

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

WILLIE COLLIER, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

**iTHINK Financial Credit Union f/k/a IBM
SOUTHEAST EMPLOYEES' CREDIT
UNION**

Defendant.

Case No. _____

CLASS ACTION PETITION

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Willie Collier (“Plaintiff”), on behalf of himself and all persons similarly situated, alleges the following based on personal knowledge as to allegations regarding himself and on information and belief as to other allegations.

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, iTHINK Financial Credit Union f/k/a IBM Southeast Employees’ Credit Union (“IBMSECU”), arising from the unfair and unconscionable assessment and collection of “overdraft fees” (“OD Fees”) on accounts that were never actually overdrawn, and for routinely charging two or more fees, including OD Fees and non-sufficient funds fees (“NSF Fee”), on a single item.

2. These practices breach contractual promises made in IBMSECU’s adhesion contracts.

3. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that IBMSECU will only charge OD Fees or NSF Fees on transactions where there are insufficient funds to cover them.

4. As happened to Plaintiff, however, IBMSECU charges OD Fees even when there are sufficient funds to cover a debit card transaction.

5. Moreover, IBMSECU unlawfully assesses multiple fees on a single Automated Clearing House (“ACH”) payment.

6. In IBMSECU’s sole and undisclosed view, each time IBMSECU processes an ACH transaction or check for payment after having been rejected for insufficient funds, it becomes a new, unique item or transaction that is subject to another fee. But IBMSECU’s “Account Documents” never even hint that this counterintuitive result could be possible.

7. IBMSECU’s Account Documents indicate that only a single fee will be charged for however many times the request for payment is reprocessed. An electronic item reprocessed after an initial return for insufficient funds cannot and does not fairly become a new, unique item for fee assessment purposes.

8. IBMSECU breaches its contract, the Account Documents, when it charges more than one fee on the same item, since the contract states—and reasonable consumers understand—that the same item can only incur a single fee.

9. IBMSECU also breaches its duty of good faith and fair dealing when it charges multiple fees on a single transaction, or charges fees on transactions that do not overcharge the account. Specifically, IBMSECU abuses its contractual discretion by charging fees upon each reprocessing of the same item and by charging fees on transactions that do not overdraft the account.

10. IBMSECU’s customers have been injured by IBMSECU’s improper practices to the tune of millions of dollars bilked from their accounts in violation of their agreements with IBMSECU.

11. On behalf of himself and the “Classes” as defined below, Plaintiff seeks damages, restitution, and injunctive relief for Defendant’s violations as set forth more fully below.

JURISDICTION AND VENUE

12. This Court has original jurisdiction over this action under the Class Action Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has original jurisdiction because (1) the proposed classes are comprised of at least 100 members; (2) at least one member of the proposed classes resides outside of Florida; and (3) the aggregate claims of the putative class members exceed \$5 million, exclusive of interest and costs.

13. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because IBMSECU is an entity with the capacity to sue and its principal place of business is in this district and therefore, IBMSECU resides in this district.

PARTIES

14. Plaintiff Collier is a natural person who is a citizen of Georgia and resides in Marietta, GA. Plaintiff has a personal checking account with IBMSECU, which is governed by IBMSECU’s Account Documents.

15. Defendant is engaged in the business of providing retail credit union services to consumers, including Plaintiff and members of the putative Classes. IBMSECU has its headquarters in Boca Raton, FL. IBMSECU has over \$1 billion in assets and provides services to customers through credit union branches throughout the Georgia and Florida.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

A. IBMSECU CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT

16. Plaintiff has a checking account with IBMSECU.

17. IBMSECU issues debit cards to its checking account customers, including Plaintiff, which allows its customers to have electronic access to their checking accounts for purchases, payments, withdrawals and other electronic debit transactions.

18. Pursuant to its Account Documents, IBMSECU charges fees for debit card transactions that purportedly result in an overdraft.

19. Plaintiff Collier brings this cause of action challenging IBMSECU's practice of charging OD Fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions" ("APPSN Transactions").

20. Here's how it works: at the moment debit card transactions are authorized on an account with positive funds to cover the transaction, IBMSECU immediately reduces accountholders' checking accounts for the amount of the purchase, sets aside funds in a checking account to cover that transaction, and as a result, the accountholder's displayed "available balance" reflects that subtracted amount. Therefore, customers' accounts will always have sufficient available funds to cover these transactions because IBMSECU has already sequestered these funds for payment.

21. However, IBMSECU still assesses crippling OD Fees on many of these transactions and misrepresents its practices in its Account Documents.

22. Despite putting aside sufficient available funds for debit card transactions at the time those transactions are authorized, IBMSECU 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.

23. IBMSECU maintains a running account balance in real time, tracking funds accountholders 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, IBMSECU 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.

24. 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.

25. Still, despite keeping those held funds off-limits for other transactions, IBMSECU improperly charges OD Fees on those APPSN Transactions, even though the APPSN Transactions *always* have sufficient available funds to be covered.

26. 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."

27. There is no justification for these practices, other than to maximize IBMSECU's OD Fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduce an account balance. But IBMSECU 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 IBMSECU was not content with these millions in OD Fees. Instead, it sought millions *more* in OD Fees on these APPSN Transactions.

28. Besides being unfair and unjust, these practices breach contract promises made in IBMSECU's adhesion contracts—contracts which fail to inform accountholders about the true nature of IBMSECU's processes and practices. These practices also exploit contractual discretion to gouge accountholders.

29. In plain, clear, and simple language, the checking account contract documents covering OD Fees promise that IBMSECU will only charge OD Fees on transactions that have insufficient funds to cover that debit card transaction.

30. In short, IBMSECU 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.

I. *Mechanics of a Debit Card Transaction*

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

32. At this step, if the transaction is approved, IBMSECU immediately decrements the funds in an accountholder’s account and sequesters funds in the amount of the transaction but does not yet transfer the funds to the merchant.

33. 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).

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

35. IBMSECU (like all credit unions and banks) decides whether to “pay” debit card transactions at authorization. After that, IBMSECU 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 IBMSECU 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).

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

II. *IBMSECU’s Account Contract*

37. Plaintiff Collier has an IBMSECU checking account, which is governed by IBMSECU’s Account Documents and other relevant agreements.

38. Amongst the documents governing Plaintiff’s relationship with IBMSECU is a Membership Agreement, which states in pertinent part:

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.

Membership Agreement at p. 3 (emphasis added).

39. The term “temporary hold” as used in the Overdraft Disclosure means that the OD Fees will be assessed immediately (when a debit card transaction is authorized), not that OD Fees could be assessed on a transaction at a later date.

40. The Membership Agreement further states when discussing overdrafts:

PAYMENT ORDER OF ITEMS - The law permits us to pay items (such as checks or drafts, Automated Clearing House (ACH) and Bill Pay transactions, and Signature Based and/or Personal Identification Number (PIN) Based Point of Sale (POS) Debit Card transactions) drawn on your account in any order. To assist you in handling your account with us, we are providing you with the following information regarding how we process the items that you write. When processing check or draft items drawn on your account, our policy is to pay them in the lowest to highest number order. The order in which check or draft items are paid is important if there is not enough money in your account to pay all of the items that are presented. Check or draft items processed as ACH Check Conversions may not follow this policy. **If an item 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 Non-Sufficient Funds (NSF).** Please refer to a current fee schedule for the amounts of the overdraft and NSF fees. We encourage you to make careful records and practice good account management. This will help you to avoid writing checks or drafts, and making ACH and Bill Pay transactions, and Signature Based and/or PIN Based Point of Sale (POS) Debit Card transactions, without sufficient funds and incurring the resulting fees. ACH and Bill Pay transactions will be posted during week days, and funds will be on hold real time for Signature Based and/or PIN Based Point of Sale (POS) Debit Card transactions.

Membership Agreement at p. 7 (emphasis added).

41. For debit card transactions, the bank decides whether to pay a debit card transaction at the moment of authorization. IBMSECU represents to its customers that it is one step, just like consumers using debit cards believe.

42. 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 IBMSECU assesses OD Fees on them anyway.

43. The above promise means that transactions are only overdraft transactions when they are authorized into a negative account balance. Of course, that is not true for APPSN Transactions.

44. APPSN transactions are always *initiated* at the time the customer swipes the debit card when there are sufficient available funds in the account.

45. In fact, IBMSECU actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to settle those same transactions. Instead, it uses a secret posting process described below.

46. All the above representations and contractual promises are untrue. In fact, IBMSECU 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 IBMSECU may impose OD Fees on any APPSN Transactions.

47. The Account Documents misconstrue IBMSECU's true debit card processing and overdraft practices.

48. First, and most fundamentally, IBMSECU charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions. That is despite contractual representations that IBMSECU will only charge OD Fees on transactions with insufficient available funds to cover a given transaction.

49. IBMSECU assesses OD Fees on APPSN Transactions that do have sufficient funds available to cover them throughout their lifecycle.

50. IBMSECU's practice of charging OD Fees even when sufficient available funds exist to cover a transaction violates a contractual promise not to do so. This discrepancy between

IBMSECU's actual practice and the contract causes accountholders like the Plaintiff to incur more OD Fees than they should.

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

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

53. In reality, IBMSECU'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 settlement.

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

55. Upon information and belief, something more is going on: at the moment a debit card transaction is getting ready to settle, IBMSECU does something new and unexpected, during the middle of the night, during its nightly batch posting process. Specifically, IBMSECU 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.

56. This secret step allows IBMSECU to charge OD Fees on transactions that never should have caused an overdraft—transactions that were authorized into sufficient funds, and for which IBMSECU specifically set aside money to pay.

57. This discrepancy between IBMSECU's actual practices and the contract causes accountholders to incur more OD Fees than they should.

58. In sum, there is a huge gap between IBMSECU's practices as described in the Account Documents and IBMSECU's practices in reality.

III. *IBMSECU Abuses Contractual Discretion*

59. IBMSECU'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, IBMSECU exploits contractual discretion to the detriment of accountholders when it uses these policies.

60. Moreover, IBMSECU uses its contractual discretion to cause APPSN Transactions to incur OD Fees by knowingly authorizing later transactions that it allows to consume available funds previously sequestered for APPSN Transactions.

61. IBMSECU uses these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable accountholder would believe could cause OD Fees.

IV. *Reasonable Accountholders Understand Debit Card Transactions are Debited Immediately*

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

63. IBMSECU was and is aware that this is precisely how accountholders reasonably understand debit card transactions to work.

64. IBMSECU knows that many accountholders prefer debit cards for these very reasons. Research indicates that accountholders prefer debit cards as a budgeting device because

they don't allow debt like credit cards do, and because the money comes directly out of a checking account.

65. 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.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card.

66. 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.

67. 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/morepeople-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23>.

68. Not only have accountholders increasingly transitioned from cash to 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.

69. IBMSECU was aware of accountholder perception that debit transactions reduce an available balance *in a specified order*—namely, the moment they are actually initiated—and its account agreement only supports this perception.

V. Plaintiff's Colliers's Debit Transactions

70. As an example, on December 23, 2019, Plaintiff Collier was assessed a \$32 OD Fee for a debit card transactions that settled that day, despite the fact that positive funds were deducted immediately, prior to that day, for the transaction on which Plaintiff was assessed the OD Fee.

B. IBMSECU CHARGES TWO OR MORE FEES ON THE SAME ITEM

71. As alleged more fully herein, IBMSECU's Account Documents allow it to take certain steps when its accountholders attempt a transaction but does not have sufficient funds to cover it. Specifically, IBMSECU may (a) authorize the transaction and charge a *single* OD Fee; or (b) reject the transaction and charge a *single* NSF Fee.

72. In contrast to its Account Documents, however, IBMSECU regularly assesses two or more fees on the *same* item.

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

74. IBMSECU's Account Documents never disclose this practice, and in fact, affirmatively misrepresent to the contrary. IBMSECU's Account Documents indicate it will only charge a single fee on an item or per transaction.

I. *Plaintiff Collier's Experience*

75. In support of his claims, Plaintiff Collier offers an example of fees that should not have been assessed against his checking account. As alleged below, IBMSECU: (a) reprocessed a previously declined transaction; and (b) charged an additional fee upon reprocessing, for a total assessment of two fees on a single item.

76. On October 16, 2019, Plaintiff Collier attempted to make a payment in the amount of \$227.00.

77. IBMSECU rejected payment of that transaction due to insufficient funds in Plaintiff's account and charged him a \$32 NSF Fee for doing so. Plaintiff does not dispute the initial fee, as it is allowed by IBMSECU's Account Documents.

78. Unbeknownst to Plaintiff and without his request to do so, IBMSECU, six days later, on October 23, 2019, IBMSECU processed the same item yet again, and again IBMSECU rejected the transaction due to insufficient funds and charged Plaintiff another \$32 NSF Fee.

79. In sum, IBMSECU assessed Plaintiff \$64 in fees to attempt to process a single payment.

80. Plaintiff understood the payment to be a single item as is laid out in IBMSECU's contract, capable at most of receiving a single NSF Fee (if IBMSECU returned it) or a single OD Fee (if IBMSECU paid it).

II. *The Imposition of Multiple Fees on a Single Item Violates IBMSECU's Express Promises and Representations*

81. The Account Documents provide the general terms of Plaintiff's relationship with IBMSECU and therein IBMSECU makes explicit promises and representations regarding how transactions will be processed, as well as when NSF Fees and OD Fees may be assessed.

82. The Account Documents contain explicit terms indicating that fees will only be assessed once per check or item when in fact IBMSECU regularly charges two or more fees per check or item even though a customer only requested the payment or transfer once.

83. IBMSECU's Account Documents indicate that a singular fee can be assessed on checks, ACH debits, and electronic payments.

84. Specifically, in the Membership Agreement, IBMSECU states:

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.

[...]

If an item 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 Non-Sufficient Funds (NSF)**. Please refer to a current fee schedule for the amounts of the overdraft and NSF fees.

Membership Agreement at p. 3, 7(emphasis added).

85. IBMSECU's Account Documents indicate that it will charge a single fee per item that is returned due to insufficient funds.

86. The same "item" 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.

87. There is zero indication anywhere in the account documents that the same “item” is eligible to incur multiple fees.

88. Even if IBMSECU reprocesses an instruction for payment, it is still the same item. IBMSECU’s reprocessing is simply another attempt to effectuate an accountholder’s original order or instruction.

89. The Fee Schedule likewise shows that only a single, \$32 fee will be charged if the account is overdrawn. Ex. A.

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

91. In sum, IBMSECU promises that one fee will be assessed per electronic payment or check, and these terms must mean all iterations of the same instruction for payment.

92. As such, IBMSECU breached the contract when it charged more than one fee per single item.

93. Reasonable consumers understand any given authorization for payment to be one, singular “item,” as those terms are used in IBMSECU’s Account Documents.

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

95. Customers reasonably understand, based on the language of the Account Documents and IBMSECU's other 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.

96. Banks and credit unions like IBMSECU 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 IBMSECU never did.

97. For example, First Citizens Bank, a major institution in the Carolinas, engages in the same abusive practice as IBMSECU, 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).

98. First Hawaiian Bank engages in the same abusive practices as IBMSECU, 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 (emphasis added).

99. 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.**

Special Handling/Electronic Banking Disclosures of Charges, First Financial Bank 2 (Aug. 2018), https://www.bankatfirst.com/content/dam/first-financial-bank/eBanking_Disclosure_of_Charges.pdf (emphasis added).

100. Central Pacific Bank, a leading bank in Hawai'i, states in its Fee Schedule under the "MULTIPLE NSF FEES" subsection: "Items and transactions (such as, for example, checks and electronic transactions/payments) returned unpaid due to insufficient/non-sufficient ("NSF") funds in your account, may be resubmitted one or more times for payment, and a \$32 fee will be imposed on you each time an item and transaction resubmitted for payment is returned due to insufficient/nonsufficient funds.

101. BP Credit Union likewise states: "Your account may be subject to a fee for each item regardless of whether we pay or return the item. We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item."

102. IBMSECU provides no such disclosure, and in so doing, deceives its accountholders.

III. The Imposition of Multiple Fees on a Single Transaction Breaches IBMSECU's Duty of Good Faith and Fair Dealing

103. 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 IBMSECU is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, IBMSECU 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 depositor.

104. Here—in the adhesion agreements IBMSECU foisted on Plaintiff and its other customers—IBMSECU 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, IBMSECU 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.

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

106. Further, IBMSECU maintains complete discretion not to assess 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 fee on a single item, IBMSECU breaches the reasonable expectation of Plaintiff and other customers and in doing so violates the implied covenant to act in good faith.

107. It was bad faith and totally outside Plaintiff’s reasonable expectations for IBMSECU to use its discretion to assess two or more fees for a single attempted payment.

108. When IBMSECU charges multiple fees, IBMSECU uses its discretion to define the meaning of “item” in an unreasonable way that violates common sense and reasonable consumer

expectations. IBMSECU uses its contractual discretion to set the meaning of those terms to choose a meaning that directly causes more fees.

CLASS ALLEGATIONS

109. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated pursuant to Federal Rule 23. The Classes include:

All IBMSECU customers who, within the applicable statute of limitations period, were charged OD Fees on APPSN Transactions on a IBMSECU checking account (the “OD Fees Class”);

All IBMSECU customers who, within the applicable statute of limitations period, were charged multiple fees the same item in a IBMSECU checking account (the “Multiple Fee Class”).

110. Excluded from the Classes are IBMSECU, IBMSECU’s subsidiaries and affiliates, their officers, directors and member of their immediate families and any entity in which Defendant has a controlling interest, the legal representatives, heirs, successors or assigns of any such excluded party, the judicial officer(s) to whom this action is assigned, and the members of their immediate families.

111. Plaintiff reserves the right to modify or amend the definition of the proposed Classes and/or to add a subclass(es), if necessary, before this Court determines whether certification is appropriate.

112. The questions here are ones of common or general interest such that there is a well-defined community of interest among the members of the Classes. These questions predominate over questions that may affect only individual class members because IBMSECU has acted on grounds generally applicable to the class. Such common legal or factual questions include, but are not limited to:

- a) Whether IBMSECU improperly charged OD Fees on APPSN Transactions;
- b) Whether IBMSECU improperly charged multiple fees on the same transactions;
- c) Whether the conduct enumerated above violates the contract;
- d) Whether the conduct enumerated above violates the covenant of good faith and fair dealing; and
- e) The appropriate measure of damages.

113. The parties are numerous such that joinder is impracticable. Upon information and belief, and subject to class discovery, the Classes consist of thousands of members or more, the identity of whom are within the exclusive knowledge of and can be ascertained only by resorting to IBMSECU's records. IBMSECU has the administrative capability through its computer systems and other records to identify all members of the Classes, and such specific information is not otherwise available to Plaintiff.

114. It is impracticable to bring members' of the Classes individual claims before the Court. Class treatment permits a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of evidence, effort, expense, or the possibility of inconsistent or contradictory judgments that numerous individual actions would engender. The benefits of the class mechanism, including providing injured persons or entities with a method for obtaining redress on claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in the management of this class action.

115. Plaintiff's claims are typical of the claims of the other members of the Classes in that they arise out of the same wrongful business practices by IBMSECU, as described herein.

116. Plaintiff is a more than an adequate representative of the Classes in that Plaintiff has an IBMSECU checking accounts and have suffered damages as a result of IBMSECU's contract violations. In addition:

- a) Plaintiff is committed to the vigorous prosecution of this action on behalf of itself and all others similarly situated and have retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of accountholders against financial institutions;
- b) There is no conflict of interest between Plaintiff and the unnamed members of the Classes;
- c) Plaintiff anticipates no difficulty in the management of this litigation as a class action; and
- d) Plaintiff's legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

117. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

118. IBMSECU has acted or refused to act on grounds generally applicable to the class, thereby making appropriate corresponding declaratory relief with respect to the Classes as a whole.

119. All conditions precedent to bringing this action have been satisfied and/or waived.

COUNT I
Breach of Contract
(On Behalf of Plaintiff and the Classes)

120. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

121. Plaintiff and IBMSECU contracted for checking account services, as embodied in the Account Documents.

122. IBMSECU breached the terms of the contract.

123. Plaintiff and members of the putative Classes have performed all of the obligations

on them pursuant to the Account Documents.

124. Plaintiff and members of the putative Classes have sustained monetary damages as a result of each of Defendant's breaches.

COUNT II
Breach of The Covenant of Good Faith and Fair Dealing
(On Behalf of Plaintiff and the Classes)

125. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs of this Complaint as if fully set forth herein.

126. Plaintiff and IBMSECU contracted for checking account services, as embodied in the Account Documents.

127. Georgia mandates that an implied covenant of good faith and fair dealing govern every contract. For banking transactions, this is also mandated by the Uniform Commercial Code that has been adopted in each state. The covenant of good faith and fair dealing constrains Defendant's discretion to abuse self-granted contractual powers.

128. This good faith requirement extends to the manner in which a party employs discretion conferred by a contract.

129. 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.

130. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A lack of good faith may be overt or may consist

of inaction, and fair dealing may require more than honesty. Other examples of violations of good faith and fair dealing are 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.

131. IBMSECU breached the covenant of good faith and fair dealing when it assessed and collected unconscionable OD Fees on accounts that were never actually overdrawn, and multiple fees on a single item.

132. Each of Defendant's actions was done in bad faith and was arbitrary and capricious.

133. Plaintiff and members of the putative Classes have performed all of the obligations imposed on them pursuant to the Account Documents.

134. Plaintiff and members of the putative Classes have sustained monetary damages as a result of each of Defendant's breaches of the covenant of good faith and fair dealing.

PRAYER FOR RELIEF

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

- a Certification for this matter to proceed as a class action on behalf of the Classes;
- b Declaring IBMSECU's OD Fee and multiple fees policies and practices to be in breach of its contract with accountholders;
- c Restitution of all OD Fees and multiple fees paid to IBMSECU by Plaintiff and the members of the Classes, as a result of the wrongs alleged herein in an amount to be determined at trial;
- d Actual damages in an amount according to proof;
- e Pre-judgment and post-judgment interest at the maximum rate permitted by applicable law;

f For costs and attorneys' fees under the common fund doctrine, and all other applicable law; and

g Such other relief as this Court deems just and proper.

TRIAL BY JURY IS DEMANDED

Dated: March 16, 2020

Respectfully submitted,

/s/ Daniel Tropin

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