

STATE OF INDIANA ) IN THE ST. JOSEPH CIRCUIT/SUPERIOR COURT  
) SS:  
COUNTY OF ST. JOSEPH ) CAUSE NO: **71C01-1909-PL-000332**

**STACEY PERRI**, on behalf of herself and all )  
others similarly situated, )

Plaintiff, )

v. )

**NOTRE DAME FEDERAL CREDIT UNION** )

Defendant. )

Class Action Complaint

Jury Trial Demanded

### **CLASS ACTION COMPLAINT**

Plaintiff, Stacey Perri, on behalf herself and all others similarly situated, by counsel,  
alleges:

#### **NATURE OF THE ACTION**

1. Plaintiff brings this action on behalf of herself and classes of all similarly situated consumers against Defendant Notre Dame Federal Credit Union (“Notre Dame FCU”), arising from its routine practices of (a) assessing overdraft fees (“OD Fees”) on transactions that did not actually overdraw the account; and (b) charging two or three non-sufficient funds fees (“NSF Fee”) on a single transaction.

2. Notre Dame FCU misleadingly and deceptively misrepresents each of the above practices, including in its own account contracts. Notre Dame FCU also omits material facts pertaining to each of the above practices, including in its account contracts.

3. This is a civil action seeking monetary damages, restitution, and declaratory and injunctive relief.

4. As described herein, Defendant’s practices violate Indiana common and statutory law, as well as the Defendant’s own form contracts.

5. Defendant's improper scheme to extract funds from accountholders already struggling to make ends meet has victimized Plaintiff and thousands of other consumers. Unless enjoined, Defendants will continue to engage in these schemes and cause substantial injury to Indiana citizens.

### **PARTIES**

6. Plaintiff Stacey Perri is a citizen and resident of Niles, Michigan.

7. Defendant Notre Federal Dame Credit Union is a credit union headquartered in Notre Dame, Indiana. It has nearly \$500 million in assets.

### **JURISDICTION**

8. This Court has general personal jurisdiction over Notre Dame FCU because Notre Dame FCU is at home in this state.

9. Preferred venue lies in St. Joseph County under Trial Rule 75(A)(4) because St. Joseph County is the county in Indiana where Notre Dame FCU has its registered agent and principal office.

### **BACKGROUND FACTS**

#### **I. NOTRE DAME FCU CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT**

##### **A. Overview of Claim**

10. Plaintiff challenges Notre Dame FCU's practice of charging OD Fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions" ("APPSN Transactions").

11. Here's how it works. At the moment a debit card transaction is authorized on an account with positive funds to cover the transaction, Notre Dame FCU immediately reduces a consumer's checking account for the amount of the purchase, sets aside funds in the checking

account to cover that transaction, and adjusts the consumer's displayed "available balance" to reflect that subtracted amount. As a result, customers' accounts will always have sufficient available funds available to cover these transactions because Notre Dame FCU has already sequestered these funds for payment.

12. However, Notre Dame FCU still assesses crippling \$32 OD Fees on many of these transactions and misrepresents its practices in its account documents.

13. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, Notre Dame FCU later assesses OD Fees on those same transactions when they purportedly settle days later into a negative balance. These types of transactions are APPSN transactions.

14. Notre Dame FCU maintains a running account balance in real time, tracking funds consumers have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, Notre Dame FCU sequesters the funds needed to pay the transaction, subtracting the dollar amount of the transaction from the customer's available balance. Such funds are not available for any other use by the accountholder, and such funds are specifically associated with a given debit card transaction.

15. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure that there are enough funds in the account to pay the transaction when it settles, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

When a consumer uses a debit card to make a purchase, a hold may be placed on funds in the consumer's account to ensure that the consumer has sufficient funds in the account when the transaction is presented for settlement. This is commonly referred to as a "debit hold." During the time the debit hold remains in place, which

may be up to three days after authorization, those funds may be unavailable for the consumer's use for other transactions.

Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 35, 2009).

16. That means when any *subsequent*, intervening transactions are initiated on a checking account, they are compared against an account balance that has already been reduced to account for any earlier debit card transactions. This means that many subsequent transactions incur OD Fees due to the unavailability of the funds sequestered for those debit card transactions.

17. Still, despite keeping those held funds off-limits for other transactions, Notre Dame FCU improperly charges OD Fees on those APPSN Transactions, even though the customer's account *always* has sufficient available funds to be cover the APPSN Transaction.

18. Indeed, the Consumer Financial Protection Bureau ("CFPB") has expressed concern with this very issue, flatly calling the practice "unfair" and/or "deceptive" when:

A financial institution authorized an electronic transaction, which reduced a customer's available balance but did not result in an overdraft at the time of authorization; settlement of a subsequent unrelated transaction that further lowered the customer's available balance and pushed the account into overdraft status; and when the original electronic transaction was later presented for settlement, because of the intervening transaction and overdraft fee, the electronic transaction also posted as an overdraft and an additional overdraft fee was charged. Because such fees caused harm to consumers, one or more supervised entities were found to have acted unfairly when they charged fees in the manner described above. Consumers likely had no reason to anticipate this practice, which was not appropriately disclosed. They therefore could not reasonably avoid incurring the overdraft fees charged. Consistent with the deception findings summarized above, examiners found that the failure to properly disclose the practice of charging overdraft fees in these circumstances was deceptive. At one or more institutions, examiners found deceptive practices relating to the disclosure of overdraft processing logic for electronic transactions. Examiners noted that these disclosures created a misimpression that the institutions would not charge an overdraft fee with respect to an electronic transaction if the authorization of the transaction did not push the customer's available balance into overdraft status. But the institutions assessed overdraft fees for electronic transactions in a manner inconsistent with the overall net impression created by the disclosures. Examiners therefore concluded that the

disclosures were misleading or likely to mislead, and because such misimpressions could be material to a reasonable consumer's decision-making and actions, examiners found the practice to be deceptive. Furthermore, because consumers were substantially injured or likely to be so injured by overdraft fees assessed contrary to the overall net impression created by the disclosures (in a manner not outweighed by countervailing benefits to consumers or competition), and because consumers could not reasonably avoid the fees (given the misimpressions created by the disclosures), the practice of assessing fees under these circumstances was found to be unfair.

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

19. There is no justification for these practices, other than to maximize Notre Dame FCU's overdraft fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduce an account balance. But Notre Dame FCU is free to protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—and it does the latter to the tune of millions of dollars each year. But Notre Dame FCU was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

20. Besides being deceptive, unfair, and unconscionable, these practices breach promises made in Notre Dame FCU's adhesion contracts—contracts which fundamentally misconstrue and mislead consumers about the true nature of Notre Dame FCU's processes and practices. These practices also exploit contractual discretion to gouge consumers.

21. In plain, clear, and simple language, the checking account contract documents covering overdraft fees promise that Notre Dame FCU will only charge OD Fees on transactions that have insufficient funds to "cover" that transaction.

22. In short, Notre Dame FCU is not authorized by contract to charge OD Fees on transactions that have not overdrawn an account, but it has done so and continues to do so.

## **B. Mechanics of a Debit Card Transaction**

23. A debit card transaction occurs in two parts. First, authorization for the purchase amount is instantaneously obtained by the merchant from Notre Dame FCU. When a merchant physically or virtually “swipes” a customer’s debit card, the credit card terminal connects, via an intermediary, to Notre Dame FCU, which verifies that the customer’s account is valid and that sufficient available funds exist to “cover” the transaction amount.

24. At this step, if the transaction is approved, Notre Dame FCU immediately decrements the funds in a consumer’s account and sequesters funds in the amount of the transaction but does not yet transfer the funds to the merchant.

25. Indeed, the entire purpose of the immediate debit and hold of positive funds is to ensure that there are enough funds in the account to pay the transaction when it settles, as discussed in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act regulations:

When a consumer uses a debit card to make a purchase, a hold may be placed on funds in the consumer’s account to ensure that the consumer has sufficient funds in the account when the transaction is presented for settlement. This is commonly referred to as a “debit hold.” During the time the debit hold remains in place, which may be up to three days after authorization, those funds may be unavailable for the consumer’s use for other transactions.

Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration, Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 35, 2009).

26. Sometime thereafter, the funds are actually transferred from the customer’s account to the merchant’s account.

27. Notre Dame FCU (like all credit unions and banks) decides whether to “pay” debit card transactions at authorization. After that, Notre Dame FCU is obligated to pay the transaction no matter what. For debit card transactions, that moment of decision can only occur at the point

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

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

### **C. Notre Dame FCU’s Account Contract**

29. Plaintiff has a Notre Dame FCU checking account, which is governed by Notre Dame FCU’s standardized “Terms and Conditions of Your Account” document (“Deposit Agreement”).

30. The Deposit Agreement promises the available balance is the balance used to determine overdrafts; and that “available” funds are reduced for “temporary debit authorization holds,” which are created by some debit card transactions:

**A temporary debit authorization hold affects your account balance** - On debit card purchases, merchants may request a temporary hold on your account for a specified sum of money, which may be more than the actual amount of your purchase. When this happens, our processing system cannot determine that the amount of the hold exceeds the actual amount of your purchase. This temporary hold, and the amount charged to your account, will eventually be adjusted to the actual amount of your purchase, but it may be up to three days before the adjustment is made. Until the adjustment is made, the amount of funds in your account available for other transactions will be reduced by the amount of the temporary hold. If another transaction is presented for payment in an amount greater than the funds left after the deduction of the temporary hold amount, that transaction will be a nonsufficient funds (NSF) transaction if we do not pay it or an overdraft transaction if we do pay it. You will be charged an NSF or overdraft fee according to our NSF or overdraft fee policy. You will be charged the fee even if you would

have had sufficient funds in your account if the amount of the hold had been equal to the amount of your purchase.

Here is an example of how this can occur - assume for this example the following: (1) you have opted-in to our overdraft services for the payment of overdrafts on ATM and everyday debit card transactions, (2) we pay the overdraft, and (3) our overdraft fee is \$35 per overdraft, but we do not charge the overdraft fee if the transaction overdraws the account by less than \$10.

You have \$120 in your account. You swipe your card at the card reader on a gasoline pump. Since it is unclear what the final bill will be, the gas station's processing system immediately requests a hold on your account in a specified amount, for example, \$80. Our processing system authorizes a temporary hold on your account in the amount of \$80, and the gas station's processing system authorizes you to begin pumping gas. You fill your tank and the amount of gasoline you purchased is only \$50. Our processing system shows that you have \$40 in your account available for other transactions ( $\$120 - \$80 = \$40$ ) even though you would have \$70 in your account available for other transactions if the amount of the temporary hold was equal to the amount of your purchase ( $\$120 - \$50 = \$70$ ). Later, another transaction you have authorized is presented for payment from your account in the amount of \$60 (this could be a check you have written, another debit card transaction, an ACH debit or any other kind of payment request). This other transaction is presented before the amount of the temporary hold is adjusted to the amount of your purchase (remember, it may take up to three days for the adjustment to be made). Because the amount of this other transaction is greater than the amount our processing system shows is available in your account, our payment of this transaction will result in an overdraft transaction. Because the transaction overdraws your account by \$20, your account will be assessed the overdraft fee of \$35 according to our overdraft fee policy. You will be charged this \$35 fee according to our policy even though you would have had enough money in your account to cover the \$60 transaction if your account had only been debited the amount of your purchase rather than the amount of the temporary hold or if the temporary hold had already been adjusted to the actual amount of your purchase.

Deposit Agreement, Ex. A at 2.

31. Notre Dame FCU also promises that its decision whether to “honor” a withdrawal request is the relevant point for determining whether an OD Fee applies:

**Overdrafts** - You understand that we may, at our discretion, honor withdrawal requests that overdraw your account. However, the fact that we may honor withdrawal requests that overdraw the account balance does not obligate us to do so later. So you can NOT rely on us to pay overdrafts on your account regardless of how frequently or under what circumstances we have paid overdrafts on your account in the past. We can change our practice of paying overdrafts on your



account without notice to you. . . . You agree that we may charge fees for overdrafts. For consumer accounts, we will not charge fees for overdrafts caused by ATM withdrawals or one-time debit card transactions if you have not opted-in to that service. We may use subsequent deposits, including direct deposits of social security or other government benefits, to cover such overdrafts and overdraft fees. The fee applies to overdrafts created by check, in-person withdrawal, ATM withdrawal, or other electronic means.

*Id.*

32. Notre Dame FCU's Overdraft Opt-in Form further expressly asks consumers to check a box next to one of the following statements:

Yes! I want Notre Dame Federal Credit Union **to authorize and pay** overdrafts on my ATM and everyday debit card transactions.

No. I do not want Notre Dame Federal Credit Union **to authorize and pay** overdrafts on my ATM and everyday debit card transactions.

Opt-in Enrollment Form, Ex. B (emphasis added).

33. Notre Dame FCU therefore promises to use a customer's available balance—the same balance that is immediately reduced when a debit card transaction is authorized—to determine whether an overdraft occurs and a fee is assessed.

34. For APPSN Transactions, for which funds are immediately deducted from a positive account balance and held aside for payment of that same transaction, there are always funds to pay those transactions—yet Notre Dame FCU assesses OD Fees on them anyway.

35. The above promises indicate that transactions are only overdraft transactions when they are authorized and approved into a negative account balance. Of course, that is not true for APPSN Transactions.

36. In fact, Notre Dame FCU actually authorizes transactions on positive funds, sets those funds, then fails to use those same funds to “post” those same transactions. Instead, it uses a secret posting process described below.

37. All the above representations and contractual promises are untrue. In fact, Notre Dame FCU charges OD Fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. No express language in any document states that Notre Dame FCU may impose OD Fees on any APPSN Transactions.

38. The account documents misconstrue Notre Dame FCU's true debit card processing and overdraft practices.

39. First, and most fundamentally, Notre Dame FCU charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions.

40. Notre Dame FCU assesses OD Fees on APPSN Transactions that *do* have sufficient funds available to pay them throughout their lifecycle.

41. Notre Dame FCU's practice of charging OD Fees even when sufficient available funds exist to pay a transaction violates a contractual promise not to do so. This discrepancy between Notre Dame FCU's actual practice and its contractual representations causes consumers like Plaintiff to incur more OD Fees than they should.

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

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

44. In reality, Notre Dame FCU's actual practice is to assay the same debit card transaction twice to determine if the transaction overdraws an account—both at the time a transaction is authorized and later at the time of posting.

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

46. Upon information and belief, something more is going on: at the moment a debit card transaction is getting ready to settle, Notre Dame FCU does something new and unexpected during its nightly batch posting process. Specifically, Notre Dame FCU releases the hold placed on funds for the transaction for a split second, putting money back into the account, then re-debits the same transaction a second time.

47. This secret step allows it to charge OD Fees on transactions that never should have caused OD Fees—transactions that were authorized into sufficient funds, and for which Notre Dame FCU specifically set aside money to pay.

48. This discrepancy between Notre Dame FCU's actual practices and the contract causes consumers to incur more OD Fees than they should.

49. In sum, there is a huge gap between Notre Dame FCU's practices as described in the account documents and Notre Dame FCU's practices in reality.

#### **D. Notre Dame FCU Abuses Contractual Discretion**

50. Notre Dame FCU's treatment of debit card transactions to charge OD Fees is not simply a breach of the express terms of the numerous account documents. In addition, Notre Dame FCU exploits contractual discretion to the detriment of accountholders when it uses these policies.

51. The term "overdraft" is undefined in the Deposit Agreement. Notre Dame FCU uses its discretion to define "overdraft" in a manner contrary to any reasonable, common sense understanding of that term. In Notre Dame FCU's implied definition, a transaction is an

“overdraft” transaction even if Notre Dame FCU sequesters sufficient available funds for that transaction at the time it is made.

52. Moreover, Notre Dame FCU uses its contractual discretion to cause APPSN Transactions to incur OD Fees by knowingly authorizing later transactions that consume funds previously sequestered for APPSN Transactions.

53. Notre Dame FCU uses all of these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable consumer would believe could cause OD Fees.

**E. Reasonable Consumers Understand Debit Card Transactions are Debited Immediately**

54. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with the immediate withdrawal of funds for debit card transactions. That is because if funds are immediately debited, they cannot be depleted by intervening transactions (and it is that subsequent depletion that is the necessary condition of APPSN Transactions). If funds are immediately debited, they are necessarily applied to the debit card transactions for which they are debited.

55. Notre Dame FCU was and is aware that this is precisely how accountholders reasonably understand debit card transactions to work.

56. Notre Dame FCU knows that many consumers prefer debit cards for these very reasons. Consumer research indicates that consumers prefer debit cards as a budgeting device because they do not allow debt like credit cards do, and because the money comes directly out of a checking account.

57. Consumer Action, a national nonprofit consumer education and advocacy organization, advises consumers determining whether they should use a debit card that “[t]here is no grace period on debit card purchases the way there is on credit card purchases; the money is immediately deducted from your checking account. Also, when you use a debit card you lose the

one or two days of ‘float’ time that a check usually takes to clear.” *What Do I Need to Know About Using a Debit Card?*, ConsumerAction (Jan. 14, 2019), [https://www.consumer-action.org/helpdesk/articles/what\\_do\\_i\\_need\\_to\\_know\\_about\\_using\\_a\\_debit\\_card](https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card).

58. Further, Consumer Action informs consumers that “Debit cards offer the convenience of paying with plastic without the risk of overspending. When you use a debit card, you do not get a monthly bill. You also avoid the finance charges and debt that can come with a credit card if not paid off in full.” *Understanding Debit Cards*, ConsumerAction, [http://www.consumer-action.org/english/articles/understanding\\_debit\\_cards](http://www.consumer-action.org/english/articles/understanding_debit_cards) (last visited August 29, 2019).

59. This understanding is a large part of the reason that debit cards have risen in popularity. The number of terminals that accept debit cards in the United States has increased by approximately 1.4 million in the last five years, and with that increasing ubiquity, consumers have (along with credit cards) viewed debit cards “as a more convenient option than refilling their wallets with cash from an ATM.” Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*, MarketWatch (Mar. 23, 2016), <http://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23>.

60. Not only have consumers increasingly substituted debit cards for cash, but they believe that a debit card purchase is the fundamental equivalent of a cash purchase, with the swipe of a card equating to handing over cash, permanently and irreversibly.

61. Notre Dame FCU was aware of a consumer perception that debit transactions reduce an available balance at a specified time and *in a specified order*—namely, the moment they are actually initiated—and Notre Dame FCU’s Deposit Agreement only supports this perception.

## **F. Plaintiff's Debit Card Transactions**

62. As examples, on October 5, 2018, November 24, 2018, December 6, 2018, and February 14, 2019, among other instances, Plaintiff was assessed OD Fees in the amount of \$32.00 on debit card transactions that settled on those days, despite the fact that positive funds were deducted immediately, prior to that day, for the transactions on which Plaintiff was assessed an OD Fees.

## **II. NOTRE DAME FCU CHARGES TWO OR MORE NSF FEES ON THE SAME ITEM**

63. As alleged more fully herein, Notre Dame FCU's account documents allow it to take certain steps when a Credit Union accountholder attempts a transaction but does not have sufficient funds to cover it. Specifically, Notre Dame FCU may (a) authorize the transaction and charge a *single* \$32 OD Fee; or (b) reject the transaction and charge a *single* \$32 NSF Fee.

64. In contrast to its account documents, however, Notre Dame FCU regularly assesses two or more NSF Fees on the *same* item or transaction.

65. 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 NSF Fee on the same item when it is reprocessed. Instead, Chase charges one NSF Fee even if a transaction is resubmitted for payment multiple times.

66. Notre Dame FCU's account documents never disclose this practice. To the contrary, Notre Dame FCU's account documents indicate it will only charge a single NSF Fee on an item or per transaction.

### A. Plaintiff's Experience

67. In support of her claims, Plaintiff offers an example of NSF Fees that should not have been assessed against her checking account. As alleged below, Notre Dame FCU: (a) reprocessed a previously declined transaction; and (b) charged a fee upon reprocessing.

68. On December 24, 2018, Plaintiff attempted an ACH payment to JPMorgan Chase.

69. Notre Dame FCU rejected payment of that transaction due to insufficient funds in Plaintiff's account and charged her a \$32 NSF Fee for doing so. Plaintiff does not dispute the initial fee, as it is allowed by Notre Dame FCU's account documents.

70. Unbeknownst to Plaintiff and without her request to Notre Dame FCU to retry the transaction, however, on December 31, 2018, Notre Dame FCU processed the same transaction yet again, and again Notre Dame FCU rejected the transaction due to insufficient funds and charged Plaintiff *another* \$32 NSF Fee.

71. Then, Unbeknownst to Plaintiff and without her request to Notre Dame FCU to retry the transaction, on January 7, 2019, Notre Dame FCU processed the same transaction yet again, and again Notre Dame FCU rejected the transaction due to insufficient funds and charged Plaintiff *another* \$32 NSF Fee.

72. *In sum, Notre Dame FCU charged Plaintiff \$96 in fees to attempt to process a single payment.*

73. Plaintiff understood the payment to be a single transaction as is laid out in Notre Dame FCU's Deposit Agreement, capable at most of receiving a single NSF Fee (if Notre Dame FCU returned it) or a single OD Fee (if Notre Dame FCU paid it).

74. The same pattern occurred numerous times for Plaintiff with Notre Dame FCU charging multiple NSF Fees for a single transaction.

**B. The Imposition of Multiple NSF Fees on a Single Transaction Violates Notre Dame FCU's Express Promises and Representations**

75. The Deposit Agreement provides the general terms of Plaintiff's relationship with Notre Dame FCU and therein Notre Dame FCU makes explicit promises and representations regarding how transactions will be processed, as well as when NSF Fees and OD Fees may be assessed.

76. The Deposit Agreement contains explicit terms indicating that NSF Fees will only be assessed once per transaction or item—defined as a customer request for payment or transfer—when in fact Notre Dame FCU regularly charges two or more NSF Fees per transaction or item even though a customer only requested the payment or transfer once.

77. Notre Dame FCU's account documents indicate that a singular NSF Fee can be assessed on checks, ACH debits, and electronic payments.

78. Notre Dame FCU's account documents state that it will charge \$32 per item or transaction that is returned due to insufficient funds.

79. According to the Deposit Agreement, at most a single fee will be assessed when a check or debit item is “written”:

If a check, item or transaction is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item for insufficient funds (NSF).

Ex. A at 4.

80. The same “check,” “item,” or “transaction” cannot conceivably become a new one each time it is rejected for payment then reprocessed, especially when—as here—Plaintiff took no action to resubmit it.

81. There is zero indication anywhere in the account documents that the same “check” or “transaction” is eligible to incur multiple NSF Fees.



82. Even if Notre Dame FCU reprocesses an instruction for payment, it is still the same “check,” “item,” or “transaction.” The Credit Union’s reprocessing is simply another attempt to effectuate an accountholder’s original order or instruction.

83. The disclosures described above never discuss a circumstance where Notre Dame FCU may assess multiple NSF Fees for a single check or transaction that was returned for insufficient funds and later reprocessed one or more times and returned again.

84. In sum, Notre Dame FCU promises that one \$32 NSF Fee will be assessed per electronic payment or check, and these terms must mean all iterations of the same instruction for payment. As such, Notre Dame FCU breached the contract when it charged more than one fee per item.

85. Reasonable consumers understand any given authorization for payment to be one, singular “check” or “electronic transaction,” as those terms are used in Notre Dame FCU’s account documents.

86. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same transaction will be treated as the same “item,” which the Credit Union will either authorize (resulting in an overdraft item) or reject (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere does Notre Dame FCU disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor do Notre Dame FCU customers ever agree to such fees or practices.

87. Customers reasonably understand, based on the language of the Deposit Agreement and Notre Dame FCU’s other account documents, that the Credit Union’s reprocessing of checks or ACH payments are simply additional attempts to complete the original order or instruction for

payment, and as such, will not trigger NSF Fees. In other words, it is always the same item or transaction.

88. Banks and credit unions like Notre Dame FCU that employ this abusive practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that do engage in this abusive practice disclose it expressly to their accountholders—something Notre Dame FCU here never did.

89. For example, First Citizens Bank, a major institution in the Carolinas, engages in the same abusive practice as Notre Dame FCU, but at least expressly states:

Because we may charge a service fee for an NSF item each time it is presented, **we may charge you more than one service fee for any given item.** All fees are charged during evening posting. When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft.

*Deposit Account Agreement*, First Citizen's Bank (Sept. 2018), <https://www.firstcitizens.com/personal/banking/deposit-agreement> (emphasis added).

90. First Hawaiian Bank engages in the same abusive practices as Defendant, but at least currently discloses it in its online banking agreement, in all capital letters, as follows:

**YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT OF A RETURNED ITEM AND RESUBMISSION.**

*Terms and Conditions of FHB Online Services*, First Hawaiian Bank 40, [https://www.fhb.com/en/assets/File/Home\\_Banking/FHB\\_Online/Terms\\_and\\_Conditions\\_of\\_FHB\\_Online\\_Services\\_RXP1.pdf](https://www.fhb.com/en/assets/File/Home_Banking/FHB_Online/Terms_and_Conditions_of_FHB_Online_Services_RXP1.pdf) (last accessed August 30, 2019) (emphasis added).

91. Klein Bank similarly states in its online banking agreement:

[W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment (electronic or check) is submitted to us for payment from your Bill Payment Account when, at the time of posting, your Bill Payment Account is overdrawn,

would be overdrawn if we paid the item (whether or not we in fact pay it) or does not have sufficient available funds; or (2) we return, reverse, or decline to pay an item for any other reason authorized by the terms and conditions governing your Bill Payment Account. **We will charge an NSF/Overdraft Fee as provided in this section 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 bill payment.**

*Consumer and Small Business Online Access Agreement*, Klein Bank ¶ H, <https://www.kleinbankonline.com/bridge/disclosures/ib/disclose.html> (last accessed September 9, 2019) (emphasis added).

92. Notre Dame FCU provides no such disclosure, and in so doing, deceives its accountholders.

**C. The Imposition of Multiple NSF Fees on a Single Transaction Breaches Notre Dame FCU's Duty of Good Faith and Fair Dealing**

93. 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 Notre Dame FCU is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, Notre Dame FCU has a duty to honor transaction requests in a way that is fair to Plaintiff and its other customers and is prohibited from exercising its discretion to pile ever greater penalties on the depositor.

94. Here—in the adhesion agreements Notre Dame FCU foisted on Plaintiff and its other customers—Notre Dame FCU has provided itself numerous discretionary powers affecting customers' credit union accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, the Credit Union abuses that discretion to take money out of consumers' account without their permission and contrary to their reasonable expectations that they will not be charged multiple fees for the same transaction.

95. Notre Dame FCU abuses the power it has over customers and their credit union accounts and acts contrary to reasonable expectations under the Deposit Agreement when it construes the word “item” to mean each iteration of the same payment. This is a breach of Notre Dame FCU’s implied covenant to engage in fair dealing and to act in good faith.

96. Further, Notre Dame FCU maintains complete discretion not to assess NSF Fees on transactions at all. By exercising its discretion in its own favor—and to the prejudice of Plaintiff and other customers—by charging more than one NSF Fee on a single item, Notre Dame FCU breaches the reasonable expectation of Plaintiff and other customers and in doing so violates the implied covenant to act in good faith.

97. It was bad faith and totally outside Plaintiff’s reasonable expectations for Notre Dame FCU to use its discretion to assess two or three NSF Fees for a single attempted payment.

98. When Notre Dame FCU charges multiple NSF Fees, Notre Dame FCU uses its discretion to define the meaning of “item” in an unreasonable way that violates common sense and reasonable consumer expectations. Notre Dame FCU uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more NSF Fees.

### **CLASS ACTION ALLEGATIONS**

99. Description of the Classes: Plaintiff brings this class action on behalf of herself and two classes of persons (“the Classes”) defined as follows:

All consumers who, during the applicable statute of limitations, were charged OD Fees on debit card transactions that did not overdraw a Notre Dame FCU checking account (the “APPSN Class”).

All consumers who, during the applicable statute of limitations, were charged multiple NSF Fees on the same item on a Notre Dame FCU checking account (the “Multiple NSF Class”).

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

99. Excluded from the Classes are Notre Dame FCU, its parents, subsidiaries, affiliates, officers and directors, any entity in which Notre Dame FCU 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.

100. This action is properly maintainable as a class action under Trial Rules 23(A), (B)(2), and (B)(3).

101. The Classes consist of thousands of members, such that joinder of all Class members is impracticable.

102. There are questions of law and fact that are common to the Class members that relate to Defendant's practice of charging: (a) OD Fees on transactions that did not overdraw accounts; and (b) multiple NSF Fees on a single item or transaction.

103. The claims of the Plaintiff are typical of the claims of the proposed Classes because they are based on the same legal theories, and Plaintiff has no interests that are antagonistic to the interests of the Class members.

104. The Plaintiff is an adequate representative of the Classes and has retained competent legal counsel experienced in class actions and complex litigation.

105. The questions of law and fact common to the Class predominate over any questions affecting only individual Class members, particularly because the focus of the litigation will be on Notre Dame FCU's conduct and its improper fees. The predominant questions of law and fact in this litigation include, but are not limited to, whether Defendant:

- Imposed OD Fees on transactions when those transactions did not overdraw accounts.

- Assessed multiple NSF Fees on the same item.
- Breached its contract with Plaintiff and Class members.
- Breached the covenant of good faith and fair dealing imposed on it.
- Violated the Indiana Deceptive Consumer Sales Act.

106. Other questions of law and fact common to the Classes include the proper method or methods by which to measure damages.

107. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, as the pursuit of hundreds of individual lawsuits would not be economically feasible for individual Class members, and certification as a class action will preserve judicial resources by allowing the common issues of the Class members to be adjudicated in a single forum, avoiding the need for duplicative hearings and discovery in individual actions that are based on an identical set of facts. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of Defendant, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and Notre Dame FCU's misconduct will proceed without remedy. In addition, without a class action, it is likely that many members of the Classes will remain unaware of Notre Dame FCU's conduct and the claims they may possess.

108. It appears that other persons who fall within the Class definitions set forth above are not pursuing similar litigation, such that individual Class members do not wish to control the prosecution of separate actions.

109. This proposed class action does not present any unique management difficulties.

**COUNT I**  
**Breach of Contract, Including Breach of the Covenant of Good Faith and Fair Dealing**  
**(On Behalf of Plaintiff and the Classes)**

110. Plaintiff incorporates the preceding paragraphs of this Complaint as if fully set forth below.

111. Plaintiff and Notre Dame FCU have contracted for bank account deposit, checking, ATM, and debit card services.

112. The Deposit Agreement states that Indiana law applies.

113. All contracts entered by Plaintiff and the Classes are identical or substantively identical because Defendant's form contracts were used uniformly.

114. Notre Dame FCU breached promises included in the account documents as described herein.

115. Indiana imposes a duty of good faith and fair dealing on contracts between banks and/or credit unions and their customers because banks and credit unions are inherently in a superior position to their checking account holders and, from this superior vantage point, they offer customers contracts of adhesion, often with terms not readily discernible to a layperson.

116. Alternatively, the duty of good faith and fair dealing arises from an ambiguity in the contract as to whether Notre Dame FCU is permitted to charge OD Fees on APPSN Transactions or multiple NSF Fees on the same item.

117. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit

of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

118. Notre Dame FCU has breached the covenant of good faith and fair dealing in the contract through its policies and practices as alleged herein.

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

120. Plaintiff and members of the Class have sustained damages as a result of Notre Dame FCU's breach of the contract.

121. Plaintiff and members of the Class have sustained damages as a result of Notre Dame FCU's breach of the covenant of good faith and fair dealing.

**COUNT II**  
**Violation of The Indiana Deceptive Consumer Sales Act**  
**(On Behalf of Plaintiff and the Classes)**

122. Plaintiff incorporates the preceding paragraphs of this Complaint as if fully set forth below.

123. The purposes and policies of the Indiana Deceptive Consumer Sales Act (the "DCSA"), Indiana Code § 24-5-0.5-1 to -12, are to:

- (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices;
- (2) protect consumers from suppliers who commit deceptive and unconscionable consumer sales practices; and
- (3) encourage the development of fair consumer sales practice.

Ind. Code § 24-5-0.5-1(b).

124. The General Assembly has instructed courts to construe the DCSA liberally to promote these purposes and policies. Ind. Code § 24-5-0.5-1(a).



125. Notre Dame FCU is a “supplier” as defined in the DCSA because it is a seller or other person who regularly engages in or solicits consumer transactions, which are defined to include sales of personal property, services, and intangibles that are primarily for a personal, familial, or household purpose, such as those at issue in this action. Ind. Code § 24-5-0.5-2(1), (3).

126. The DCSA provides that “[a] supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction. Such an act, omission, or practice by a supplier is a violation of [the DCSA] whether it occurs before, during, or after the transaction. An act, omission, or practice prohibited by this section includes both implicit and explicit misrepresentations.” Ind. Code § 24-5-0.5-3(a).

127. The DCSA further provides:

Without limiting the scope . . . the following acts, and the following representations as to the subject matter of a consumer transaction, made orally, in writing, or by electronic communication, by a supplier, are deceptive acts:

- (1) That such subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have.
- (2) That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not. . . .

Ind. Code § 24-5-0.5-3.

128. Notre Dame FCU committed deceptive acts, including but not limited to:

- a. Representing that its account deposit, checking, ATM, and debit card services had performance, characteristics, uses, or benefits they did not have and which Notre Dame FCU knew or should reasonably have known they do not have;
- b. Representing that its account deposit, checking, ATM, and debit card services were of a particular standard, quality, grade, style, or model,

when they were not and when Notre Dame FCU knew or should reasonably have known that they were not; and

- c. Omitting necessary information about the types of fees it would charge and when those fees would be charged.

129. Notre Dame FCU's violations were willful and were done as part of a scheme, artifice, or device with intent to defraud or mislead, and therefore are incurable deceptive acts under the DCSA.

130. The DCSA provides that "[a] person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act or five hundred dollars (\$500), whichever is greater. The court may increase damages for a willful deceptive act in an amount that does not exceed the greater of: (i) three (3) times the actual damages of the consumer suffering the loss; or (ii) one thousand dollars (\$1,000)." Ind. Code § 24-5-0.5-4(a)

131. The DCSA provides that "[a]ny person who is entitled to bring an action under subsection (a) on the person's own behalf against a supplier for damages for a deceptive act may bring a class action against such supplier on behalf of any class of persons of which that person is a member . . . ." Ind. Code § 24-5-0.5-4(b).

132. Had Plaintiff and members of the Classes been aware that they were going to be charged NSF Fees and OD Fees in the manner Notre Dame FCU assessed them, Plaintiff and members of the Classes would not have entered into such transactions and would not have incurred the additional or multiple fees.

133. As a direct and proximate result of Defendant's unfair and deceptive acts and practices in violation of the DCSA, Plaintiff and members of the Classes have incurred more OD

Fees and NFS Fees than they should have and have suffered monetary damages for which Defendant is liable.

134. Plaintiff and members of the Classes seek actual damages plus interest on damages at the legal rate, as well as all other just and proper relief afforded by the DCSA. As redress for Defendant's repeated and ongoing violations, Plaintiff and members of the Classes are entitled to, *inter alia*, actual damages, treble damages, attorneys' fees, and injunctive relief.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff and 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 under Ind. R. Trial. P. 23(B)(2) and 23(B)(3);
- B. Restitution of all improperly assessed OD Fees and NSF Fees paid to Notre Dame FCU by Plaintiff and the Classes, as a result of the wrongs alleged herein in an amount to be determined at trial;
- C. Actual damages in an amount according to proof;
- D. Pre-judgment interest at the maximum rate permitted by applicable law;
- E. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law;
- F. Attorneys' fees under the DCSA, the common fund doctrine, and all other applicable law; and
- G. Such other relief as this Court deems just and proper.

### **JURY DEMAND**

Plaintiff, by counsel, demands trial by jury.

Dated: September 10, 2019

Respectfully submitted,

/s/Lynn A. Toops

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*\*Pro Hac Vice Motions to be Filed*

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