \$25 overdraft fee for the earlier \$2.00 online
13 transaction (a 1,250% charge) based on its use of available rather than ledger balance.

14 51. Had BECU used the ledger balance accounting method, it would have only
15 charged Mr. Marical one \$25 overdraft fee instead of two. BECU provided no notice of an
16 impending overdraft or fee at a time that would have allowed Mr. Marical to avoid the
17 overdraft fees by using other methods of payment or by foregoing the transactions.

18 52. The paragraphs above summarize selected examples of instances in which
19 BECU charged Mr. Marical overdraft fees at a time in which his ledger balance was sufficient
20 to cover the transaction. On information and belief, BECU has levied additional similar
21 overdraft fees against Mr. Marical's account during the class period.

1 53. On or about December 24, 2018 Mr. Marical made a \$35 purchase from Best
2 Buy. On December 24 Best Buy electronically presented an item of \$35 to BECU for payment
3 against Mr. Marical’s account. BECU did not honor the item. It rejected the \$35 transaction
4 and then charged Mr. Marical a \$25 NSF fee. Three days later, on December 27, Best Buy’s
5 automated system presented the same \$35 item to BECU for payment against Mr. Marical’s
6 account. BECU again rejected the payment and charged another \$25 NSF fee against Mr.
7 Marical’s account. The legend on the monthly account statement BECU provided notes
8 “External Withdrawal BEST BUY – RETRY PYMT.” On December 31, Best Buy’s automated
9 system again presented the same \$35 item to BECU for payment against Mr. Marical’s
10 account. BECU again rejected the payment and charged yet another \$25 NSF fee against Mr.
11 Marical’s account (and again noted the transaction as “External Withdrawal BEST BUY – RETRY
12 PYMT.”) In total, BECU charged \$75 in NSF fees based on a \$35 transaction that it never
13 honored.

14 54. Sometime before 2019, Mr. Marical set up an automatic payment with USAA in
15 the amount of \$266.90. On January 23, 2019 USAA presented an item of \$266.90 to BECU for
16 payment against Mr. Marical’s account. BECU did not honor the payment but charged Mr.
17 Marical a \$25 NSF fee. On January 28, USAA presented the same, previously unpaid \$266.90
18 to BECU for payment against Mr. Marical’s account. BECU again rejected the item and charged
19 another \$25 NSF fee based on the same item from USAA. Regarding this second attempt on
20 January 28, the account statement BECU provided notes “External Withdrawal USAA P&C EXT
21 – RETRY PYMT.”

1 55. The paragraphs above summarize selected examples of instances in which
2 BECU charged Mr. Marical an NSF fee when it did not honor the underlying item in which
3 BECU charged multiple NSF fees based on the same item. On information and belief, BECU has
4 levied additional similar NSF fees against Mr. Marical’s account during the class period.

5 **Emily Anderson’s experience**

6 56. Ms. Anderson has maintained a personal checking account with BECU for over
7 a decade. Ms. Anderson is disabled and derives most of her income from Social Security and
8 Disability payments.

9 57. On or about August 29, 2016 Ms. Anderson made a purchase at Walmart for
10 \$19.81 for which she paid using an electronic check from her BECU account. On August 29,
11 Walmart presented “Electronic Check 2011” in the amount of \$19.81 to BECU for payment
12 from Ms. Anderson’s account. BECU did not honor the item but charged Ms. Anderson a \$25
13 NSF fee which it then withdrew from her account. Because the item was not honored,
14 Walmart then levied a \$30 return fee which it presented as an item to BECU for payment
15 against Ms. Anderson’s account on September 16. BECU did not honor Walmart’s return fee
16 item, but charged Ms. Anderson another \$25 NSF fee. The monthly statement BECU provided
17 references the same Check 2011 when listing the NSF fee BECU levied on the return fee item.
18 On September 23, Walmart’s automated system resubmitted the \$30 return fee to BECU for
19 payment from Ms. Anderson’s account. BECU again rejected the payment and charged Ms.
20 Anderson another \$25 NSF fee. BECU’s account statement noted “RETRY PYMT” when it listed
21 both the \$30 charge from Walmart and the \$25 NSF fee it levied as a result. On September 30,
22 Walmart again submitted the \$30 charge to BECU as an item for payment from Ms.

1 Anderson's account. BECU again rejected the item, charged Ms. Anderson yet another \$25
2 NSF fee, and again noted "RETRY PYMT" on the account statement. In sum, the \$19.81
3 electronic check ended up costing Ms. Anderson \$100 in NSF fees to BECU (and an additional
4 \$30 to Walmart).

5 58. On August 22, 2016 Fred Meyer presented check number 2004 in the amount
6 of \$17.34 to BECU as an item for payment from Ms. Anderson's account. BECU did not honor
7 the item but charged Ms. Anderson a \$25 NSF fee. On August 30, Fred Meyer again presented
8 check number 2004 for \$17.34 to BECU as an item for payment from Ms. Anderson's account.
9 BECU again rejected this same item and charged Ms. Anderson another \$25 NSF fee. On
10 September 6, Fred Meyer presented the same \$17.34 item to BECU a third time. BECU paid
11 the item on the third try but then charged Ms. Anderson a third \$25 NSF fee. Then on
12 September 15, Fred Meyer presented a \$40 return fee based on the previous rejections of
13 check number 2004 in the amount of \$17.34. BECU rejected the return fee (which it noted as
14 being based on check number 2004) and then charged Ms. Anderson still another \$25 NSF fee.
15 In sum, this \$17.34 check cost Ms. Anderson \$100 in NSF fees to BECU and another \$40 to
16 Fred Meyer.

17 59. On December 22, 2016 check number 2024 in the amount of \$21.85 was
18 presented to BECU for payment from Ms. Anderson's account. BECU did not honor the item
19 but charged Ms. Anderson a \$25 NSF fee, which it then withdrew from her account. On
20 December 29, the same item (check number 2024 in the amount of \$21.85) was again
21 presented to BECU for payment against Ms. Anderson's account. BECU again did not honor
22 the item and charged another \$25 NSF fee which it then withdrew from Ms. Anderson's
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1 account. In sum, BECU charged Ms. Anderson \$50 in NSF fees on for a \$21.85 check that it
2 never paid.

3 60. The paragraphs above summarize selected examples of instances in which
4 BECU charged Ms. Anderson an NSF fee when it did not honor the underlying item and in
5 which BECU charged multiple NSF fees based on the same item. On information and belief,
6 BECU has levied additional similar NSF fees against Ms. Anderson’s account during the class
7 period.

8 **V. CLASS ACTION ALLEGATIONS**

9 61. Plaintiffs bring this case as a class action under CR 23(a) and (b)(3).

10 62. The proposed Classes are defined as follows:

11 Dishonored Item Class

12 All BECU members in Washington who, during the applicable
13 statute of limitations and up through the entry of judgment,
14 were charged an NSF fee based on a transaction or item that
15 BECU did not honor.

14 Multiple NSF Class

15 All BECU members in Washington who, during the applicable
16 statute of limitations and up through the entry of judgment,
17 were charged multiple NSF fees based on a single transaction
18 the member initiated.

17 Sufficient Funds Class

18 All BECU members in Washington who, during the applicable
19 statute of limitations and up through the entry of judgment,
20 incurred one or more overdraft fees based on a transaction
21 where BECU received information necessary to approve or
22 decline the transaction when there were sufficient funds in the
23 account to pay the transaction or there would have been such
24 funds had BECU not improperly levied previous overdraft or NSF
25 fees.

(collectively these three classes are referred to herein as “the Classes”). Excluded from the
Classes are any entity in which BECU has a controlling interest, officers or director of BECU,

1 this Court and any employees assigned to work on the case, and all employees of the law
2 firms representing Plaintiffs and the Class.

3 63. Certification of Plaintiff's claims for class-wide treatment is appropriate
4 because Plaintiffs can prove the elements of their claims on a class-wide basis using the same
5 evidence that would be used to prove those elements in individual actions alleging the same
6 claims.

7 64. Numerosity. The members of each Class are so numerous that a joinder of all
8 members would be impracticable. Defendant BECU is the largest credit union in the state of
9 Washington with more than 1.16 million members. While the exact number of members in
10 each Class is unknown at this time, it is reasonable to assume each Class includes thousands of
11 members.

12 65. Commonality and Predominance (CR 23(a)(2) and CR 23(b)(3)). There are
13 numerous questions of law and fact common to Plaintiffs and members of each Class. Those
14 common questions of law or fact predominate over questions that may affect only individual
15 Class members. The common issues arising from BECU's conduct predominate over any
16 individual issues. Adjudication of these common issues in a single action has important and
17 desirable advantages of judicial economy. The questions of law and fact common to Plaintiffs
18 and members of the Classes include, among others, the following:

19 a. Whether a reasonable consumer can understand the terms of BECU's
20 Agreements to only allow BECU to charge an NSF fee when it honors a transaction or item;

21 b. Whether BECU's Agreements allow only a single NSF fee based on a
22 single transaction;

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1 c. Whether BECU's Agreements allow only it to impose an NSF fee when
2 the customer actually lacks funds to pay a given transaction;

3 d. Whether BECU has engaged in a common course of conduct that
4 breaches its contractual agreement with its members;

5 e. Whether BECU has engaged in a common course of conduct that
6 breaches its covenant of good faith and fair dealing;

7 f. Whether BECU's common practice of charging multiple NSF fees based
8 on a single item or transaction is unfair or deceptive within the meaning of RCW 19.86.020;

9 g. Whether BECU has engaged in a common course of using the available
10 balance accounting method for purposes of assessing overdraft fees, while causing its
11 members to use their ledger balance instead;

12 h. Whether BECU's use of a member's available balance rather than the
13 ledger balance is unfair or deceptive within the meaning of RCW 19.86.020;

14 i. Whether BECU's imposition of an NSF fee when it dishonors a
15 transaction is unfair or deceptive within the meaning of RCW 19.86.020

16 j. Whether BECU's common courses of conduct occurred in trade or
17 commerce and are injurious to the public interest;

18 k. Whether BECU's common courses of conduct have caused Plaintiffs and
19 Class members to be injured in their business or property;

20 l. Whether injunctive relief is appropriate to remedy BECU's unfair and
21 deceptive acts and practices; and

1 m. The nature and extent of Class-wide injury and the measure of
2 compensation for such injury.

3 66. Typicality. Plaintiffs' claims are typical of the claims of the Classes. The
4 evidence and legal theories regarding BECU's alleged wrongful conduct are substantially the
5 same for Plaintiffs and all of the class members, as the relevant agreements and the
6 challenged practices are uniform for all members within the respective Classes.

7 67. Adequacy. Plaintiffs will fairly and adequately protect the interests of the
8 Classes. Plaintiffs have retained capable and competent attorneys who have significant
9 experience in complex and class action litigation, including consumer rights litigation. Plaintiffs
10 and their counsel are committed to prosecuting this action vigorously on behalf of the Classes
11 and have the financial resources to do so. Neither Plaintiffs nor their counsel have interests
12 that are contrary to or that conflict with those of the Classes.

13 68. Superiority. Plaintiffs and members of the Classes have suffered and will
14 continue to suffer harm and damages as a result of Defendant's unlawful and wrongful
15 conduct. Absent a class action, however, most members of the Classes would likely find the
16 cost of litigating their claims prohibitive. Class treatment is superior to multiple individual suits
17 or piecemeal litigation because it conserves judicial resources, promotes consistency and
18 efficiency of adjudication, provides a forum for small claimants, and deters illegal activities.
19 There will be no significant difficulty in the management of this case as a class action. The
20 members of the Classes are readily identifiable from Defendant's records.

1 **VI. CLAIMS**

2 **FIRST CAUSE OF ACTION**

3 **Breach of Contract**

3 **(Brought by Plaintiffs Marical and Anderson on behalf of the Dishonored Item Class)**

4 69. Plaintiffs reallege and incorporate by reference each and every allegation set
5 forth in the preceding paragraphs.

6 70. Plaintiffs and BECU have contracted for bank account services, which are
7 governed by the Account Agreements and incorporated documents, which were drafted by
8 and are binding on BECU.

9 71. Under the terms of the agreement governing "Account Access" BECU stated
10 that it would only charge an NSF fee in cases in which it honors an item. BECU regularly
11 violates this contractual promise by charging NSF fees in cases in which it does not honor an
12 item.

13 72. Plaintiffs and members of the Dishonored Items Class have performed all, or
14 substantially all of the obligations imposed on them under the applicable Agreements.

15 73. As a result of BECU's acts in breach of its Agreements, Plaintiff and the
16 Dishonored Item Class have been deprived of money from each of their respective BECU
17 accounts in amounts to be determined at trial and are entitled to recovery of such damages,
18 including prejudgment interest thereon.

19 **SECOND CAUSE OF ACTION**

20 **Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**
20 **(Brought by Plaintiffs Marical and Anderson on behalf of the Multiple NSF Class)**

21 74. Plaintiffs reallege and incorporate by reference each and every allegation set
22 forth in the preceding paragraphs.

1 75. Plaintiffs and BECU have contracted for bank account services, which are
2 governed by the Account Agreements and incorporated documents, which were drafted by
3 and are binding on BECU.

4 76. Clauses in BECU's Account Agreements and incorporated documents state that
5 when a member lacks sufficient funds to cover a transaction, BECU may either authorize the
6 transaction and charge a single overdraft fee or reject the transaction and charge a single NSF
7 fee. BECU regularly violates its contractual promises by charging multiple NSF fees based on a
8 single transaction.

9 77. Under Washington law, parties to a contract are required to not only adhere to
10 the express terms of a governing contract, but to also act in good faith when they are vested
11 with discretionary power over the other party. Where a party drafts a contract and reserves
12 discretionary power for itself, the party with discretion is required to exercise that power and
13 discretion in good faith. This creates an implied promise to act in accordance with all parties'
14 reasonable expectations.

15 78. In the form agreements BECU drafted and required Plaintiffs and all of its
16 members to accept, BECU vested itself with numerous discretionary powers that effect its
17 members' bank accounts. BECU has a duty to honor transaction requests in a manner that is
18 fair to Mr. Marical, Ms. Anderson, and the members of the Multiple NSF Class and is
19 prohibited from exercising its discretion to pile on penalties.

20 79. Instead of exercising its discretion in good faith and consistent with its
21 customers' reasonable expectations, BECU has abused its discretion to take money out of
22 Multiple NSF Class members' accounts without their permission and in a manner that is
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1 contrary to the reasonable expectation that they will not be charged multiple NSF fees based
2 on the same transaction presented multiple times.

3 80. Additional clauses in BECU's agreements and incorporated documents state
4 that BECU will act to minimize the number of transactions that trigger NSF fees. Yet BECU acts
5 in a manner that is contrary to this contractual promise by treating transactions in a way that
6 maximizes rather than minimizes NSF fees.

7 81. BECU's abuse of the discretion it reserved for itself, and its actions to maximize
8 NSF fees constitute a breach of its duty of good faith and fair dealing. BECU deliberately and
9 consciously frustrates the agreed common purposes of the contract and disappoints the
10 reasonable expectations of Plaintiffs and members of the Multiple NSF Class, thereby
11 depriving them of the benefit of their bargain.

12 82. Plaintiffs and members of the Multiple NSF Class have performed all, or
13 substantially all of the obligations imposed on them under the applicable Agreements.

14 83. As a result of BECU's acts in breach of its Agreements, Plaintiff and the Multiple
15 NSF Class have been deprived of money from each of their respective BECU accounts in
16 amounts to be determined at trial and are entitled to recovery of such damages, including
17 prejudgment interest thereon.

18 **THIRD CAUSE OF ACTION**

19 **Violation of the Washington Consumer Protection Act** 20 **(Brought by Plaintiffs Marical and Anderson on behalf of the Multiple NSF Class, and by** 21 **Plaintiff Marical on behalf of the Sufficient Funds Class)**

22 84. Plaintiffs reallege and incorporate by reference each and every allegation set
23 forth in the preceding paragraphs.

1 85. Plaintiffs and members of the Classes are “persons” within the meaning of RCW
2 19.86.010(1).

3 86. Defendant BECU is a “person” within the meaning of RCW 19.86.010(1).

4 87. Defendant’s common courses of conduct alleged above are unfair and
5 deceptive and had, and continue to have, the capacity to deceive a substantial portion of the
6 public.

7 88. Defendant’s common courses of unfair and deceptive conduct occur in trade or
8 commerce and impact the public interest because Defendant is in the business of providing
9 financial services to tens of thousands of consumers in Washington. Thousands of
10 Washingtonians have been and continue to be affected by Defendant’s unfair and deceptive
11 acts and practices.

12 89. Defendant’s common courses of conduct caused injury to the business or
13 property of Plaintiffs and the Multiple NSF and Sufficient Funds Classes.

14 90. Plaintiffs and the Multiple NSF and Sufficient Funds Classes have been damaged
15 in amounts to be determined at trial and under RCW 19.86.090, Plaintiffs and the Multiple
16 NSF and Sufficient Funds Classes are entitled to recover such damages, including interest
17 thereon, as well as exemplary damages, attorneys’ fees and costs.

18 91. Under RCW 19.86.090, Plaintiffs and the Multiple NSF and Sufficient Funds
19 Classes are also entitled to an order enjoining Defendant from engaging in the illegal acts and
20 practices described above.

21 92. Plaintiffs and the Multiple NSF and Sufficient Funds Classes are also entitled to
22 additional equitable relief as the Court deems appropriate, including but not limited to
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1 disgorgement for the benefit of the Classes of all or part of the ill-gotten gains Defendant has
2 received in connection with the acts described above.

3 **FOURTH CAUSE OF ACTION**

4 **Unjust Enrichment**

5 **(Brought by Plaintiffs on behalf of all Classes)**

6 93. Plaintiffs reallege and incorporate by reference each and every allegation set
7 forth in the preceding paragraphs.

8 94. By means of BECU's wrongful conduct alleged herein, BECU knowingly provides
9 banking services to Plaintiffs and members of each Class that are unfair, unconscionable, and
10 oppressive.

11 95. BECU knowingly received and retained wrongful benefits and funds from
12 Plaintiffs and members of the Classes. In so doing, BECU acted with conscious disregard for
13 the rights of Plaintiffs and members of the Classes.

14 96. As a result of BECU's wrongful conduct as alleged herein, BECU has been
15 unjustly enriched at the expense of, and to the detriment of Plaintiffs and members of the
16 Classes.

17 97. BECU's unjust enrichment is traceable to and resulted directly and proximately
18 from the conduct alleged herein.

19 98. Under the common law doctrine of unjust enrichment, it is inequitable for
20 BECU to be permitted to retain the benefits it received, and is still receiving, without
21 justification, from the imposition of overdraft fees on Plaintiffs and members of the Classes in
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1 an unfair, unconscionable, and oppressive manner. BECU's retention of such funds under
2 circumstances making it inequitable to do so constitutes unjust enrichment.

3 99. The financial benefits derived by BECU rightfully belong to Plaintiffs and
4 members of the Classes. BECU should be compelled to disgorge in a common fund for the
5 benefit of Plaintiffs and members of the Classes all wrongful or inequitable proceeds it
6 received. A constructive trust should be imposed upon all wrongful or inequitable sums BECU
7 received that is traceable to Plaintiffs and members of the Classes.

8 100. Plaintiffs and members of the Classes have no adequate remedy at law.

9 **VII. PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs, on their own behalf and on behalf of members of the Classes,
11 pray for judgment against Defendant as follows:

12 A. Certify the proposed Classes;

13 B. Appoint Steve Marical and Emily Anderson as representatives of the
14 Dishonored Item Class and the Multiple NSF Class, appoint Steve Marical as representative for
15 the Sufficient Funds Class, and appoint the undersigned attorneys as counsel for the Classes;

16 C. Enter judgment in favor of Plaintiffs and the Classes and against Defendant
17 BECU on all causes of action alleged;

18 D. Declare that the acts and practices of Defendant BECU violate Washington law;

19 E. Issue a permanent injunction under RCW 19.86.090 enjoining and restraining
20 Defendant BECU from continuing to engage in the unlawful conduct alleged in this complaint;

21 F. Award Plaintiffs and members of the Classes actual and exemplary damages in
22 amounts to be proven at trial;

1 G. Award Plaintiffs' counsel attorneys' fees, costs, and expenses as allowed by
2 law;

3 H. Award Plaintiffs and the Classes pre-judgment and post-judgment interest as
4 allowed by law; and

5 I. Grant Plaintiffs and the Classes such other and additional relief as is just and
6 proper under applicable law.

7 RESPECTFULLY SUBMITTED AND DATED this 2nd day of August, 2019.

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