

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

MALINDA FAIRCHILD-CATHEY,
RICHARD MUMFORD, and AARON
FORJONE on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

AMERICU CREDIT UNION,

Defendant.

Civil Action No. 6:21-cv-01173-DNH-ML

JURY TRIAL DEMAND

AMENDED CLASS ACTION COMPLAINT

Plaintiffs Malinda Fairchild-Cathey, Richard Mumford, and Aaron Forjone on behalf of themselves and all others similarly situated bring this class action complaint against AmeriCU Credit Union (“AmeriCU” or “Bank”), and allege the following:

NATURE OF THE ACTION

1. Plaintiffs bring this action individually and on behalf of all similarly situated consumers against Defendant AmeriCU (“AmeriCU” or “Bank”), arising from its routine practices of (a) assessing more than one insufficient funds fee (“NSF Fee”) on the same transaction; (b) assessing an overdraft fee (“OD Fee”) on transactions that did not actually overdraw checking accounts; and (c) adopting a policy that results in accountholders being assessed three out-of-network ATM Fees (“OON Fees”) on out-of-network ATM withdrawals immediately preceded by a purported “balance inquiry,” with AmeriCU impermissibly assessing a second OON Fee.

2. AmeriCU’s customers have been injured by the Bank’s improper practices to the tune of millions of dollars bilked from their accounts in violation AmeriCU’s clear contractual commitments.

3. Plaintiffs, on behalf of themselves and three Classes of similarly situated consumers, seek to end AmeriCU's abusive and predatory practices and force it to refund all of these improper charges. Plaintiffs assert a claim for breach of contract, including breach of the covenant of good faith and fair dealing, and seek damages, restitution, and injunctive relief, as set forth more fully below.

4. While there is nothing unlawful about assessing NSF Fees on accounts when such fees are assessed in compliance with contractual terms, NSF Fees in general have a crushing impact on persons living paycheck to paycheck. This is why the financial services industry is increasingly moving away from such fees.

5. For example, one of the nation's largest consumer banks, Ally Bank recently stopped assessing overdraft fees altogether. Diane Morais, Ally Bank's president of consumer and commercial banking, said that one reason is because NSF Fees disproportionately affect people who are living paycheck to paycheck. *Overdraft Fees Are Getting the Boot at Ally Financial*, The Wall Street Journal (June 2, 2021), <https://www.wsj.com/articles/overdraft-fees-are-getting-the-boot-at-ally-financial-11622631600> (last accessed June 4, 2021).

PARTIES

6. Plaintiff Melinda Fairchild-Cathey is a citizen and resident of Rome, New York.

7. Plaintiff Richard Mumford is a citizen and resident of Munnsville, New York.

8. Plaintiff Aaron Forjone is a citizen and resident of Auburn, New York.

9. Defendant AmeriCU is engaged in the business of providing retail banking services to consumers, including Plaintiffs and members of the putative Classes. AmeriCU has its headquarters in Rome, New York.

JURISDICTION AND VENUE

10. This Court has original jurisdiction of 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 Class is comprised of at least 100 members; (2) at least one member of the proposed class resides outside of New York; and (3) the aggregate claims of the putative class members exceed \$5 million, exclusive of interest and costs.

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because AmeriCU is subject to personal jurisdiction here and regularly conducts business in this District, and because a substantial part of the events or omissions giving rise to the claims asserted herein occurred in this district.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

I. AMERICU CHARGES MORE THAN ONE FEE ON THE SAME TRANSACTION

12. AmeriCU's Account Documents allow AmeriCU to charge a *single* \$28 NSF Fee when a transaction is returned for insufficient funds or paid despite insufficient funds.

13. AmeriCU breaches its Account Documents by charging more than one \$28 NSF Fee on the same transaction, since the contract explicitly states—and reasonable consumers understand—that the same transaction can only incur a single NSF Fee.

14. A recent Washington Post article discussed predatory overdraft fees, labeling NSF fees like those AmeriCU imposes as “indefensible” because “the customer gets hit with multiple charges for the same item.” *I bought my kids dinner – and saw firsthand how overdraft fees punish the poor*, The Washington Post (October 1, 2021), https://www.washingtonpost.com/outlook/i-bought-my-kids-dinner--and-saw-firsthand-how-overdraft-fees-punish-the-poor/2021/09/30/32383c40-216e-11ec-b3d6-8cdebe60d3e2_story.html (last accessed October 8, 2021). The banks “are charging a fee for doing literally nothing.... [T]his is like asking a friend if I can borrow \$20, only to have him take \$10 out of my wallet for turning down my request.” *Id.*

15. AmeriCU's abusive practices are not standard within the financial services industry. Indeed, major banks like Wells Fargo—one of the largest consumer banks in the country—charge one NSF Fee per item, even if that item is resubmitted for payment multiple times. And while some other

banks engage in the same practices as AmeriCU, their members agree to terms authorizing the fee practice.

16. AmeriCU’s Account Documents do not say that AmeriCU may repeatedly charge customers multiple fees on a single transaction. To the contrary, the Account Documents indicate AmeriCU will only charge a single NSF Fee on a transaction.

A. Plaintiff Fairchild-Cathey’s Experiences.

17. In support of her claim, Plaintiff Fairchild-Cathey offers examples of fees that should not have been assessed against her checking account. As alleged below, AmeriCU: (a) reprocessed previously declined transactions; and (b) charged an additional fee upon reprocessing.

18. For example, on November 14, 2016, and July 12, 2017, Plaintiff Fairchild-Cathey was charged \$28 NSF Fees on transactions that were resubmitted by the merchant for payment without Plaintiff Fairchild-Cathey’s request to reprocess the transactions. The re-submitted transactions were specifically labeled as “RETRY PYMT” on her statements.

19. Each merchant request for payment was for a single transaction and, as is laid out in AmeriCU’s Account Documents, should be subject to, at most, a single NSF Fee (if AmeriCU returned it or paid it).

B. The Imposition of Multiple Fees on a Single Transaction Violates AmeriCU’s Express Promises and Representations.

20. AmeriCU’s Account Documents state that the Bank will assess a single fee of \$28 for a transaction that is returned due to insufficient funds.

21. According to AmeriCU’s schedule of fees, at most a *single* fee will be assessed per “each” item:

Return Check Fee (i.e., Overdrawn).....	\$28.00 each Items returned for Insufficient/uncollected funds
--	--

Overdraft Fee.....\$28.00 each
Member Privilege (MP) Overdraft Fee*.....\$28.00 each

Ex. A.

22. The same check, ACH, or other electronic payment on an account is not a new “item” each time it is rejected for payment then reprocessed, especially when—as here—Plaintiff Fairchild-Cathey took no action to resubmit the transaction.

23. As alleged herein, Plaintiff Fairchild-Cathey took only a single action to make a single payment; she therefore created only one transaction and may be charged only a single fee.

24. As the disclosures described above show, Plaintiff Fairchild-Cathey never agreed that AmeriCU may assess multiple NSF Fees for a transaction that was returned for insufficient funds and later reprocessed one or more times and returned again.

25. In sum, AmeriCU promises that one \$28 NSF Fee will be assessed per item, and this must mean all iterations of the same instruction for payment. As such, AmeriCU breached the contract when it charged more than one fee per transaction.

26. A reasonable consumer would understand that AmeriCU’s Account Documents permit it to assess an NSF Fee only once per “item.”

27. 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 Bank will either pay (resulting in an overdraft item) or return (resulting in a returned transaction) when it decides there are insufficient funds in the account. Nowhere do AmeriCU and its customers agree that AmeriCU will treat each reprocessing of a check or ACH payment as a separate transaction, subject to additional fees.

28. Customers reasonably understand, based on the language of the Account Documents, that the Bank’s attempts to reprocess checks or ACH payments are simply additional attempts to complete the

original order or instruction for payment, and as such, will not trigger additional NSF Fees. In other words, it is always the same transaction.

29. Banks like AmeriCU that employ this abusive multiple fee practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that engage in this abusive practice require their accountholders to expressly authorize it—something AmeriCU never did.

30. For example, First Hawaiian Bank engages in the same abusive practices as AmeriCU, 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://bit.ly/2KWMvTg> (last accessed Jan. 28, 2021) (emphasis added).

31. 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 Account Terms and Conditions, Klein Bank 4 (Jan. 2013), <https://bit.ly/2KVckhI> (emphasis added).

32. Central Pacific Bank, a leading bank in Hawai'i, states in its deposit account 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 funds ("NSF") in your account, may be resubmitted one or more times for payment, and a returned item/transaction fee will be

imposed on you each time an item and transaction resubmitted for payment is returned due to insufficient/non-sufficient funds.

Miscellaneous Fee Schedule, Central Pacific Bank 1 (Jan. 4, 2021), <https://www.cpb.bank/media/2776/fee-001.pdf> (last accessed June 4, 2021).

33. BP Credit Union likewise states: “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.” *Membership and Account Agreement*, BP Federal Credit Union, ¶ 14(a), <https://www.bpfcu.org/images/docs/membership-agreement.pdf> (last accessed June 4, 2021).

34. Regions Bank likewise states:

If an item is presented for payment on your account at a time when there is an insufficient balance of available funds in your account to pay the item in full, you agree to pay us our charge for items drawn against insufficient or unavailable funds, whether or not we pay the item. If any item is presented again after having previously been returned unpaid by us, you agree to pay this charge for each time the item is presented for payment and the balance of available funds in your account is insufficient to pay the item.

Deposit Agreement, Regions Bank 18 (2018), <https://bit.ly/2L0vx6A> (last accessed June 4, 2021).

35. Andrews Federal Credit Union states:

You understand and agree that a merchant or other entity may make multiple attempts to resubmit a returned item for payment. Consequently, 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. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to use for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item. 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.

Terms & Conditions, Andrews Federal Credit Union 17 (Aug. 2020), ¶ 6, <https://bit.ly/3iXEdHb> (last accessed June 4, 2021).

36. Consumers Credit Union states:

Consequently, 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. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission 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 item.

Member Services Guide, Consumers Credit Union 5 (Apr. 2020), ¶ 11a, <https://bit.ly/3iVM1ta> (last accessed June 4, 2021).

37. Wright Patt Credit Union states:

Consequently, 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. Therefore, multiple fees may be charged to you as a result of a returned item and represented regardless of the number of times an item is presented or represented to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

Important Account Information, Wright Patt Credit Union 13 (July 2020), ¶ 6.1, (last accessed June 4, 2021).

38. Railroad & Industrial Federal Credit Union states:

Consequently, because we may charge an NSF fee for an NSF item each time it is presented, we may charge you more than one NSF fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

Important Account Information for Our Members, Railroad & Industrial Federal Credit Union, p. 2, (Aug. 1, 2019), <https://bit.ly/3t5ehhF> (last accessed June 4, 2021).

39. Partners 1st Federal Credit Union states:

Consequently, because we may charge a fee for an NSF item each time it is presented, we may charge you more than one fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission 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 item.

Consumer Membership & Account Agreement, Partners 1st Federal Credit Union, p. 11 (Sept. 15, 2019), <https://bit.ly/39pDZWb> (last accessed March 2, 2021).

40. Members First Credit Union states:

We reserve the right to charge an Non-Sufficient Funds Fee (NSF Fee) each time a transaction is presented if your account does not have sufficient funds to cover the transaction at the time of presentment and we decline the transaction for that reason. **This means that a transaction may incur more than one Non-Sufficient Funds Fee (NSF Fee) if it is presented more than once . . .** we reserve the right to charge a Non-Sufficient Funds (NSF Fee) for both the original presentment and the representment[.]

Membership and Account Agreement, Members First Credit Union of Florida 3, <https://bit.ly/39rRJ2Y> (last accessed March 2, 2021).

41. Community Bank, N.A. states:

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

Overdraft and Unavailable Funds Practices Disclosure, Community Bank 5 (Nov. 12, 2019), <https://bit.ly/3iY9dH2> (last accessed June 4, 2021).

42. RBC Bank states:

We may also charge against the Account an NSF fee for each item returned or rejected, including for multiple returns or rejections of the same item.

Service Agreement for Personal Accounts, RBC Bank 13 (Sept. 17, 2014), <https://bit.ly/3otUtko> (last accessed June 4, 2021).

43. Diamond Lakes Credit Union 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.

Membership and Account Agreement, Diamond Lakes Federal Credit Union, <https://bit.ly/39o2P94> (last accessed June 4, 2021).

44. Parkside Credit Union states,

If the Credit Union returns the item, you will be assessed an NSF Fee. Note that the Credit Union has no control over how many times an intended payee may resubmit the same

check or other item to us for payment. In the event the same check or other item is presented for payment on more than one occasion, your account will be subject to an additional charge on each occasion that the item is presented for payment. There is no limit to the total fees the Credit Union may charge you for overdrawing your account.

Membership and Account Agreement, Parkside Credit Union 21 (Jan. 30, 2020), <https://bit.ly/3aaXfpG> (last accessed March 2, 2021).

45. AmeriCU provides no such disclosure, and by not doing so, deceives its accountholders.

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

46. 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 vested with a discretionary power over the other party. Further, as to bank transactions, the Uniform Commercial Code (“UCC”)—which has been adopted by all states—mandates good faith and fair dealing. As such, when a party such as AmeriCU gives itself discretion to act, 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 Bank is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the Bank has a duty to honor transaction requests in a way that is fair to Plaintiff Fairchild-Cathey and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties.

47. Here—in the adhesion agreements AmeriCU foisted on Plaintiff Fairchild Cathey and its other customers—AmeriCU has provided itself numerous discretionary powers affecting customers’ bank accounts. But instead of exercising that discretion in good faith and consistent with consumers’ reasonable expectations, the Bank abuses that discretion to take money out of consumers’ accounts without their permission and contrary to their reasonable expectations that they will not be charged multiple fees for the same transaction.

48. AmeriCU exercises its discretion in its own favor—and to the prejudice of Plaintiff Fairchild-Cathey and its other customers—when it defines “item” in a way that directly leads to more

NSF Fees. Further, AmeriCU abuses the power it has over customers and their bank accounts and acts contrary to their reasonable expectations under the Account Documents. This is a breach of the Bank's implied covenant to engage in fair dealing and act in good faith.

49. By exercising its discretion in its own favor—and to the prejudice of Plaintiff Fairchild-Cathey and other customers—by charging more than one fee on a single transaction, AmeriCU breaches the reasonable expectation of Plaintiff Fairchild-Cathey and other customers and in doing so violates the implied covenant to act in good faith.

50. It was bad faith and totally outside Plaintiff Fairchild Cathey's reasonable expectations for AmeriCU to use its discretion to assess multiple NSF Fees for a single attempted payment.

II. DEFENDANT CHARGES OD FEES ON TRANSACTIONS THAT DO NOT ACTUALLY OVERDRAW THE ACCOUNT

51. Plaintiff Fairchild-Cathey has a checking account with Defendant. Plaintiff Mumford formerly held a checking account with Defendant.

52. Defendant issues debit cards to its checking account customers, including Plaintiffs Fairchild-Cathey and Mumford, which allows its customers to have electronic access to their checking accounts for purchases, payments, withdrawals, and other electronic debit transactions.

53. Pursuant to its Account Documents, Defendant charges fees for transactions that purportedly result in an overdraft.

54. Plaintiffs Fairchild-Cathey and Mumford bring this cause of action challenging Defendant's practice of charging OD Fees on what are referred to in this complaint as "Authorize Positive, Purportedly Settle Negative Transactions" ("APPSN Transactions").

55. Here's how it works. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, Defendant immediately reduces accountholders' checking accounts by 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 Defendant has already sequestered these funds for payment.

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

57. Despite putting aside sufficient available funds for debit card and other POS transactions at the time those transactions are authorized, Defendant 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.

58. Defendant 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, Defendant 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.

59. 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.

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

61. 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."

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

63. Besides being unfair and unjust, these practices breach contract promises made in Defendant's adhesion contracts—contracts which fail to inform accountholders about the true nature of

Defendant's processes and practices. These practices also exploit contractual discretion to gouge accountholders.

64. In plain, clear, and simple language, the Account Documents covering OD Fees promise that Defendant will only charge OD Fees on transactions that have insufficient funds to cover that transaction.

65. In short, Defendant 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.

A. Mechanics of a Debit Card Transaction

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

67. At this step, if the transaction is approved, Defendant 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.

68. 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).

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

70. Defendant (like all banks and credit unions) decides whether to "pay" debit card transactions at authorization. After that, Defendant 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 Defendant 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).

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

B. Defendant's Account Contract

72. Plaintiffs Fairchild-Cathey and Mumford have each held a checking account with Defendant that was governed by Defendant's standardized Account Documents.

73. The Account Documents promise in pertinent part:

Payment of Overdrafts. If, on any day, the available funds in your share or deposit account are not sufficient to pay the full amount of a check, draft, item, transaction or other items posted to your account plus any applicable fee ("overdraft"), we may pay or return the overdraft. The Credit Union's determination of an insufficient account balance may be made at any time between presentation and the Credit Union's midnight deadline with only one review of the account required. We do not have to notify you if your account does not have sufficient available funds to pay an overdraft. Your account may be subject to a charge for each overdraft regardless of whether we pay or return the overdraft. For ATM and one-time debit card transactions, you must consent to the Credit Union's overdraft protection plan in order for the transaction amount to be covered

under the plan. Without your consent, the Credit Union may not authorize and pay an overdraft resulting from these types of transactions. Services and fees for overdrafts are shown in the document the Credit Union uses to capture the member's opt-in choice for overdraft protection and the Schedule of Fees and Charges.

Except as otherwise agreed in writing, if we exercise our right to use our discretion to pay an overdraft, we do not agree to pay overdrafts in the future and may discontinue covering overdrafts at any time without notice. If we pay an overdraft or impose a fee that overdraws your account, you agree to pay the overdrawn amount in accordance with your overdraft protection plan or, if you do not have such a plan, in accordance with our overdraft payment policy.

Ex. B at 4.

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

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

76. APPSN transactions are always initiated at a time when there are sufficient available funds in the account.

77. In fact, AmeriCU actually authorizes transactions on positive funds, claims to set those funds aside on hold, but then fails to use those same funds to settle those same transactions. Instead, it uses a secret posting process described below.

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

79. First, and most fundamentally, AmeriCU charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions. That is despite contractual

representations that AmeriCU will only charge OD Fees on transactions with insufficient available funds to cover a given transaction.

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

81. AmeriCU'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 AmeriCU's actual practice and the contract causes accountholders like Plaintiffs Fairchild-Cathey and Mumford to incur more OD Fees than they should.

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

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

84. In reality, AmeriCU's actual practice is to deduct 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.

85. At the time of settlement, however, an available balance *does not change at all* for these transactions previously authorized into good funds. As such, AmeriCU 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.

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

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

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

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

C. Defendant Abuses Contractual Discretion

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

91. Defendant 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.

92. Defendant uses this contractual discretion unfairly to extract OD Fees on transactions that no reasonable accountholder would believe could cause OD Fees.

D. Reasonable Accountholders Understand Debit Card/POS Transactions Are Debited Immediately

93. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent with immediate deduction and holding of funds for debit card/POS transactions. That is because, if funds are immediately debited from the balance and held, 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 from the available balance, then they are necessarily available to be applied to the debit card transactions for which they are debited.

94. Defendant was and is aware that this is precisely how accountholders reasonably understand such transactions to work.

95. Defendant knows that many accountholders prefer debit cards for this very reason. Research indicates that accountholders 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.

96. 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), https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card (last visited June 4, 2021).

97. 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, http://www.consumer-action.org/english/articles/understanding_debit_cards (last visited June 4, 2021).

98. 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 increased by approximately 1.4 million in a recent five year period 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>.

99. 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.

100. Defendant 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.

E. Plaintiff Fairchild-Cathey’s Experience

101. As examples, on July 5, 2019 and March 24, 2019, Plaintiff Fairchild-Cathey was assessed OD Fees for 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 Fairchild-Cathey was assessed the OD Fee. At the time that the positive funds were deducted, Plaintiff Fairchild-Cathey had a positive balance, which would not have caused an OD Fee.

F. Plaintiff Mumford’s Experience

102. As examples, on June 22, 2020 and June 27, 2020, Plaintiff Mumford was assessed OD Fees for 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 Mumford was assessed the OD Fee. At the time that the positive funds were deducted, Plaintiff Mumford had a positive balance, which would not have caused an OD Fee.

III. ATM CLAIM: THREE FEES FOR CASH WITHDRAWALS UNDERTAKEN WITH A BALANCE INQUIRY

103. AmeriCU also charges surprise ATM Fees on unsuspecting accountholders. When an AmeriCU accountholder who checks the account balance as part of a cash withdrawal transaction at an

out of network ATM machine, the AmeriCU accountholder is charged multiple distinct fees: 1) the ATM operator and/or ATM network imposes a surcharge for the withdrawal; 2) AmeriCU charges an OON Fee for making an out-of-network cash withdrawal; and 3) AmeriCU charges yet another OON Fee for supposedly undertaking one or more balance inquiries during the cash withdrawal. A single \$20.00 withdrawal can cost the customer between \$5.00 and \$8.00 in fees, including two separate fees to AmeriCU.

104. Because the provision of balance inquiries are essentially cost-free to ATM owners, and because they are hugely profitable, ATM owners have placed a great emphasis in recent years on increasing the number of supposed balance inquiries undertaken at their machines—by any means necessary.

105. In the last decade, the revolution of mobile banking applications and increasing legislative scrutiny on the punitive nature of independent ATM machine withdrawal surcharges has forced the ATM operators to seek other sources of revenue. The 2015 Independent ATM deployer survey sponsored by Kahuna ATM Solutions and the ATM Industry Association found that declining interchange rates were one of the top concerns for Independent ATM operators.¹ For example, one of the largest ATM operators repeatedly voiced this concern in its financial disclosures, stating:

In addition to the impact of the net interchange rate decrease, we saw certain financial institutions migrate their volume away from some networks to take advantage of the lower pricing offered by other networks, resulting in lower net interchange rates per transaction to us. If financial institutions move to take further advantage of lower interchange rates, or if networks reduce the interchange rates they currently pay to ATM deployers or increase their network fees, our future revenues and gross profits could be negatively impacted.

(i) ¹ See 2015 IAD Poll at <https://www.atmmarketplace.com/news/2015-iad-poll-reveals-growing-attention-on-emv-shrinking-focus-on-mobile/> (Last Viewed June 11, 2020).

See Cardtronics plc SEC Form 10-Q, filed May 3, 2018, p. 46 (available at <https://www.sec.gov/Archives/edgar/data/1671013/000155837018003893/catm-20180331x10q.htm>).

106. Feeling the financial pressure of declining interchange rates, the ATM operators sought to increase revenue in other ways.

107. They turned to balance inquiries to drive revenue. But they had a problem: very few consumers seek them out and are willing to pay for them.

108. Consumers, in short, use ATMs for the service of withdrawing cash, not to perform balance inquiries and transfers that are now commonly performed online or on mobile devices for free.

109. ATM operators and financial institutions have known for years that the vast majority of customers who come to use their ATM machines are there to perform **only** a cash withdrawal.

110. This makes perfect sense. Due to the availability of cost-free alternatives, like checking a balance on a mobile app, phone banking, or online access, paying for a balance inquiry at an ATM is not a rational act for the vast majority of consumers. Moreover, the shelf-life of the information obtained through a balance inquiry is extremely short. With checking accounts having numerous transactions that post throughout the day, as well as scheduled withdrawals that occur overnight, the viability of the information received through a balance inquiry at an ATM is only even arguably beneficial for the immediate business at hand, *i.e. the cash withdrawal*.

111. Moreover, because consumers are entitled to receive, as part of their cash withdrawal, a printed receipt at the conclusion of their transaction, they already have free access to their account balances without having to engage in a separate balance inquiry.

112. Therefore, when a consumer uses an ATM for a balance inquiry, it is almost always *in conjunction* with a cash withdrawal transaction.

113. For all these reasons, historically only a tiny percentage of ATM transactions were for

balance inquiries. Very few consumers need this information urgently enough to pay for it.

114. But ATM operators had a solution: lure consumers into balance inquiries via trickery and deception in order to increase balance inquiries from those customers who otherwise do not need them or would not be willing to pay for them as part of a cash withdrawal. The ATM operators have embraced a number of tactics to increase the number of balance inquiries supposedly performed at their ATM machines.

115. When consumers use ATMs not owned by their own financial institution, federal law requires the owners of those Out-of-Network ATMs to inform users of the amount of the usage fees charged by the ATM owner.

116. That message appears only after a user has decided to perform a cash withdrawal and entered the amount of cash she would like to withdraw.

117. Through repeated exposure to such fee warning messages, consumers are accustomed to being warned of fee assessments at out of network ATMs, and to being provided with the opportunity to decide whether the fees charged are reasonable—before proceeding with their cash withdrawal. But there is no warning whatsoever at an ATM that any form of balance inquiry could be an event worthy of a fee, either from the ATM owner or from the consumer's financial institution.

118. Without such a notice, a balance inquiry appears to be nothing more than an unremarkable, free lead-in to a cash withdrawal to reasonable, diligent consumers.

119. Second, many ATM operators use intentionally deceptive on-screen prompts to exploit and add to the consumer confusion resulting from a lack of an on-screen fee notice. While varying in certain ways, the intention and effect is the same: to trick consumers into repeatedly paying more for a single ATM usage by increasing purported balance inquiries.

A. Overview of Claim

120. AmeriCU's Deposit Agreement and Fee Schedule and other supporting documents misrepresent to accountholders the true nature of AmeriCU's assessment of these fees. AmeriCU's contract terms mislead accountholders to believe that a balance inquiry is not a separate, individual transaction; rather, accountholders are led to believe that a balance inquiry is part of a single transaction, such as a deposit or withdrawal, conducted almost simultaneously at a single out of network ATM.

121. AmeriCU's uniform practice of charging two OON Fees per cash withdrawal preceded by a balance inquiry on top of the fee charged by the out-of-network ATM operator violates representations in AmeriCU's account documents, and constitutes a breach of contract and breach of the covenant of good faith and fair dealing. Indeed, AmeriCU's account documents misrepresent the possibility of being charged two fees by AmeriCU during one transaction at an out of network ATM. The practice also violates New York consumer protection laws.

122. Consumers simply do not know they can be assessed *three discrete fees for a simple out of network ATM session that lasts less than two minutes*. AmeriCU, along with the ATM owners, is all too happy to keep consumers in the dark.

123. AmeriCU's account documents do not represent that consumers will be subject to the triple OON Fees for an out-of-network ATM withdrawal preceded by what they deem to be a consented-for "balance inquiry."

124. When consumers use ATMs not owned by their own financial institution, federal law requires the owners of those Out-of-Network ATMs to inform users of the amount of the usage fees charged by the ATM owner.

125. Thus, it is standard at ATMs in the United States that when a consumer uses an ATM not owned by the consumer's home financial institution, a message is displayed on the screen stating that usage of the ATM will cost a specified amount to proceed with a withdrawal of funds, and that such a fee

is in addition to a fee that may be assessed by a consumer's financial institution for use of the ATM. *See supra.*

126. Through repeated exposure to such fee warning messages, consumers are accustomed to being warned of fee assessments at out of network ATMs, and to being provided with the opportunity to decide whether the fees charged are reasonable—before proceeding with their cash withdrawal.

127. AmeriCU knows this—that consumers expect a fair fee disclosure at the ATM—and has exploited consumers' reasonable expectation that they will only engage in fee-worthy actions knowingly and with appropriate disclosures—and will be provided a warning and an opportunity to cancel actions before being assessed a fee. AmeriCU does this by assessing additional OON Fees on consumers merely because they pressed buttons during a cash withdrawal transaction that AmeriCU, in its discretion, deems to be tantamount to requests for balance inquiries.

128. Repeated exposure to such messages is partly responsible for building the reasonable consumer understanding that a balance inquiry is a common lead-in to a withdrawal, a mere first step to the real business at hand, an informational exercise offered by the ATM to help inform the cash withdrawal.

129. Reasonable consumers like Plaintiff Forjone do not, in sum, understand a balance inquiry to be an independent transaction worthy of a separate fee.

130. AmeriCU knows this—that in the absence of a prominent warning otherwise, consumers expect a balance inquiry to be an integral, included part of a cash withdrawal.

131. AmeriCU has designed a scheme to assess OON Fees on those purported balance inquiries. AmeriCU preys on the common sense that a balance inquiry preceded by a cash withdrawal is not an independent and separate transaction and therefore should not form the basis for a separate fee.

132. If a financial institution is going to charge such a conscience-shocking fee, its contract with its members must allow for fully and fairly disclose such a fee. AmeriCU did the opposite—

providing express and implied indications that balance inquiries undertaken in conjunction with cash withdrawals would not incur additional OON Fees. Alternatively, this practice constitutes a breach of the covenant of good faith and fair dealing.

B. Account Disclosures

133. Against the backdrop of the reasonable consumer expectations and federal law above, AmeriCU’s disclosures reinforce the reasonable understanding that no fee will be assessed for a balance inquiry—especially if ATM users are not warned beforehand.

134. AmeriCU’s disclosures also reinforce the common sense presumption that there can be no balance inquiry fee when such an inquiry is in conjunction with a cash withdrawal at the same ATM.

135. AmeriCU’s Fee Schedule fails to disclose the number of fees an accountholder will be charged for an out-of-network withdrawal preceded by a balance inquiry.

Non AmeriCU (Foreign) ATM Fee.....\$1.25 each
(Withdrawals, Inquiries, and Transfers)

Ex. A.

136. Based on the Fee Schedule, ATM users would have no reason to believe that a balance inquiry undertaken with a cash withdrawal will result in two separate OON Fees because it is all a single transaction

137. Accountholders using non-AmeriCU ATMs are never warned that they will receive **two separate fees** from AmeriCU—plus another one from the ATM owner—when they check their balance before proceeding with a cash withdrawal at the same ATM. But that is exactly what happens.

138. The most reasonable understanding of this disclosure is that for all activities incident to a cash withdrawal, including a balance inquiry undertaken simultaneously, a single fee will be assessed.

139. When a balance inquiry precedes a withdrawal, common sense and consumer expectation dictate that that two-step process is part of the same ATM use.

140. In general, and in Plaintiff Forjone’s case here, the ATM owner does not warn the user that there is a separate charge for a balance inquiry, and in fact the ATM owner does not charge a separate fee to the user for a balance inquiry. Therefore, the user can have no reasonable expectation that AmeriCU will assess a fee for an action that the ATM owner does not charge or warn about.

141. AmeriCU accountholders using a non-AmeriCU ATM are never warned that they will receive two separate fees from AmeriCU—plus another one from the ATM owner—when they check their balance before proceeding with a cash withdrawal at the same ATM.

142. At the very least, AmeriCU uses contractual discretion in bad faith when it assesses two OON Fees during the same ATM use when a balance inquiry immediately precedes a cash withdrawal.

C. Plaintiff Forjone’s Out of Network ATM Balance Inquiry Transactions

143. On July 12, 2019, Plaintiff Forjone placed his AmeriCU debit card into an out of network ATM in order to make a cash withdrawal during which time he made a balance inquiry. Following his transaction, AmeriCU issued account statements showing he was assessed, in addition to the cash withdrawal surcharge paid to the ATM operator, a separate \$1.00 fee from AmeriCU for making an out-of-network balance inquiry, and an additional \$1.00 fee from AmeriCU for making an out-of-network cash withdrawal.

CLASS ACTION ALLEGATIONS

144. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of Rule 23. The proposed classes are defined as:

All AmeriCU accountholders who, during the applicable statute of limitations, were charged OD Fees on debit card transactions that were authorized into a positive available balance (“APPSN class”).

All AmeriCU accountholders who, during the applicable statute of limitations, were charged more than one NSF Fee on the same item (“Multi NSF class”).

All AmeriCU checking account holders who, during the applicable statute of limitations, were assessed two or more OON Fees when they performed a balance inquiry prior to withdrawing cash at an out-of-network ATM (the “Balance Inquiry Class”).

Plaintiffs also brings their claims on behalf of Subclasses of New York accountholders with the subclasses to be defined as follows:

All AmeriCU accountholders in the state of New York who, during the applicable statute of limitations, were charged OD Fees on debit card transactions that were authorized into a positive available balance (“New York APPSN Subclass”).

All AmeriCU accountholders who in the state of New York who, during the applicable statute of limitations, were charged more than one NSF Fee on the same item (“New York Multi NSF class”).

All AmeriCU checking account holders in the State of New York who, during the applicable statute of limitations, were assessed two or more OON Fees when they performed a balance inquiry prior to withdrawing cash at an out-of-network ATM (the “New York Balance Inquiry Class”).

145. Excluded from the Classes are Defendant, Defendant’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.

146. Plaintiffs reserve 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.

147. 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 AmeriCU has acted on grounds generally applicable to the class. Such common legal or factual questions include, but are not limited to:

- a) Whether AmeriCU improperly charged OD Fees on APPSN Transactions;

- b) Whether AmeriCU improperly charged multiple NSF Fees on the same transaction;
- c) Whether AmeriCU improperly charged OON Fees for balance inquires made in conjunction with a withdrawal at out-of-network ATMS;
- d) Whether the conduct enumerated above violates the contract;
- e) Whether the conduct enumerated above violates the covenant of good faith and fair dealing;
- f) Whether the conduct enumerated above is a deceptive act or practice in violation of New York law;
- g) The appropriate measure of damages.

148. 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 resort to AmeriCU's records. AmeriCU 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 Plaintiffs.

149. 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.

150. Plaintiffs' 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 AmeriCU, as described herein.

151. Plaintiffs are more than adequate representatives of the Classes in that Plaintiffs are or were AmeriCU checking accountholders and have suffered damages as a result of AmeriCU's contract violations. In addition:

- a) Plaintiffs are committed to the vigorous prosecution of this action on behalf of themselves and all others similarly situated and has 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 Plaintiffs and the unnamed members of the Classes;
- c) Plaintiffs anticipate no difficulty in the management of this litigation as a class action; and
- d) Plaintiffs' legal counsel has the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

152. Plaintiffs know of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

153. AmeriCU 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.

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

COUNT I
BREACH OF CONTRACT INCLUDING THE
COVENANT OF GOOD FAITH AND FAIR DEALING
(Individually and on Behalf of the Classes)

155. Plaintiffs repeat and incorporate all of the preceding allegations as if fully set forth herein.

156. Plaintiffs, and all members of the proposed Classes contracted with AmeriCU for checking account services, including debit card services.

157. AmeriCU breached promises made to Plaintiffs and all members of the proposed Classes when as described herein, AmeriCU charged OD Fees as a result of transactions that did not overdraw a

checking account, when it assessed more than one NSF Fee on the same transaction and when it charged OON Fees for balance inquires made in conjunction with a withdrawal at out-of-network ATMs.

158. In addition, there exists an implied covenant of good faith and fair dealing in all contracts that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. 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.

159. 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.

160. The implied covenant of good faith and fair dealing applies to the performance and enforcement of contracts, limits the parties' conduct when their contract defers decision on a particular term, omits terms, or provides ambiguous terms.

161. AmeriCU has breached the covenant of good faith and fair dealing and abused its discretion in its contract as described herein. Specifically, AmeriCU should not have used its discretion to charge OD Fees on APPSN Transactions, charge multiple NSF fees on the same transaction, and charge OON Fees for balance inquires made in conjunction with a withdrawal at out-of-network ATMs. The Account Documents do not have a contract term permitting these practices and are otherwise ambiguous as to any right for AmeriCU to engage in these practices.

162. Plaintiffs and all members of the proposed Classes have performed all, or substantially all, of the obligations imposed on them under the contract.

163. Plaintiffs and all members of the proposed Classes have sustained damages as a result of AmeriCU's breaches of the contract.

COUNT II
VIOLATION OF N.Y. GEN. BUS. LAW § 349, *et seq.*
NEW YORK GENERAL BUSINESS LAW
(On Behalf of the New York Subclasses)

164. Plaintiffs repeat and incorporate by reference each of the foregoing paragraphs as if fully set forth herein.

165. AmeriCU's practices of charging fees on APPSN transactions, charging multiple fees on the same transaction, and charging OON fees for balance inquiries made in connection with a withdrawal at an out-of-network ATM violate New York General Business Law § 349 ("NYGBL § 349").

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

167. As a bank with multiple branch locations in New York, AmeriCU conducted business, trade, or commerce in New York State.

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

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

a. AmeriCU misrepresented material facts, pertaining to the sale and/or furnishing of banking services to the New York Subclass by representing and advertising that it would only charge overdraft fees when an overdraft actually occurred, representing and advertising that it would charge multiple fees

on the same transaction, and representing and advertising that it would not charge OON fees for balance inquiries made in connection with a withdrawal at an out-of-network ATM ; and

b. AmeriCU omitted, suppressed, and concealed the material fact that it would charge fees on APPSN transactions, charge multiple fees on the same transaction, and and charge OON fees for balance inquiries made in connection with a withdrawal at an out-of-network ATM .

AmeriCU systematically engaged in these deceptive, misleading, and unlawful acts and practices, to the detriment of Plaintiffs and members of the New York Subclasses.

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

171. As a direct and proximate result of AmeriCU's deceptive trade practices, members of the New York Subclass suffered injury and/or damages, including assessment of OD Fees on APPSN transactions, multiple fees on the same transaction, and OON fees for balance inquiries made in connection with a withdrawal at an out-of-network ATM.

172. Had Plaintiffs Fairchild-Cathey and Mumford known they could be charged OD Fees on APPSN transactions, they would have made different payment decisions so as to avoid incurring such fees or opted out of OD protection.

173. Had Plaintiff Fairchild-Cathey known she could be charged multiple fees on the same transaction, she would have made different payment decisions so as to avoid incurring such fees or opted out of OD protection.

174. Had Plaintiff Forjone known he could be charged OON fees for balance inquiries made in connection with a withdrawal at an out-of-network ATM, he would have made different decisions regarding his ATM transactions so as to avoid these fees.

175. As a result of AmeriCU's violations of NY GBL § 349, Plaintiffs and members of the putative Subclass have paid and will continue to pay excessive fees to AmeriCU. Accordingly, they have

suffered and will continue to suffer actual damages.

176. Accordingly, Plaintiffs and the New York Subclass members are entitled to relief under N.Y. Gen. Bus. Law § 349(h), including, but not limited to, actual damages, treble damages, statutory damages, injunctive relief, and/or legal fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the Classes, demands 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 AmeriCU's OD Fee policies and practices to be in breach of its contract with accountholders;
- C. Restitution of all OD Fees and improperly assessed paid to AmeriCU by Plaintiffs 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.

DEMAND FOR JURY TRIAL

Plaintiffs and all others similarly situated hereby demand trial by jury on all issues in this Class Action Complaint that are so triable.

Dated: January 28, 2022

Respectfully submitted,

By: */s/ Jeffrey D. Kaliel* _____

Jeffrey D. Kaliel
KALIELGOLD PLLC
1100 15th Street NW, 4th Floor
Washington, D.C. 20005
(202) 350-4783
jkaliel@kaliellpc.com

Sophia G. Gold
KALIELGOLD PLLC
950 Gilman Street, Suite 200
Berkeley, California 94710
(202) 350-4783
sgold@kalielgold.com

David M. Berger (*pro hac vice forthcoming*)
Tayler L. Walters (*pro hac vice forthcoming*)
GIBBS LAW GROUP LLP
505 14th St. Suite 1110
Oakland, California 94612
Telephone: (510) 350-9700
Email: *dmb@classlawgroup.com*
Email: *tlw@classlawgroup.com*

Attorneys for Plaintiffs and the Putative Classes

CERTIFICATE OF SERVICE

The undersigned certifies that on January 28, 2022, a copy of the above document has been delivered to the following persons by the ECF system or by electronic mail and/or United States mail first class to:

Brian S. Gitnik
Litchfield Cavo LLP
420 Lexington Avenue, Suite 2104
New York, New York 10170
(212) 792-9772
gitnik@litchfieldcavo.com

/s/ Jeffrey D. Kaliel
Jeffrey D. Kaliel

EXHIBIT A

SCHEDULE OF FEES AND CHARGES

Checking Fees

Performance Checking	
Minimum Balance	\$5.00 per month (If average daily balance falls below \$1,000.00)
Prestigious Checking	
Minimum Balance	\$10.00 per month (If average daily balance falls below \$5,000.00)
Fresh Start Checking and Fresh Start Basic Accounts	
Monthly Maintenance Fee	\$9.95 without direct deposit
Monthly Maintenance Fee	\$7.95 with direct deposit
Fresh Start Basic - Checks posted	\$5.00 each check posted

Automatic Overdraft Transfers from Savings

Over Three (3) Transfers (Per Month)	\$10.00 each Lump sum charged at month end
---	---

Other Checking Fees

Return Check Fee (i.e., Overdrawn)	\$28.00 each Items returned for insufficient/ uncollected funds
Overdraft Fee	\$28.00 each
Member Privilege (MP) Overdraft Fee*	\$28.00 each
Check Collection	\$20.00 each
Check Protest	\$20.00 each
Check Stop Payment	
Unassisted (TeleLink/Online/Kiosk)	\$15.00 each
Assisted (Branch/Call Center)	\$30.00 each
Check printing fee	Depends on the style and quantity of checks ordered and related charges.
Official Check **Stop Payment	\$20.00 each
Official Check Copy	\$3.00 each
Official Check (\$500.00 min)	\$7.00 each
Unassisted (TeleLink/Online/Kiosk)	\$5.00

*Please refer to the Member Privilege Overdraft Policy for additional details

**available only when item is lost or stolen

Research Requests

Copies of Checks, Slips, Etc	\$2.00 each item
Account Research/ Reconciliation	\$20.00 per hour
Statement Copies	\$2.00 each statement
Account History+and Copy	\$1.00 per inquiry (+First inquiry per month is free)
Legal Paper Processing	Varies based on circumstance

Money Market Fees

Excessive Transaction	\$4.00 each
-----------------------	-------------

Wire Transfers

Bank to Bank Wire	\$15.00 each
-------------------	--------------

ACH Fees

ACH Authorized Revoke/Stop	\$20.00 each
ACH Returned Item Fee	\$28.00 each

ATM/ POS Transactions

AmeriCU ATM's	No Fee
Non AmeriCU (Foreign) ATM Fee	\$1.25 each (Withdrawals, Inquires and Transfers)

Visa Check Card Fees

Non Sufficient Funds (Return Item)	\$28.00/item
Express Mailing Fee	\$25.50
Express Mailing Fee: Next Day	
By 10:30 AM Sat Incl. (NYS only)	\$30.00
Express Mailing Fee: Sun. or Holiday (NYS Only)	\$30.00
Express Mailing Fee: Sun. or Holiday By 10:30 AM (NYS Only)	\$35.00
Express Mailing Fee: 2 Business Day (Outside of NYS)	\$25.50
Receipt Copies for Debit Card	\$5.00 each
Card Replacement	\$10.00

Preauthorized EFT Fees

Non Sufficient Funds (Return Item)	\$28.00/item
------------------------------------	--------------

Online Bill Payment Service Fees

Online Bill Payment Service	No Fee
Online Check Copy	No Fee
Online Reactivation	No Fee
Expedited Payment	\$9.95
Overnight Check Payment	\$25.00

Safe Deposit Box* Fees

3 x 5 Box	\$30.00
3 x 10 Box	\$50.00
5 x 10 Box	\$70.00
10 x 10 Box	\$100.00
Replace Lost Safe Deposit Box Key	\$12.00
*Available only at Black River Blvd., Rome Branch Office	

Miscellaneous Fees

Money Orders	\$2.00 each
Third-Party* Check Cashing	\$5.00 (*Member cashing a check for a non-member)
Inactive Account/Maintenance	\$5.00 per month
Dormant Acct. Processing	\$5.00 each
Savings Only* - Check Cashing	\$2.00 each (*Waived with qualifying relationship)
Bad Address	\$5.00 annually
Canadian Check Processing	\$10.00 each
Red Zipper Bags	\$3.00 each

Relationship Pricing

Flex Members	\$1.00 per transaction (for transactions performed at an AmeriCU Financial Center or AmeriCU Member Call Center)
	\$1.00 per check if over 4 written per month
Bill Pay Users	\$1.00 per check if over 10 written per month

EFFECTIVE DATE: 10/01/21

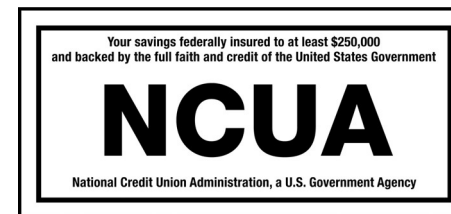


EXHIBIT B

MEMBERSHIP AND ACCOUNT AGREEMENT

This Agreement covers the rights and responsibilities concerning your Accounts and the rights and responsibilities of the credit union providing this agreement (credit union). In this Agreement, the words "you" and "yours" mean anyone who signs an account card or Account Change Card (Account Card or any other account opening document). The words "we," "us," and "our" mean the Credit Union. The word "account" means any one or more share or other accounts you have with the Credit Union.

Your account type(s) and ownership features are designated on your Account Card. By signing an Account Card, each of you, jointly and severally, agree to the terms and conditions in this Agreement and Account Card, the Funds Availability Policy Disclosure, Truth-in-Savings Disclosure, Electronic Funds Transfer Agreement and Disclosure, Privacy Notice Disclosure, any Account Deposit Receipt accompanying this Agreement, the Credit Union's bylaws and policies, and any amendments to these documents from time to time which collectively govern your membership and accounts.

1. MEMBERSHIP ELIGIBILITY — To join the Credit Union you must meet the membership requirements including purchase and maintenance of the minimum required share(s) ("membership share") as set forth in the Credit Union's bylaws. You authorize us to check your account, credit, and employment history, and obtain reports from third parties, including credit reporting agencies, to verify your eligibility for the accounts and services you request and for other accounts, products, or services we may offer you or for which you may qualify.

2. INDIVIDUAL ACCOUNTS — An individual account is an account owned by one member (individual, corporation, partnership, trust or other organization) qualified for credit union membership. If the account owner dies, the interest passes, subject to applicable law, to the account owner's estate or Payable on Death (POD) beneficiary/payee or trust beneficiary, subject to other provisions of this Agreement governing our protection for honoring transfer and withdrawal requests of an owner or owner's agent prior to notice of an owner's death and to any security interest or pledge granted by the account owner and subject to our statutory lien rights.

3. JOINT ACCOUNTS — A joint account is an account owned by two or more persons.

a. Rights of Survivorship. Unless otherwise stated on the Account Card, a joint account includes rights of survivorship. This means when one owner dies, all sums in the account will pass to the surviving owner(s). For a joint account without rights of survivorship, the deceased owner's interest passes to his or her estate. A surviving owner's interest is subject to the Credit Union's statutory lien for the deceased owner's obligations, and to any security interest or pledge granted by a deceased owner, even if a surviving owner did not consent to it.

b. Control of Joint Accounts. Any owner is authorized and deemed to act for any other owner(s) and may instruct us regarding transactions and other account matters. Each owner guarantees the signature of any other owner(s). Any owner may withdraw all funds, stop payment on items, transfer, or pledge to us all or any part of the shares without the consent of the other owner(s). We have no duty to notify any owner(s) about any transaction. We reserve the right to require written consent of all owners for any change to or termination of an account. If we receive written notice of a dispute between owners or inconsistent instructions from them, we may suspend or terminate the account and require a court order or written consent from all owners to act.

c. Joint Account Owner Liability. If an item deposited in a joint account is returned unpaid, a joint account is overdrawn, or if we do not receive final payment on a transaction, the owners, jointly and severally, are liable to us for the amount of the returned item, overdraft, or unpaid amount and any charges, regardless of who initiated or benefited from the transaction. If any account owner is indebted to us, we may enforce our rights against any account of the indebted owner, including all funds in the joint account regardless of who contributed the funds in the account.

4. POD/TRUST ACCOUNT DESIGNATIONS — A Payable on Death (POD) account or trust account designation is an instruction to the Credit Union that an individual or joint account so designated is payable to the owner(s) during his, her or their lifetimes and, when the last account owner dies, payable to all surviving POD or trust beneficiary/payee. If there is more than one surviving beneficiary/payee, the account is owned jointly by such beneficiaries/payees without rights of survivorship upon the death of the last account owner. Any POD or trust beneficiary/payee designation shall not apply to Individual Retirement Accounts (IRAs). We are not obligated to notify any beneficiary/payee of the existence of any account or the vesting of the beneficiary/payee's interest in any account, except as otherwise provided by law. This paragraph does not apply to an account held on behalf of or held in the name of a trust.

5. ACCOUNTS FOR MINORS — We may require any account established by a minor to be a joint account with an owner who has reached the age of majority under state law and who shall be jointly and severally liable to us for any returned item, overdraft, or unpaid charges or amounts on such account. We may pay funds directly to the minor without regard to his or her minority. Unless a guardian or parent is an account owner, the guardian or parent shall not have any account access rights. We have no duty to inquire about the use or purpose of any transaction. We will not change the account status when the minor reaches the age of majority, unless authorized in writing by all account owners.

6. UNIFORM TRANSFERS/GIFTS TO MINORS ACCOUNT — A Uniform Transfers/Gifts to Minors Account (UTMA/UGMA) is an individual account created by a custodian who deposits funds as an irrevocable gift to a minor. The minor to whom the gift is made is the beneficiary of the custodial property in the account. The custodian has possession and control of the account for the exclusive right and benefit of the minor and barring a court order otherwise, is the only party entitled to make deposits, withdrawals, or close the account. We have no duty to inquire about the use or purpose of any transaction. If the custodian dies, we may suspend the account, until we receive instructions from any person authorized by law to withdraw funds or a court order authorizing withdrawal.

7. AGENCY DESIGNATION ON AN ACCOUNT — An agency designation on an account is an instruction to us that the owner authorizes another person to make transactions as agent for the account owner regarding the accounts designated. An

agent has no ownership interest in the account(s) or Credit Union voting rights. We have no duty to inquire about the use or purpose of any transaction made by the agent.

8. DEPOSIT OF FUNDS REQUIREMENTS — Funds may be deposited to any account, in any manner approved by the Credit Union in accordance with the requirements as set forth in the Truth-in-Savings Disclosure. Deposits made by mail, at night depositories or at unstaffed facilities are not our responsibility until we receive them. We reserve the right to refuse or to return any deposit.

a. Endorsements. We may accept transfers, checks, drafts, and other items for deposit into any of your accounts if they are made payable to, or to the order of, one or more account owners even if they are not endorsed by all payees. You authorize us to supply missing endorsements of any owners if we choose. If a check, draft or item that is payable to two or more persons is ambiguous as to whether it is payable to either or both, we will process the check, draft or item as though it is payable to all such persons. If an insurance, government, or other check or draft requires an endorsement, we may require endorsement as set forth on the item. Endorsements must be made on the back of the share draft or check within 1½ inches from the top edge, although we may accept endorsements outside this space. However, any loss we incur from a delay or processing error resulting from an irregular endorsement or other markings by you or any prior endorser will be your responsibility.

b. Collection of Items. We act only as your agent and we are not responsible for handling items for deposit or collection beyond the exercise of ordinary care. We are not liable for the negligence of any correspondent or for loss in transit, and each correspondent will only be liable for its own negligence. We may send any item for collection. Items drawn on an institution located outside the United States may be handled on a collection basis only. Canadian checks are the only type of foreign check that we will handle. You waive any notice of nonpayment, dishonor, or protest regarding items we purchase or receive for credit or collection to your account. We reserve the right to pursue collection of previously dishonored items at any time, including giving a payor financial institution extra time beyond any midnight deadline limits.

c. Restrictive Legends. Some checks and drafts contain restrictive legends or similar limitations on the front of the item. Examples of restrictive legends include "two signatures required", "void after 60 days" or "not valid over \$500." We are not liable for payment of any check or draft contrary to a restrictive legend or other limitation contained in or on the item unless we have specifically agreed in writing to the restrictions or limitations.

d. Final Payment. All items or Automated Clearing House (ACH) transfers credited to your account are provisional until we receive final payment. If final payment is not received, we may charge your account for the amount of such items or ACH transfers and impose a return item charge on your account. Any collection fees we incur may be charged to your account. We reserve the right to refuse or return any item or funds transfer.

e. Direct Deposits. We may offer preauthorized deposits (e.g., payroll checks, Social Security or retirement checks, or other government checks) or preauthorized transfers from other accounts. You must authorize direct deposits or preauthorized transfers by filling out a separate form. You must notify us at least 30 days in advance to cancel or change a direct deposit or transfer option. If your account is overdrawn, you authorize us to deduct the amount your account is overdrawn from any deposit, including deposits of government payments or benefits. Upon a bankruptcy filing, unless you cancel the authorization, we will continue applying payments from direct deposits in accordance with your authorization on file with us. If we are required to reimburse the U.S. Government for any benefit payment directly deposited into your account, we may deduct the amount returned from any of your accounts, unless prohibited by law.

f. Crediting of Deposits. Deposits made after the deposit cut-off time and deposits made on either holidays or days that are not our business days will be credited to your account on the next business day.

9. ACCOUNT ACCESS —

a. Authorized Signature. Your signature on the Account Card authorizes your account access. We will not be liable for refusing to honor any item or instruction if we believe the signature is not genuine. If you have authorized the use of a facsimile signature, we may honor any check or draft that appears to bear your facsimile signature even if it was made by an unauthorized person. You authorize us to honor transactions initiated by a third person to whom you have given your account number even if you do not authorize a particular transaction. You agree to register a complaint of any theft of blank checks or other instruments or any unauthorized use of your share draft or share savings account(s) with a local law enforcement agency and to provide us with a copy of the law enforcement agency's official report.

b. Access Options. You may withdraw or transfer funds from your account(s) in any manner we permit (e.g., at an automated teller machine, in person, by mail, Internet access, automatic transfer, or telephone, as applicable). We may return as unpaid any check or draft drawn on a form we do not provide, and you are responsible for any loss we incur handling such a check or draft. We have the right to review and approve any form of power of attorney and may restrict account withdrawals or transfers. We are under no obligation to honor any power of attorney which we reasonably conclude is invalid or unreliable or has been revoked.

c. Credit Union Examination. We may disregard information on any check or draft, other than the signature of the drawer, the amount and any magnetic encoding. You agree we do not fail to exercise ordinary care in paying an item solely because our procedures do not provide for sight examination of items.

10. ACH & WIRE TRANSFERS — Except as amended by this Agreement, electronic funds transfers we permit that are subject to Article 4A of the Uniform Commercial Code will be subject to such provisions of the Uniform Commercial Code as enacted by the state where the main office of the Credit Union is located. We may execute certain requests for electronic funds transfers by Fedwire. Fedwire transactions are subject to Federal Reserve Board Regulation J. You may order electronic funds transfers to or from your account. We will debit your account for the amount of an electronic funds transfer and will charge your account for any fees related to the transfer. Unless we agree otherwise in writing, we reserve the right to refuse to execute any order to transfer funds to or from your account. We are not obligated to execute any order to transfer funds out of your account if the amount of the requested transfer plus applicable fees exceeds the available funds in your account. We are not liable for errors, delays, interruptions or transmission failures caused by third parties or circumstances beyond our control including mechanical, electronic or equipment failure. We will not provide you with next day notice of ACH, wire transfers and other electronic payments credited to your account. You will receive notice of such credits on your account statements. You may contact us to determine whether a payment has been received. If we fail to properly execute a payment order, and such action results in a delay in payment to you, we will pay you dividends or interest for the period of delay as required by applicable law. The dividends or interest paid to you will be based on the lowest nominal dividend or interest rate we were paying on any account during that period. Payment orders we accept will be executed within a reasonable time of receipt but may not necessarily be executed on the date they are received. Cut-off times may apply to the receipt, execution and

processing of funds transfers, payment orders, cancellations, and amendments and if received after a cut-off time, may be treated as having been received on the next funds transfer business day. Information about any cut-off times is available upon request. From time to time, we may need to temporarily suspend processing of a transaction for greater scrutiny of verification in accordance with applicable law. This action may affect settlement or availability of the transaction. When you initiate a wire transfer, you may identify the recipient and any financial institution by name and by account or identifying number. The Credit Union and any other financial institutions facilitating the transfer may rely strictly on the account or identifying number even if the number identifies a different person or financial institution. Any account owner may amend or cancel a payment order even if that person did not initiate the order. We may refuse requests to amend or cancel a payment order that we believe will expose the Credit Union to liability or loss. Any request to amend or cancel a payment order that we accept will be processed within a reasonable time after it is received. You agree to hold us harmless from and indemnify us for all losses and expenses resulting from any actual or attempted amendment or cancellation of a payment order. We may require you to follow a security procedure to execute a payment order or certain electronic funds transfer transactions. We will notify you of any such security procedures and you agree that our security procedures are commercially reasonable.

11. ACCOUNT RATES AND FEES — We pay account earnings and assess fees against your account as set forth in the Truth-in-Savings Disclosure or Schedule of Fees and Charges. We may change the Truth-in-Savings Disclosure or Schedule of Fees and Charges at any time and will notify you as required by law.

12. TRANSACTION LIMITATIONS —

a. Withdrawal Restrictions. We will pay checks or drafts, permit withdrawals and make transfers from available funds in your account. The availability of funds in your account may be delayed as described in our Funds Availability Policy Disclosure. We may also pay checks or drafts, permit withdrawals and make transfers from your account from insufficient available funds if you have established an overdraft protection plan or, if you do not have such a plan with us, according to our overdraft policy.

We may refuse to allow a withdrawal in some situations, and will advise you accordingly; for example: (1) a dispute between account owners (unless a court has ordered the Credit Union to allow the withdrawal); (2) a legal garnishment or attachment is served; (3) the account secures any obligation to us; (4) required documentation has not been presented; or (5) you fail to repay a credit union loan on time. We may require you to give written notice of seven (7) days to 60 days before any intended withdrawals.

b. Transfer Limitations. We may limit the dollar amount or the number of transfers from your account. Please consult your Truth-in-Savings Disclosure or your Electronic Funds Transfer Agreement and Disclosure.

13. CERTIFICATE ACCOUNTS — Any time deposit, term share, share certificate, or certificate of deposit account allowed by state law (certificate account), whichever we offer, is subject to the terms of this Agreement, the Truth-in-Savings Disclosure and Account Deposit Receipt for each account, the terms of which are incorporated herein by reference.

14. OVERDRAFTS —

a. Payment of Overdrafts. If, on any day, the available funds in your share or deposit account are not sufficient to pay the full amount of a check, draft, item, transaction or other items posted to your account plus any applicable fee ("overdraft"), we may pay or return the overdraft. The Credit Union's determination of an insufficient account balance may be made at any time between presentation and the Credit Union's midnight deadline with only one review of the account required. We do not have to notify you if your account does not have sufficient available funds to pay an overdraft. Your account may be subject to a charge for each overdraft regardless of whether we pay or return the overdraft. For ATM and one-time debit card transactions, you must consent to the Credit Union's overdraft protection plan in order for the transaction amount to be covered under the plan. Without your consent, the Credit Union may not authorize and pay an overdraft resulting from these types of transactions. Services and fees for overdrafts are shown in the document the Credit Union uses to capture the member's opt-in choice for overdraft protection and the Schedule of Fees and Charges.

Except as otherwise agreed in writing, if we exercise our right to use our discretion to pay an overdraft, we do not agree to pay overdrafts in the future and may discontinue covering overdrafts at any time without notice. If we pay an overdraft or impose a fee that overdraws your account, you agree to pay the overdrawn amount in accordance with your overdraft protection plan or, if you do not have such a plan, in accordance with our overdraft payment policy.

b. Order of Payments. Checks, drafts, items and other transactions may not be processed in the order that you make them or in the order that we receive them. We may, at our discretion, pay a check, draft or item and execute other transactions on your account in any order we choose. The order in which we process checks, drafts and items and execute other transactions on your account may affect the total amount of overdraft fees that may be charged to your account. Please contact us if you have questions about how we pay checks and drafts and process transfers and withdrawals.

15. POSTDATED AND STALEDATED DRAFTS — You agree not to issue any check or draft that is payable on a future date (postdated). If you do issue a check or draft that is postdated and we pay it before that date, you agree that we shall have no liability to you for payment. You agree not to deposit checks, drafts, or other items before they are properly payable. We are not obligated to pay any check or draft drawn on your account that is presented more than six (6) months past its date.

16. STOP PAYMENT ORDERS —

a. Stop Payment Order Request. Any owner may request a stop payment order on any check or draft drawn on the owner's account. To be binding an order must be in writing, dated, signed, and must accurately describe the check or draft including the exact account number, check or draft number and the exact amount of the check or draft. This exact information is necessary for the Credit Union's computer to identify the check or draft. If we receive incorrect or incomplete information, we will not be responsible for failing to stop payment on the check or draft. In addition, we must receive sufficient advance notice of the stop payment order to allow us a reasonable opportunity for us to act on it. If we recredit your account after paying a check or draft over a valid and timely stop payment order, you agree to sign a statement describing the dispute with the payee, to assign to us all of your rights against the payee or other holders of the check or draft and to assist us in any legal action.

b. Duration of Order. Oral stop payment orders for checks or drafts will lapse within 14 calendar days unless confirmed in writing within that time. Written stop payment orders for checks or drafts are effective for six (6) months and may be renewed in additional six (6) month periods by requesting in writing that the stop payment order be renewed within a period during which the stop payment order is effective. We are not required to notify you when a stop payment order expires.

c. Liability. Fees for stop payment orders are set forth in the Truth-in-Savings Disclosure. Payment on any certified check, cashier's check, teller's check, or any other check, draft, or payment guaranteed by us may be stopped only according to the provisions of Section 4-403 of the Uniform Commercial Code as enacted by the state of New York. Although payment of an item may be stopped, you may remain liable to any item holder, including us. You have the burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order. You agree to indemnify and hold the Credit Union harmless from all costs, including attorney's fees, damages or claims related to our refusing payment of an item, including claims of any joint account owner, payee, or endorsee in failing to stop payment of an item as a result of incorrect information provided by you.

17. CREDIT UNION LIABILITY — If we do not properly complete a transaction according to this Agreement, we will be liable for your losses or damages not to exceed the amount of the transaction, except as otherwise provided by law. We will not be liable if: (1) your account contains insufficient funds for the transaction; (2) circumstances beyond our control prevent the transaction; (3) your loss is caused by your or another financial institution's negligence; or (4) your account funds are subject to legal process or other claim. We will not be liable for consequential damages, except liability for wrongful dishonor. We exercise ordinary care if our actions or non-actions are consistent with applicable state law, Federal Reserve regulations and operating letters, clearinghouse rules, and general financial institution practices followed in the area we serve. You grant us the right, in making payments of deposited funds, to rely exclusively on the form of the account and the terms of this Agreement. Any conflict regarding what you or our employees may say or write will be resolved by reference to this Agreement.

18. CHECKS PRESENTED FOR PAYMENT IN PERSON — We may refuse to accept any check or draft drawn on your account that is presented for payment in person. Such refusal shall not constitute a wrongful dishonor of the check or draft and we shall have no liability for refusing payment.

19. REMOTELY CREATED CHECKS — For purposes of this paragraph, "account" means a transaction account, credit account, and any other account on which checks (share drafts) may be drawn. A remotely created check is a check created by someone other than the person on whose account the check is drawn. A remotely created check is generally created by a third party payee as authorized by the owner of the account on which the check is drawn. Authorization is made over the telephone or through online communication. The owner of the account does not sign a remotely created check. In place of the owner's signature, the remotely created check usually bears a statement that the owner authorized the check or bears the owner's printed or typed name. If you authorize a third party to draw a remotely created check against your account, you may not later revoke your authorization. It is your responsibility to resolve any authorization issues directly with the third party. We are not required to credit your account, and may charge against your account any remotely created check for which the third party has proof of your authorization.

20. PLEDGE/STATUTORY LIEN — Unless prohibited by law, you pledge and grant as security for all obligations you may have now or in the future, except obligations secured by your principal residence, all shares and dividends and all deposits and interest, if any, in all accounts you have with us now and in the future. If you pledge a specific dollar amount in your account for a loan, we will freeze the funds in your account(s) to the extent of the outstanding balance of the loan or, if greater, the amount of the pledge if the loan is a revolving loan. Otherwise, funds in your pledged account(s) may be withdrawn unless you are in default. Federal or state law, depending upon whether we have a federal or state charter, gives us a lien on all shares and dividends and all deposits and interest, if any, in accounts you have with us now and in the future. Except as limited by state or federal law, the statutory lien gives us the right to apply the balance of all your accounts to any obligation on which you are in default. After you are in default, we may exercise our statutory lien rights without further notice to you.

Your pledge and our statutory lien rights will allow us to apply the funds in your account to what you owe when you are in default, except as limited by state or federal law. If we do not apply the funds in your account(s) to satisfy your obligation, we may place an administrative freeze on your account(s) in order to protect our statutory lien rights and may apply the funds in your account(s) to the amount you owe us at a later time. The statutory lien and your pledge do not apply to any Individual Retirement Account or any other account that would lose special tax treatment under state or federal law if given as security. By not enforcing our right to apply funds in your account to your obligations that are in default, we do not waive our right to enforce these rights at a later time.

21. LEGAL PROCESS — If any legal action is brought against your account, we may pay out funds according to the terms of the action or refuse any payout until the dispute is resolved. Any expenses or attorney fees we incur responding to legal process may be charged against your account without notice, unless prohibited by law. Any legal process against your account is subject to our lien and security interest.

22. ACCOUNT INFORMATION — Upon request, we will give you the name and address of each agency from which we obtain a credit report regarding your account. We agree not to disclose account information to third parties except when: (1) it is necessary to complete a transaction; (2) the third party seeks to verify the existence or condition of your account in accordance with applicable law; (3) such disclosure complies with the law or a government agency or court order; or (4) you give us written permission.

23. NOTICES —

a. Name or Address Changes. You are responsible for notifying us of any address or name change. The Credit Union is only required to attempt to communicate with you at the most recent address you have provided to us. We may require all name and address changes to be provided in writing. If we attempt to locate you, we may impose a service fee as set forth in the Truth-in-Savings Disclosure.

b. Notice of Amendments. Except as prohibited by applicable law, we may change the terms of this Agreement. We will notify you of any changes in terms, rates, or fees as required by law. We reserve the right to waive any term in this Agreement. Any such waiver shall not affect our right to future enforcement.

c. Effect of Notice. Any written notice you give us is effective when we receive it. Any written notice we give to you is effective when it is deposited in the U.S. mail, postage prepaid and addressed to you at your statement mailing address. Notice to any account owner is considered notice to all account owners.

d. Electronic Notices. If you have agreed to receive notices electronically, we may send you notices electronically and discontinue mailing paper notices to you until you notify us that you wish to reinstate receiving paper notices.

24. TAXPAYER IDENTIFICATION NUMBERS AND BACKUP WITHHOLDING — Your failure to furnish a correct Taxpayer Identification Number (TIN) or meet other requirements may result in backup withholding. If your account is subject to backup

withholding, we must withhold and pay to the Internal Revenue Service (IRS) a percentage of dividends, interest, and certain other payments. If you fail to provide your TIN, we may suspend opening your account.

25. STATEMENTS —

a. Contents. If we provide a periodic statement for your account, you will receive a periodic statement of transactions and activity on your account during the statement period as required by applicable law. If a periodic statement is provided, you agree that only one statement is necessary for joint accounts. For share draft or checking accounts, you understand and agree that your original check or draft, when paid, becomes property of the Credit Union and may not be returned to you, but copies may be retained by us or be payable through financial institutions and made available upon your request. You understand and agree that statements are made available to you on the date they are sent to you. You also understand and agree that checks or drafts or copies thereof are made available to you on the date the statement is sent to you, even if the checks or drafts do not accompany the statement.

b. Examination. You are responsible for promptly examining each statement upon receiving it and reporting any irregularities to us. If you fail to report any irregularities such as forged, altered, unauthorized, unsigned, or otherwise fraudulent items drawn on your account, erroneous payments or transactions, or other discrepancies reflected on your statement within 33 days of the date we sent the statement to you, we will not be responsible for your loss. Also, we will not be responsible for any loss resulting from any forged, altered, unauthorized, unsigned, or otherwise fraudulent items drawn on your account by the same wrongdoer if you fail to notify us of such irregularities within 17 days of the date we sent the statement to you and the first altered or forged item was made available to you. In addition, we will not be liable for any items that are forged or altered in a manner not detectable by a reasonable person, including the unauthorized use of a facsimile signature machine.

c. Notice to Credit Union. You agree that the Credit Union's retention of checks or drafts does not alter or waive your responsibility to examine your statements or the time limit for notifying us of any errors. The statement will be considered correct for all purposes and we will not be liable for any payment made or charge to your account unless you notify us in writing within the above time limit for notifying us of any errors. If you fail to receive a periodic statement, you agree to notify us within fourteen (14) days of the time you regularly receive a statement.

26. INACTIVE/DORMANT ACCOUNTS —

Inactive Accounts

A **share savings account** is considered inactive if the following apply:

- a. You have made NO withdrawal(s) or deposit(s), excluding dividend crediting or fee posting, in the past 12 months,
- b. The balance in your account is less than \$200.00 and
- c. You have NO other accounts or loans with AmeriCU or its subsidiaries.

Unless prohibited by applicable law, we may charge an Inactive Account Maintenance Fee as set forth in the Truth-in-Savings Disclosure for processing your inactive account. If we impose a fee, we will notify you, as required by law, at your last known address. You authorize us to transfer funds from another account of yours to cover any service fees, if applicable. To the extent allowed by law, we reserve the right to transfer the account funds to an account payable and to suspend any further account statements. Accounts that are held by members under age 18 are exempt from these provisions.

A **share draft checking** account is considered inactive if you have made NO withdrawal(s) or deposit(s), excluding dividend crediting or fee posting, in the past 12 months.

An inactive share draft checking account belonging to a member who has no loans or other account relationships with the Credit Union, and whose total share draft balances are less than \$5,000, will be closed and the balance transferred to a share savings account, unless the account is reactivated or the Credit Union is notified that the member wishes to keep the share draft checking account open. Accounts that are held by members under age 18 are exempt from these provisions.

Abandoned Property

An Account is considered dormant if, for a period of three (3) consecutive years, there has been:

- a. NO withdrawal(s) or deposit(s), excluding dividend crediting or fee posting;
- b. NO member acknowledgment, on file, of a positive verification letter from the Credit Union's Supervisory Committee;
- and
- c. NO correspondence from you regarding the Account.

If an account is dormant, the shares will be turned over to the State of New York under the Abandoned Property Law. Once funds have been turned over to the state, we have no further liability to you for such funds and if you choose to reclaim such funds, you must apply to the appropriate state agency.

27. SPECIAL ACCOUNT INSTRUCTIONS — You may request that we facilitate certain trust, will, or court-ordered account arrangements. However, because we do not give legal advice, we cannot counsel you as to which account arrangement most appropriately meets the specific requirements of your trust, will, or court order. If you ask us to follow any instructions that we believe might expose us to claims, lawsuits, expenses, liabilities, or damages, whether directly or indirectly, we may refuse to follow your instructions or may require you to indemnify us or post a bond or provide us with other protection. We may require that account changes requested by you, or any account owner, such as adding or closing an account or service, be evidenced by a signed Account Change Card and accepted by us.

28. TERMINATION OF ACCOUNT — We may terminate your account at any time without notice to you or may require you to close your account and apply for a new account if: (1) there is a change in owners or authorized signers; (2) there has been a forgery or fraud reported or committed involving your account; (3) there is a dispute as to the ownership of the account or of the funds in the account; (4) any checks or drafts are lost or stolen; (5) there are excessive returned unpaid items not covered by an overdraft protection plan; (6) there has been any misrepresentation or any other abuse of any of your accounts; or (7) we reasonably deem it necessary to prevent a loss to us. You may terminate an individual account by giving written notice. We reserve the right to require the consent of all owners to terminate a joint account. We are not responsible for payment of any check, draft, withdrawal, or other item after your account is terminated; however, if we pay an item after termination, you agree to reimburse us.

29. TERMINATION OF MEMBERSHIP — You may terminate your membership by giving us written notice or by withdrawing your minimum required membership share, if any, and closing all your accounts. You may be denied services for causing a loss to the Credit Union or you may be expelled for any reason as allowed by applicable law.

30. DEATH OF ACCOUNT OWNER — We may continue to honor all transfer orders, withdrawals, deposits and other transactions on an account until we know of a member's death. Once we know of a member's death, we may pay checks or drafts or honor other payments or transfer orders authorized by the deceased member for a period of ten (10) days after that date unless we receive instructions from any person claiming an interest in the account to stop payment on the checks or drafts or other items. We may require anyone claiming a deceased owner's account funds to indemnify us for any losses resulting from our honoring that claim. This Agreement will be binding upon any heirs or legal representatives of any account owner.

31. UNLAWFUL INTERNET GAMBLING AND OTHER ILLEGAL ACTIVITIES — You agree that you are not engaged in unlawful Internet gambling or any other illegal activity. You agree that you will not use any of your accounts, access devices or services for unlawful Internet gambling or other illegal activities. We may terminate your account relationship if you engage in unlawful Internet gambling or other illegal activities.

32. SEVERABILITY — If a court holds any portion of this Agreement to be invalid or unenforceable, the remainder of this Agreement shall not be invalid or unenforceable and will continue in full force and effect. All headings are intended for reference only and are not to be construed as part of the Agreement.

33. ENFORCEMENT — You are liable to us for any losses, costs or expenses we incur resulting from your failure to follow this Agreement. You authorize us to deduct any such losses, costs or expenses from your account without prior notice to you. If we bring a legal action to collect any amount due under or to enforce this Agreement, we shall be entitled, subject to applicable law, to payment of reasonable attorney's fees and costs, including fees on any appeal, bankruptcy proceedings, and any post-judgment collection actions.

34. GOVERNING LAW — This Agreement is governed by the Credit Union's bylaws, federal laws and regulations, the laws, including applicable principles of contract law, and regulations of the state in which the Credit Union's main office is located, and local clearinghouse rules, as amended from time to time. As permitted by applicable law, you agree that any legal action regarding this Agreement shall be brought in the county in which the Credit Union is located.

35. NEGATIVE INFORMATION NOTICE — We may report information about your loan, share or deposit accounts to credit bureaus. Late payments, missed payments, or other defaults on your accounts may be reflected in your credit report.

36. IMPORTANT INFORMATION ABOUT PROCEDURES FOR OPENING A NEW ACCOUNT — To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account.

What this means to you: When you open an account, we ask for your name, address, date of birth, and other information that will allow us to identify you. We may also ask to see your driver's license or other identifying documents.