



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

5. As described herein, Defendant's practices violate Indiana common law, as well as the Defendant's own form contracts.

6. Defendant's improper scheme to extract funds from accountholders already struggling to make ends meet has victimized Plaintiff and thousands of other Indiana citizens.

### **PARTIES**

7. Plaintiff is a citizen and resident of Indianapolis, Indiana.

8. Teachers Credit Union is Indiana's largest credit union. It has over \$3 billion in assets and maintains its headquarters in South Bend, Indiana.

### **JURISDICTION AND VENUE**

9. This Court has jurisdiction over TCU because Defendant is incorporated under the laws of the State of Indiana and has engaged in a continuous and systematic course of business in the State by, *inter alia*, maintaining permanent offices in Indiana and offering banking products for sale to Indiana consumers.

10. Venue is proper in Marion County because the events or omissions giving rise to this action occurred in Marion County.

### **BACKGROUND FACTS**

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

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

11. Plaintiff brings this cause of action challenging TCU's practice of charging OD Fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions," or "APPSN Transactions."

12. Here's how it works. At the moment a debit card transaction is authorized on an account with positive funds to cover the transaction, TCU immediately reduces the consumer's checking accounts for the amount of the transaction, sets aside funds to cover the transaction, and as a result, the customer's displayed "available balance" in the account reflects that subtracted amount. Because TCU sequesters the funds for payment, the account will always have sufficient funds available to cover the transaction.

13. However, TCU still assesses crippling OD Fees, currently in the amount of \$32, on many of these transactions, and misrepresents its practices in its Deposit Agreement.

14. Despite putting aside sufficient funds for debit card transactions at the time the transactions are authorized, TCU 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.

15. TCU 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, TCU 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.

16. 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. 29, 2009).

17. 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 also means that many subsequent transactions incur OD Fees due to the unavailability of the funds sequestered for the earlier debit card transactions.

18. Despite keeping the held funds off-limits for other transactions (thereby ensuring that the related transactions *always* have sufficient available funds to be covered), TCU improperly charges OD Fees on APPSN Transactions.

19. 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.

*Supervisory Highlights*, Consumer Financial Protection Bureau 9 (Winter 2015), [https://files.consumerfinance.gov/f/201503\\_cfpb\\_supervisory-highlights-winter-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf).

20. There is no justification for this practice, other than to maximize TCU's OD Fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduce an account balance. But TCU 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 TCU was not content with just those millions in OD Fees. Instead, it sought millions *more* in OD Fees assessed on APPSN Transactions.

21. Besides being deceptive, unfair, and unconscionable, this practice breaches promises made in TCU's adhesion contracts—the Deposit Agreement which fundamentally

misconstrues and misleads consumers about the true nature of TCU's processes and practices. This practice also exploits TCU's contractual discretion to gouge consumers.

22. In plain, clear, and simple language, the Deposit Agreement covering OD Fees promises that TCU will only charge an OD Fee on a transaction that has insufficient funds to cover the transaction.

23. Despite the promises in its Deposit Agreement, TCU routinely charges OD Fees on APPSN Transactions.

24. In short, TCU 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, on a systematic basis.

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

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

26. At this step, if the transaction is approved, TCU 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.

27. As explained *supra*, the immediate debit and hold of positive funds is designed to ensure that there are enough funds in the account to pay the transaction when it settles.

28. Sometime thereafter, the funds are actually transferred from the customer's account to the merchant's account.

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

**C. TCU’s Deposit Agreement**

30. Plaintiff has a TCU checking account, which is governed by TCU’s Deposit Agreement.

31. The Deposit Agreement provides that TCU will not charge OD Fees on transactions that have sufficient funds to cover the transactions at the time they are initiated.

32. TCU promises that “debit authorization holds” are placed immediately on debit card transactions; that those held funds are not and cannot be available for use by *other* transactions; that the held funds will be used to pay for the transaction for which they were held; and that overdraft determinations are made at the moment TCU decides whether or not to “honor withdrawal requests that overdraw the account balance”:

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.

[ . . . ]

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.

Ex. A at 4–5.

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

34. 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.

35. In fact, TCU actually authorizes transactions on positive funds, sets those funds aside, then fails to use those same funds to pay those same transactions. Instead, it uses a secret posting process described below.

36. All of the above representations and contractual promises are untrue. TCU 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 TCU may impose overdraft fees on APPSN Transactions.

37. The Deposit Agreement misconstrues TCU's true debit card processing and overdraft practices.

38. First, and most fundamentally, TCU charges overdraft fees on debit card transactions for which there are sufficient funds available to use to cover the transactions.

39. TCU assesses OD Fees on APPSN Transactions that *do* have sufficient account funds available to pay them throughout their lifecycle.



40. TCU'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 TCU's actual practice and the contract causes consumers like Plaintiff to incur more OD Fees than they should.

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

42. Because these withdrawals take place upon initiation, they cannot be re-debited later. But that is what TCU does when it re-debits the account during a secret batch posting process.

43. TCU's actual practice is to assay the same debit card transaction twice to determine if the transaction overdraws an account—either at the time a transaction is authorized or later at the time the transaction is settled.

44. At the time of settlement, however, the available balance *has not changed at all* for these transactions previously authorized into sufficient funds. As such, TCU may not charge an OD Fee on such transactions because the available balance was never rendered insufficient.

45. Upon information and belief, something more is going on: during its middle-of-the-night batch posting process, and at the moment a debit card transaction is getting ready to settle, TCU releases the debit hold for a split second, putting money back into the account, then re-debits the same transaction a second time.

46. This secret step allows it to charge OD Fees on transactions that never should have qualified—transactions that were authorized into sufficient funds, and for which TCU specifically set aside money to pay them.

47. This gap between TCU's actual practices and what it promises in its Deposit Agreement causes consumers to incur more OD Fees than they should.

**D. TCU Abuses Contractual Discretion**

48. TCU's manipulation of debit card transactions to charge OD Fees is not simply a breach of the express terms of Deposit Agreement; TCU also exploits its contractual discretion to the detriment of accountholders when it engages in this challenged practice.

49. The phrase "to pay" a transaction is undefined in the Deposit Agreement. TCU uses its discretion to define "to pay" in a manner contrary to any reasonable, common sense understanding of the phrase. By TCU's implied definition, a balance is insufficient "to pay" a transaction even if TCU has purposefully sequestered sufficient available funds for that transaction at the time it is made.

50. Moreover, TCU uses its contractual discretion to cause APPSN Transactions to incur OD Fees by knowingly authorizing later transactions which consume available funds previously sequestered for APPSN Transactions.

51. TCU uses its contractual discretion unfairly to extract OD Fees on transactions that no reasonable consumer would believe could cause the fees.

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

52. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with the immediate withdrawal of funds for debit card transactions. 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, then, they are necessarily applied to the debit card transactions for which they were debited.

53. TCU was and is aware that this is precisely how accountholders reasonably understand debit card transactions work.

54. TCU 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.

55. 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?*, Consumer Action (Jan. 14, 2019), [http://www.consumer-action.org/helpdesk/articles/what\\_do\\_i\\_need\\_to\\_know\\_about\\_using\\_a\\_debit\\_card/](http://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card/).

56. 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*, Consumer Action, [https://www.consumer-action.org/english/articles/understanding\\_debit\\_cards](https://www.consumer-action.org/english/articles/understanding_debit_cards) (last visited August 13, 2019).

57. 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

viewed debit cards (along with credit 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>.

58. Not only have consumers increasingly substituted cash for debit cards, 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.

59. TCU was aware of the consumer perception that debit transactions reduce an available balance *in a specified order*—namely, the moment they are actually initiated—and its Deposit Agreement only support this perception.

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

60. As an example of TCU’s unlawful APPSN policy which ensnared Plaintiff, on April 2, 2018, Ms. Ingram was assessed a \$32.00 OD Fee on a debit card transaction of \$7.96 that settled that day, despite the fact that positive funds were deducted immediately, two days prior, for the transactions. As another example, the same fact pattern occurred on March 21, 2018, when TCU assessed an OD Fee on a debit card purchase of \$26.45 that was authorized into a positive account balance the day prior.

#### **II. TCU CHARGES TWO OR MORE NSF FEES ON THE SAME ITEM**

61. TCU’s Deposit Agreement allows it to take certain steps when an accountholder attempts an Automated Clearing House (“ACH”) transaction but does not have sufficient funds to cover it. Specifically, the Credit Union may (a) authorize the transaction and charge a *single* OD Fee; or (b) reject the transaction and charge a *single* NSF Fee.

62. In contrast to its Deposit Agreement, however, TCU regularly assesses two or more NSF Fees on the *same* item or transaction.

63. Plaintiff does not dispute TCU's right to reject a transaction and charge a *single* NSF Fee, but TCU unlawfully maximizes its already profitable NSF Fees with deceptive practices that also violate the express terms of its Deposit Agreement.

64. Specifically, TCU unlawfully assesses *multiple* NSF Fees on a single ACH transaction.

65. Unbeknownst to consumers, each time TCU reprocesses an ACH transaction or check for payment after it was initially rejected for insufficient funds, TCU chooses to treat it as a new and unique item or transaction that is subject to yet another NSF Fee. But TCU's Deposit Agreement never discloses that this counterintuitive and deceptive result could be possible and, in fact, suggests the opposite.

66. The Deposit Agreement indicates that only a *single* NSF Fee will be charged per "transaction" or "item," however many times that item is reprocessed without the customer's request to do so. An electronic item reprocessed after an initial return for insufficient funds, especially through no action by the customer, cannot and does not fairly become a new, unique item for fee assessment purposes, particularly where TCU reprocesses the items knowing there are insufficient funds.

67. TCU's Deposit Agreement never discloses this practice. To the contrary, the Credit Union's Deposit Agreement indicates it will only charge a single NSF Fee on an item or per transaction.

68. 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 reprocessed for payment multiple times.

#### **A. Plaintiff's Experience**

69. In support of her claim, Plaintiff offers an example of an NSF Fee that should not have been assessed against her checking account. As alleged below, TCU (a) reprocessed a previously declined transaction without Plaintiff's knowledge or request; and (b) charged a fee upon reprocessing.

70. On February 16, 2018, Ms. Ingram attempted an electronic payment via ACH.

71. TCU rejected payment of that transaction due to insufficient funds and charged Ms. Ingram a \$32 NSF Fee for doing so. Ms. Ingram does not dispute this initial fee, as it is allowed by TCU's Deposit Agreement.

72. Unbeknownst to Ms. Ingram and without her request to TCU to reprocess the transaction, however, ten days later, on February 26, 2018, TCU processed the same transaction yet again, and again rejected the transaction due to insufficient funds and charged Ms. Ingram *another* \$32 NSF Fee.

73. *In sum, TCU charged Ms. Ingram \$64 in NSF Fees to process a single, unpaid transaction.*

74. Ms. Ingram understood the payment to be a single transaction as is laid out in TCU's Deposit Agreement, capable at most of receiving a single NSF Fee (if TCU returned it) or a single OD Fee (if TCU paid it).

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

75. The Deposit Agreement provides the general terms of Plaintiff's relationship with the Credit Union and 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 "ACH NSF Item," when in fact TCU regularly charges two or more NSF Fees per item even though a customer only requested the payment or transfer once.

77. TCU's Deposit Agreement indicates that a singular NSF Fee can be assessed on items.

78. TCU's Deposit Agreement states that it will charge \$32 per item that is returned due to insufficient funds.

79. According to the Deposit Agreement, at most a *single* fee will be assessed on an "ACH NSF Item":

If a check, item or transaction (other than an ATM or everyday debit card 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). The amounts of the overdraft and NSF fees are disclosed elsewhere, as are your rights to opt in to overdraft services for ATM and everyday debit card transactions, if applicable.

[...]

ACH Fees	
ACH Overdraft Item Fee .....	\$32.00
ACH NSF Item Fee .....	\$32.00

Ex. A at 9, 24.

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

81. There is zero indication anywhere in the Deposit Agreement that the same “check, item or transaction” is eligible to incur multiple NSF Fees.

82. Even if TCU 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 request for payment.

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

84. In sum, TCU promises that one \$32 NSF Fee will be assessed per “check, item or transaction”, and these terms must mean all iterations of the same request for payment. As such, TCU breached its Deposit Agreement when it charged more than one NSF Fee per item.

85. Reasonable consumers understand any given authorization for payment to be one, singular “check, item or transaction,” as those terms are used in TCU’s Deposit Agreement.

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 TCU disclose that it will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees, nor do TCU customers ever agree to such fees.



87. Customers reasonably understand, based on the language of the Deposit Agreement, 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, they are always the same item or transaction.

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

89. For example, First Citizens Bank, a major institution in the Carolinas, engages in the same abusive practice as TCU, 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.<sup>1</sup>

90. First Hawaiian Bank also engages in the same abusive practices as TCU, 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.**<sup>2</sup>

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

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<sup>1</sup> *First Citizens Bank Deposit Account Agreement*, First Citizens Bank, <https://www.firstcitizens.com/personal/banking/deposit-agreement> (last visited Aug. 13, 2019) (emphasis added).

<sup>2</sup> *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\\_FH\\_B\\_Online\\_Services\\_RXP1.pdf](https://www.fhb.com/en/assets/File/Home_Banking/FHB_Online/Terms_and_Conditions_of_FH_B_Online_Services_RXP1.pdf) (last visited Aug. 13, 2019) (emphasis added).

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.<sup>3</sup>

92. First Financial Bank in Ohio, aware of the commonsense meaning of “item,” clarifies the meaning of that term to its accountholders:

Merchants or payees may present an item multiple times for payment if the initial or subsequent presentment is rejected due to insufficient funds or other reason (representation). **Each presentment is considered an item and will be charged accordingly.**<sup>4</sup>

93. TCU provides no such disclosures, and in so doing, deceives its accountholders.

**C. The Imposition of Multiple NSF Fees on a Single Transaction Breaches TCU’s Duty of Good Faith and Fair Dealing**

94. 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.

95. The party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties’ reasonable expectations and means that the Credit Union is prohibited from exercising its discretion to enrich itself and gouge its customers.

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<sup>3</sup> *Online Access Agreement*, Klein Bank 4 (Jan. 2013), <http://cups.cs.cmu.edu/bankprivacy/notices/kleinfincialinc1123915chaskamn16.pdf> (emphasis added).

<sup>4</sup> *Terms and Conditions of Your Account*, First Financial Bank 36 (Aug. 2018), [https://www.bankatfirst.com/content/dam/first-financial-bank/FFB\\_Terms\\_and\\_Conditions.pdf](https://www.bankatfirst.com/content/dam/first-financial-bank/FFB_Terms_and_Conditions.pdf) (emphasis added).

96. Indeed, the Credit Union 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 on ever greater penalties on the customer.

97. Here—in the adhesion agreements TCU foisted on Plaintiff and its other customers—TCU 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.

98. TCU exercises its discretion in its own favor—and to the prejudice of Plaintiff and its other customers—when it reprocesses a transaction knowing the customer’s account lacks funds and then charges additional NSF Fees on a single item.

99. Further, TCU abuses the power it has over customers and their accounts and acts contrary to their reasonable expectations under the Deposit Agreement. This is a breach of the Credit Union’s implied covenant to engage in fair dealing and act in good faith when exercising its discretionary powers.

100. Further, TCU maintains complete discretion not to assess NSF Fees on transactions at all. As alleged above, the Credit Union “reserves the right to charge you an overdraft/insufficient funds fee.” By exercising its discretion in its own favor—and to the prejudice of Plaintiff and other customers—and charging more than one NSF Fee on a single item, TCU breaches the reasonable expectation of Plaintiff and other customers and in doing so violates the implied covenant to act in good faith.

101. It was bad faith and totally outside of Plaintiff's reasonable expectations for TCU to use its discretion to assess two or three NSF Fees for a single attempted payment.

102. When TCU charges multiple NSF Fees, the Credit Union uses its discretion to define contract terms in an unreasonable way that violates common sense and reasonable consumer expectations. TCU uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more NSF Fees.

103. Moreover, TCU provides itself discretion to refuse to reprocess transactions that are initially rejected. It abuses that discretion when it repeatedly reprocesses transactions and charges NSF Fees each time.

### **CLASS ACTION ALLEGATIONS**

104. Description of the Classes: Plaintiff brings this class action on behalf of herself and two classes of persons (collectively "the Classes") defined as follows:

All TCU checking accountholders in Indiana who, during the applicable statute of limitations, were charged OD Fees on debit card transactions that did not overdraw a TCU checking account (the "APPSN Class").

All TCU checking accountholders in Indiana who, during the applicable statute of limitations, were charged multiple NSF Fees on a single item (the "Multiple NSF Class").

105. Excluded from the Classes are Defendant's officers, directors, affiliates, legal representatives, employees, successors, subsidiaries, and assigns. Also excluded from the Classes are any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff. Also specifically excluded are any individuals who were not Indiana citizens at the time this action was commenced.

106. The time period for each of the Classes is the number of years immediately preceding the date on which this Complaint was filed as allowed by the applicable statute of limitations, going forward into the future until such time as TCU ceases the conduct challenged herein.

107. Numerosity: The members of the proposed Classes are so numerous that individual joinder of all members is impracticable. The exact number and identities of the members of the proposed Classes are unknown at this time and can be ascertained only through appropriate discovery. Plaintiff estimates the number of members in each Class to be in the thousands.

108. Common Questions of Law and Fact Predominate: There are many questions of law and fact common to Plaintiff and the Classes, and those questions substantially predominate over any questions that may affect individual Class members. Common questions of law and fact include:

- A. Whether TCU charged OD Fees on transactions that did not overdraw an account;
- B. Whether TCU charged multiple NSF Fees on a single item;
- C. Whether TCU breached its Deposit Agreement by charging OD Fees on transactions that did not overdraw an account;
- D. Whether TCU breached its Deposit Agreement by charging multiple NSF Fees on a single item;
- E. Whether TCU breached the covenant of good faith and fair dealing;
- F. Whether TCU was unjustly enriched;
- G. The proper method or methods by which to measure damages; and

H. The declaratory relief to which the Classes are entitled.

109. Typicality: Plaintiff's claims are typical of the claims of the members of the Classes. Plaintiff and all members of the Classes have been similarly affected by the actions of Defendant.

110. Adequacy of Representation: Plaintiff will fairly and adequately represent and protect the interests of the Classes. Plaintiff has retained counsel with substantial experience in prosecuting complex class action litigation. Plaintiff and her counsel are committed to vigorously prosecuting this action on behalf of the Classes and have the financial resources to do so.

111. Superiority of Class Action: Plaintiff and the members of the Classes suffered, and will continue to suffer, harm as a result of TCU's unlawful and wrongful conduct. A class action is superior to other available methods for the fair and efficient adjudication of the present controversy. Individual joinder of all members of the Classes is impractical. Even if individual Class members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversies engendered by TCU's common course of conduct. The class action device allows a single court to provide the benefits of unitary adjudication, judicial economy, and the fair and equitable handling of all class members' claims in a single forum. The conduct of this action as a class action conserves the resources of the parties and of the judicial system and protects the rights of the Class members.

112. Risk of Inconsistent or Varying Adjudication: Class action treatment is proper, and this action should be maintained as a class action because the risks of separate actions by individual members of the Classes would create a risk of: (a) inconsistent or varying adjudications with

respect to individual Class members, which would establish incompatible standards of conduct for the TCU as the parties opposing the Classes; and/or (b) adjudications with respect to individual Class members would, as a practical matter, be dispositive of the interests of other Class members not party to the adjudication or would substantially impair or impeded their ability to protect their interests.

113. Action Generally Applicable to Class as a Whole: TCU, as the party opposing the Classes, has acted or refused to act on grounds generally applicable to the Classes, thereby making appropriate final declaratory relief with respect to the Classes as a whole.

**FIRST CLAIM FOR RELIEF**  
**Breach of Contract, Including the Covenant of Good Faith and Fair Dealing**  
**(On behalf of all Classes)**

114. Plaintiff incorporates by reference the preceding paragraphs.

115. Plaintiff and TCU have contracted for banking services, as embodied in the TCU's Deposit Agreement.

116. All contracts entered into by Plaintiff and the Classes are identical or substantively identical because the TCU's Deposit Agreement was used uniformly.

117. TCU has breached the express terms of the Deposit Agreement as described herein.

118. Under the law of Indiana, parties must act in good faith when exercising discretionary powers and interpreting contractual ambiguity. 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.

119. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes their conduct to be justified. Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion of the spirit of the bargain, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

120. TCU abused the ambiguity it created and the discretion it granted to itself when it charged OD Fees on transactions that did not overdraw an account and when it charged more than one NSF Fee on a single transaction.

121. In these ways TCU violated its duty of good faith and fair dealing.

122. TCU willfully engaged in the foregoing conduct for the purpose of (1) gaining unwarranted contractual and legal advantages; and (2) unfairly and unconscionably maximizing revenue from Plaintiff and other members of the Classes.

123. Plaintiff and members of the Classes have performed all, or substantially all, of the obligations imposed on them under the Deposit Agreement.

124. Plaintiff and members of the Classes have sustained damages as a result of TCU's breaches of the Deposit Agreement and violations of the covenant of good faith and fair dealing.

**SECOND CLAIM FOR RELIEF**  
**Unjust Enrichment**  
**(On behalf of all Classes)**



125. Plaintiff re-alleges the preceding paragraphs as if fully set forth herein and, to the extent necessary, pleads this cause of action in the alternative. Plaintiff will not pursue unjust enrichment if her breach of contract claim survives at the time of trial.

126. Plaintiff, on behalf of herself and the Classes, asserts a common law claim for unjust enrichment.

127. By means of TCU's wrongful conduct alleged herein, TCU knowingly assessed improper bank fees.

128. TCU knowingly received and retained wrongful benefits and funds from Plaintiff and members of the Classes. In so doing, TCU acted with conscious disregard for the rights of Plaintiff and members of the Classes.

129. As a result of TCU's wrongful conduct as alleged herein, TCU has been unjustly enriched at the expense of, and to the detriment of, Plaintiff and members of the Classes.

130. TCU's unjust enrichment is traceable to, and resulted directly and proximately from, the conduct alleged herein.

131. Under the common law doctrine of unjust enrichment, it is inequitable for TCU to retain the benefits it received, and is still receiving, without justification. TCU's retention of such funds under circumstances making it inequitable to do so constitutes unjust enrichment.

132. The financial benefits derived by TCU rightfully belong to Plaintiff and members of the Classes. TCU should be compelled to disgorge in a common fund for the benefit of Plaintiff and members of the Classes all wrongful or inequitable proceeds it received. A constructive trust should be imposed upon all wrongful or inequitable sums received by TCU traceable to Plaintiff and the members of the Classes.

133. Plaintiff and members of the Classes have no adequate remedy at law.

**RELIEF REQUESTED**

WHEREFORE, Plaintiff individually and on behalf of the Classes demands a trial by jury on all triable issues and respectfully requests that the Court:

- (a) Certify this case as a class action;
- (b) Award Plaintiff and the Classes actual, incidental, and consequential damages in an amount to be proven at trial, including any and all compensatory damages, restitution, authorized attorneys' fees, interest, and costs, and any further relief as the Court deems just equitable, and proper; and
- (c) Declare TCU's practices outlined herein to be unlawful as to Indiana citizens.

DATED: August 27, 2019

Respectfully submitted,

s/Lynn A. Toops

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\* *Pro Hac Vice* Motion to be promptly filed