

DISTRICT COURT, SARPY COUNTY, NEBRASKA

ALEXANDER BEAM and
KENNETH RANDOLPH,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

COBALT CREDIT UNION,

Defendant.

No. CI-24-635

**PLAINTIFF'S
FIRST AMENDED
COMPLAINT
and
Jury Demand

CLASS ACTION**

Alexander Beam and Kenneth Randolph ("Plaintiffs") allege for their First Amended Complaint:

Overview

1. Plaintiffs sue on behalf of themselves and a Class of similarly situated customers against Defendant Cobalt Credit Union ("Cobalt CU" or "Defendant") for damages arising from Cobalt CU's policy and practice of charging its customers 1) Overdraft Fees ("OD Fees") on transactions that did not overdraw his account; and 2) charging multiple fees on the same item. This conduct breaches Cobalt's account agreements with Plaintiffs and putative class members, all of who are Cobalt customers with agreements similar to Plaintiffs.

2. The plain language of Cobalt CU's adhesion contracts promises that Cobalt CU will charge OD Fees on items when they cause the deposit account against which the item is drawn to have a negative balance. Cobalt also contracts to charge no more than a single

fee per item. Cobalt is a financial institution of the type referred to in this Complaint from time to time with the word “bank.”

3. Overdraft fees represent one of the biggest profit centers for banks and credit unions like Cobalt. Overdraft handling is susceptible to high levels of abuse. Abuse imposes large financial burdens on customers like and including Plaintiffs. An investigation by the U.S. federal Consumer Financial Protection Bureau (“CFPB”) revealed that some banks intentionally create confusion for their customers regarding their overdraft policies, intentionally obscure how fees are charged for overdraft and insufficient funds transactions and design their customers’ account holder application and onboarding processes to allow banks to capitalize by overcharging customers. This confusion allows banks to maximize the overdraft fees they charge. Cobalt CU has done so. This is described by Ashlee Kieler in *CFPB Says TCF Bank Made Millions From Misleading Overdraft Practices*, Consumerist.com (Jan. 19, 2017), <https://consumerist.com/2017/01/19/cfpb-says-tcf-bank-made-millions-from-misleading-overdraft-practices/>; and *Consumer Financial Protection Bureau Orders Santander Bank to Pay \$10 Million Fine for Illegal Overdraft Practices* (July 14, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-orders-santander-bank-pay-10-million-fine-illegal-overdraft-practices/>.

4. This increased revenue source imposes a disproportionate impact on Cobalt CU customers with limited financial means, and who live in the lower socio-economic levels of the United States’ population, and on Plaintiffs. For example, the Center for Responsible Lending reported that, “[o]verdraft fees often impose a great burden on those already living paycheck to paycheck, struggling to make ends meet.” *Center for Responsible Lending, Unfair Market: The State of High-Cost Overdraft Practices in 2017*

(August 2018), <https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-unfair-market-overdraft-1-aug2018.pdf>.

5. Historically, overdraft fees represent a substantial revenue generator for financial institutions. In 2013 alone, a survey by Moebs Services, Inc. found that certain financial institutions generated \$31.9 billion in overdraft revenue. *See How Banks Sell Overdraft 1* (July 2014) (available at http://calreinvest.org/wp-content/uploads/2018/09/Report_How_Banks_Sell_Overdraft_Results_of_Overdraft_Mystery_Shopping_in_Four_Key_States.pdf). As banks continued their practices of pushing overdraft products, “the Federal Reserve Board enacted certain regulatory changes in 2009, including requiring that bank customers must ‘opt in’ to bank overdraft products that may be triggered by ATM withdrawals or debit card purchases.” *Id.* These regulations were designed to protect consumers from banking practices like those used by Cobalt CU.

6. These facts are known to Cobalt CU and throughout its industry. Banks themselves have acknowledged the abuses of OD Fees. One of the nation’s largest banks, Ally Financial, announced that it was eliminating overdraft fees on all accounts and stated: “[n]ationwide, more than 80% of overdraft fees are paid by consumers living paycheck to paycheck or with consistently low balances – precisely the people who need help stabilizing their finances...[e]liminating these fees helps keep people from falling further behind and feeling penalized as they catch up.” Jessica Dickler, *Ally Bank is Eliminating Overdraft Fees Once and For All*, CNBC (June 2, 2021), <https://www.cnbc.com/2021/06/02/ally-bank-eliminates-overdraft-fees-for-all-customers.html>.

7. Cobalt CU, continues to charge OD Fees and does so to harm Plaintiffs and other Cobalt CU customers by charging OD Fees

that are not due, or are excessive, or both. Cobalt CU charges OD fees, but more than that, it does so by:

- a. Imposing and collecting fees on transactions that do not create overdrawn accounts; and
- b. Imposing and collecting fees more than once per event; and
- c. Imposing and collecting fees in other ways identification of which requires discovery.

Cobalt CU's actions constitute breaches of its account contracts with Plaintiffs and Class members, and breaches of its Bylaws which constitute part of its contract with its members. does so contrary to its contracts with Plaintiffs and others, and in violation of the law. On behalf of themselves and the putative Class, Plaintiffs seek damages for Cobalt CU's breaches of contract. The amount of damages requires discovery.

Jurisdiction; Venue; Parties

8. This Court's general subject matter jurisdiction, found in Neb Rev Stat §24-302, authorizes the court to adjudicate this case. Venue is proper in Sarpy County where Plaintiffs conduct business with Defendant and where Defendant has a principal place of business. Cobalt CU is headquartered at 7148 Towne Center Parkway, Papillion, Sarpy County, Nebraska 68046.

9. Plaintiff Alexander Beam is a resident of Nebraska and a U.S. citizen. Plaintiff Kenneth Randolph is a resident and citizen of Council Bluffs, Iowa. and a U.S. citizen. Plaintiffs assert a state law claim for breach of contract and damages. Plaintiffs were Cobalt account holder at all relevant times whose account agreements were identical and typical of their class, and whose agreements were breached by Cobalt CU in substantially identical ways.

10. Cobalt CU, the Defendant, is a federally chartered financial institution with over \$1 billion in account assets and more than 114,000 members. It has the powers and responsibilities that include the powers to sue, be sued, make contracts, create, and maintain with members share accounts and deposits, make loans, and engage in permitted financial activities. Cobalt CU is a fiduciary to customers like Plaintiffs.

11. Cobalt CU operates under Charter No. 24917. Cobalt CU and maintains offices throughout east central Nebraska in at least Sarpy, Douglas, Cass, and Lancaster Counties in Nebraska and in Pottawattomie, Mills, Harrison, Crawford, Shelby, Ida, Sac, Monona, and Carroll Counties in Iowa.

12. Cobalt CU's Bylaws provide in part at Art I, Sec 2:

Section 2. Purposes. This credit union is a member-owned, democratically operated, not-for-profit organization managed by a volunteer board of directors, with the specified mission of meeting the credit and savings needs of consumers, especially persons of modest means. The purpose of this credit union is to promote thrift among its members by affording them an opportunity to accumulate their savings and to create for them a source of credit for business, or productive purposes.

Its Bylaws provide for members and membership, and for a Board of Directors. At Art VI, Sec 6, the Bylaws provide:

Section 6. Board responsibilities. The board has the general direction and control of the affairs of this credit union and is responsible for performing all the duties customarily performed by boards of directors. This includes but is not limited to the following:

- (a) Directing the affairs of the credit union in accordance with the Act, these bylaws, the rules and regulations and sound business practices.
- (b) Establishing programs to achieve the purposes of this credit union as stated in Article I, Section 2, of these bylaws.

13. Cobalt CU's Articles and Bylaws must meet statutory requirements and be approved by regulatory officials. The Articles and Bylaws constitute obligations of Cobalt CU to its customers; they are contractual with members along with the Account Agreement required to create a deposit account. Cobalt CU's acts and omissions, below, constitute breaches of its contractual and organizational responsibilities to Plaintiffs and Class members all of whom are customers with rights and privileges defined by law and Cobalt CU's Articles, Bylaws, and contracts.

Class Authorization

14. This Class Action is authorized by *Neb Rev Stat* § 25-319 et seq. The questions presented are of common or general interest for many persons, the putative Class members are very numerous and it is impracticable to bring them before the Court individually.

General Allegations

I. Cobalt CU Charges OD Fees ON Transactions That Do Not Overdraw Affected Accounts

15. Plaintiffs bring this claim challenging Cobalt CU's practice of charging OD Fees on what are referred to here as "Authorize Positive, Purportedly Settle Negative Transactions" or "APPSN Transactions."

How an APPSN Transaction Occurs

16. When debit card transactions are authorized on an account with positive funds to cover the transaction, Cobalt CU immediately reduces consumers' checking accounts for the transaction, sets aside funds in a checking account to cover that transaction. As a result, the customers' displayed "available balance" reflects that subtracted sum and a reduced balance. Thus, customers' accounts will always have sufficient available funds available to cover these transactions because Cobalt CU has already sequestered the customer's funds for payment.

17. Nonetheless, Cobalt CU assesses \$35 OD Fees on many of these transactions and does so contrary to representations and assurances in its Account Contract with the customer.

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

19. Cobalt CU maintains a running account balance in real time, tracking funds consumers have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, Cobalt CU 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 dedicated to payment in connection with the given debit card transaction.

20. The purpose of the immediate debit and hold of positive funds is to ensure enough funds are 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). Fees are required to be fully disclosed along with terms under which they may be imposed. 12 CFR §707.11 Opt-in and opt-out privileged and procedures for assessment of overdraft fees are required to be truthfully stated and followed. *Id.*

21. 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. Cobalt CU's actions result in its determination that many subsequent transactions incur OD Fees due to the unavailability of the funds sequestered for those debit card transactions.

22. While keeping those held funds off-limits for other transactions, Cobalt CU improperly charged, and continues to charge OD Fees on those APPSN Transactions, although the APPSN transactions always have sufficient available funds to be "covered."

Cobalt CU Breaches Its Account Agreements

23. The Consumer Financial Protection Bureau (“CFPB”) has called the APPSN Transaction practice in which Cobalt CU engages “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, 8–9 (available at https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf).

24. The CFPB recently released additional critique of this exact practice:

Unanticipated overdraft fees can occur on “authorize positive, settle negative” or APSN transactions, when financial institutions assess an overdraft fee for a debit card transaction where the consumer had sufficient available balance in their account to cover the transaction at the time the consumer initiated the transaction and the financial institution authorized it, but due to intervening authorizations, settlement of other transactions (including the ordering in which transactions are settled), or other complex processes, the financial institution determined that the consumer's balance was insufficient at the time of settlement. These unanticipated overdraft fees are assessed on consumers who opted in to overdraft coverage for

one-time debit card and ATM transactions, but they likely did not expect overdraft fees for these transactions.

...

Certain financial institution practices can exacerbate the injury from unanticipated overdraft fees from APSN transactions by assessing overdraft fees in excess of the number of transactions for which the account lacked sufficient funds. In these APSN situations, financial institutions assess overdraft fees at the time of settlement based on the consumer's available balance reduced by debit holds, rather than the consumer's ledger balance, leading to consumers being assessed multiple overdraft fees when they may reasonably have expected only one.

Consumer Financial Protection Bureau, Circular 2022-06, October 26, 2022, https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf, pp. 8-9, 10 (last accessed November 2, 2022).

25. There is no legal justification for these practices which, when accomplished, breach Cobalt's contractual duties to customers. They serve only to maximize Cobalt CU's overdraft fee revenue. APPSN Transactions only exist because intervening checking account transactions supposedly reduces an account balance. Cobalt CU may protect its interests and either reject those intervening transactions or charge OD Fees on those intervening transactions—it does this *after* improper OD Fees have been imposed and collected. Cobalt CU was not content with these revenues in OD Fees. Instead, it collected far more funds in OD Fees on APPSN Transactions. Discovery is required to determine how much was improvidently collected and from whom.

26. These practices breach contractual commitments made in Cobalt CU's Account Contract as alleged above. The breaches proximately cause damages to Plaintiffs and Class members when imposed and collected.

27. Cobalt CU's Account Contract requires that Cobalt CU only charge OD Fees on transactions that have insufficient funds to "cover" that transaction. Cobalt CU is not authorized by the Account Contract to charge OD Fees on transactions that have not overdrawn an account, but Cobalt CU has done so and continues to do so in breach of the Account Contract.

Mechanics of Debit Card Transactions

28. Cobalt CU is authorized to issue credit and debit account cards and has done so.

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

30. At this step, if the transaction is approved, Cobalt CU immediately decreases the funds in a consumer's account and sequesters funds in the amount of the transaction but Cobalt CU does not, at this step, transfer the funds to the merchant.

31. The 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). OD Fees are regulated by federal law. See, 12 CFR § 707.11 et seq. and 12 CFR § 1005.17 among other laws and regulations.

32. Sometime thereafter, Cobalt transfers funds from the customer’s account to the merchant’s account. This is referred to in the banking industry as “posting” or “settling”—something which may occur several days after the transaction was initially initiated.

33. There is no change—no impact whatsoever—to the available funds in an account when posting or payment of a transaction that settles in the same amount for which it authorized occurs. That is because available funds amounts do not change for debit card transactions that settle in the same amount for which they were authorized.

Cobalt CU’s Account Contract

34. Cobalt CU’s Account Contract made with Plaintiffs and class members promises that Cobalt CU immediately places holds on debit card transactions at the moment of authorization and that those funds held are off-limits for other, later transactions:

OVERDRAFTS. You understand and agree that
We may from time to time, and at Our sole discretion, pay

certain items in order to cover an overdraft, and charge You a fee for doing so. You further understand that payment of any overdrafts will be made in an order of Our choosing. You hold Us harmless from any and all liability which might otherwise exist if We do not pay an overdraft. If You would like to opt-out, that is, if You would prefer We not pay any share drafts that would overdraw Your share draft Account, You may opt-out by writing to Us at the address in this Agreement or by calling Us at the telephone number shown in this Agreement and informing Us of Your intention to opt-out.

Id. at Ex. A, p. 2.

35. Cobalt CU's Overdraft Disclosure promises the same:

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover your overdrafts in two different ways:

1. We have a Standard Overdraft Courtesy Plan that is available with your account. The information below explains our Standard Overdraft Courtesy Plan.

2. We also offer draw account plans, such as a link to a savings account or line of credit, which may be less expensive than our Standard Overdraft Courtesy Plan. To learn more, ask us about these types of plans.

What is the Standard Overdraft Courtesy Plan?

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction. If we do not authorize and pay an overdraft, your transaction will be declined.

We authorize and pay overdrafts for the following transactions when qualifications are met:

- Checks and other transactions made using your checking account number
- Automatic bill payments We do not authorize or pay overdrafts for the following transactions unless you enroll by completing the form below*:
- ATM transactions
- Everyday debit card transactions (i.e. groceries, clothes, gas, online purchases, etc.)

What are the requirements of the Standard Overdraft Courtesy Plan?

- A member needs to have a checking account with regular transaction activity occurring to qualify for the Standard Overdraft Courtesy Plan.
- The number and amount of items we review to authorize and pay may ***vary daily*** based on our evaluation of certain factors associated with your account some of which include the following: age of account, deposit balances, previous overdraft activity, and loan status.
- If your account has had a negative balance for 30 days or your loan account is 30 days past due, you will be disqualified from the Standard Overdraft Courtesy Plan.

What fees will I be charged if Cobalt Credit Union pays my overdraft?

Under the Standard Overdraft Courtesy Plan:

- We will charge you a fee of \$35 each time we pay an overdraft.
- There is no limit on the total fees we can charge you for repeatedly overdrawing your account.

Id., Ex. B

36. For APPSN Transactions, which are immediately deducted from a positive account balance and held aside for payment of that same transaction, there are always funds to cover those transactions—yet Cobalt CU assesses OD Fees on them anyway. It breaches its contract with its customer by doing so.

37. These promises mean that transactions are only overdraft transactions when they are authorized into a negative account balance. This is not how Cobalt CU handles APPSN Transactions.

38. Cobalt CU authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to “pay” those same transactions when they settle. Instead, it uses an undisclosed posting process described below.

39. All these representations and contractual promises are fulfilled. Cobalt CU charges OD Fees even when sufficient funds exist to cover transactions that are authorized into a positive balance. No express language in the Account Contract states that Cobalt CU may impose OD Fees on any APPSN Transactions. Cobalt CU’s actual practices are contrary to its actual debit card processing and overdraft practices. By doing so it breaches its contracts with customers like and including Plaintiffs.

40. Cobalt CU charges OD Fees on debit card transactions for which there are sufficient funds available to cover the transactions. It does so despite affirmative contractual representations that Cobalt CU will only charge OD Fees on transactions with insufficient available funds to cover a given transaction. By doing so it breaches its contracts with customers like and including Plaintiffs.

41. Cobalt CU assesses OD Fees on APPSN Transactions that *do* have sufficient funds available to cover them throughout their lifecycle. By doing so it breaches its contracts with customers like and including Plaintiffs.

42. Cobalt CU'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 breach between Cobalt CU's actual practice and the contract causes consumers like Plaintiffs to incur more OD Fees than they should.

43. Funds for APPSN Transactions are debited from the account immediately, consistent with standard industry practice.

44. Because these withdrawals take place upon initiation, they cannot be re-debited later. But that is what Cobalt CU does when it re-debits the account during its undisclosed batching posting process.

45. Cobalt CU's actual practice is to inspect 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.

46. At the time of settlement, the available balance *does not change at all* for these transactions previously authorized into good funds. As such, Cobalt CU cannot charge an OD Fee on such transaction because the available balance has not been rendered insufficient due to the pseudo-event of settlement, but it does so and by doing so it breaches its contracts with customers like and including Plaintiffs.

47. This discrepancy between Cobalt CU's actual practices and the Account Contract causes Plaintiffs and Class Members to incur more OD Fees than they should. This creates a major gap between Cobalt CU's practices as described in the Account Contract and Cobalt CU's actual practices. Each deviation from the contract constitutes a breach of contract by Cobalt CU.

Cobalt CU Abuses Contractual Discretion

48. Cobalt CU'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, Cobalt CU exploits contractual discretion to the detriment of accountholders when it uses these policies.

49. The term "to cover" a transaction is undefined. Cobalt CU uses its discretion to define "temporary debit authorization hold" in a manner contrary to any reasonable, common sense understanding of that term. In Cobalt CU's implied definition, a transaction is not covered even if Cobalt CU sequesters sufficient available funds for that transaction.

50. Moreover, Cobalt CU 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.

51. Cobalt CU uses all these contractual discretion points unfairly to extract OD Fees on transactions that no reasonable consumer would believe could cause OD Fees.

Plaintiffs' Experiences - Breach by Cobalt CU

52. In December of 2023 and November of 2022, Plaintiff Beam was assessed OD Fees in the amount of \$35 for debit card transactions that settled on that day even though positive funds were deducted and held immediately for the transaction on which he was assessed an OD Fee.

53. Plaintiff Randolph was apparently assessed OD Fees in the amount of \$35 for debit card transactions that settled on that day even though positive funds were deducted and held immediately for the transaction on which he was assessed an OD Fee.

II. DEFENDANT ASSESSES TWO OR MORE FEES ON THE SAME ITEM RETURNED FOR INSUFFICIENT FUNDS

54. Defendant maximizes its already profitable fees through the deceptive and contractually-prohibited practice of charging multiple NSF fees, or an NSF fee followed by an overdraft fee, on an item.

55. Unbeknownst to Plaintiffs and others, consumers, when Defendant reprocesses an electronic payment item, ACH item, or check for payment after it was initially rejected for insufficient funds, Defendant chooses to treat it as a new and unique item that is subject to yet another fee. But Defendant's contract never states that this counterintuitive and deceptive result could be possible and, in fact, promises the opposite.

56. The Federal Deposit Insurance Corporation (the "FDIC") has expressed concern with the practice of assessing multiple fees on an item. In 2012, the FDIC determined that one bank's assessment of more than one NSF Fee on the same item was a "deceptive and unfair act." *In the Matter of Higher One, Inc., Consent Order*, Consent Order, FDIC-1 1-700b, FDIC-1 1-704k, 2012 WL 7186313.

57. In a recent issue of the CFPB’s Supervisory Highlight, the Bureau scrutinized junk fees, including the practice of charging multiple NSF fees, stating:

Supervision found that institutions engaged in unfair acts or practices by charging consumers multiple NSF fees when the same transaction was presented multiple times for payment against an insufficient balance in the consumer’s accounts, potentially as soon as the next day. The assessment of multiple NSF fees for the same transaction caused substantial monetary harm to consumers, totaling millions of dollars. These injuries were not reasonably avoidable by consumers, regardless of account opening disclosures. And the injuries were not outweighed by countervailing benefits to consumers or competition.

Consumer Financial Protection Bureau, “Supervisory Highlights Junk Fees Special Edition” (March 2023).

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

59. Upon information and belief, the contract allows Defendant to take certain steps when paying a check, electronic payment item, or ACH item when the accountholder does not have sufficient funds to cover it. Specifically, Defendant may (a) pay the item and charge a \$35 fee; or (b) reject the item and charge a \$35 fee.

60. In contrast to the Contract, however, Defendant regularly assesses two or more \$35 fees on an item.

Imposition of Multiple Fees on a Single Item Violates Defendant's Express Promises and Representations

61. On information and belief, at the time Plaintiff Randolph was assessed multiple fees on a single item, Defendant's account contract promised that a single fee will be assessed on an item.

62. The same "item" on an account cannot conceivably become a new one when it is rejected for payment then reprocessed, especially when—as here—Plaintiff Randolph took no action to resubmit it.

63. There is zero indication anywhere in the contract that the same "item" is eligible to incur multiple fees.

64. Even if Defendant reprocesses an instruction for payment, it is still the same "item." Its reprocessing is simply another attempt to effectuate an account holder's original order or instruction.

65. The contract never discusses a circumstance where Defendant may assess multiple fees for a single check, electronic payment item, or ACH item that was returned for insufficient funds and later reprocessed one or more times and returned again.

66. In sum, upon information and belief, Defendant promises that one fee will be assessed on an item, and this term must mean all iterations of the same instruction for payment. As such, Defendant breached the contract when it charged more than one fee per item.

67. Reasonable consumers understand any given authorization for payment to be one, singular "item."

68. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same item will be treated as the same "item," which Defendant will either authorize (resulting in an overdraft item) or reject (resulting in a returned item) when it decides there are insufficient funds in the account.

69. Nowhere do Defendant and its customers agree that Defendant will treat each reprocessing of a check, electronic payment item, or ACH item as a separate item, subject to additional fees.

70. Customers reasonably understand that Defendant's reprocessing of checks, electronic payment items, and ACH items are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger fees. In other words, it is always the same item.

71. Banks and credit unions like Defendant that employ this abusive practice require their accountholders to expressly agree to it—something Defendant here did not do.

72. Community Bank, NA, discloses its fee practice in its online banking agreement, in all capital letters, as follows:

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 N.A. 5 (Nov. 12, 2019), <https://bit.ly/3uQafe7> (emphasis added).

73. Defendant's contract provides no such authorization, and actually promises the opposite— Defendant may charge, at most, a fee per item.

Plaintiff Randolph's Experience

87. On information and belief, Plaintiff Randolph was assessed multiple fees on an item. Randolph understood the payment to be a single item as is laid out in the contract, capable of receiving, at most, a single fee if Defendant returned it, or a single fee if Defendant paid it.

III. CLASS ALLEGATIONS

74. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to *Neb Rev Stat* § 25-319. This action satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements.

The APSN Class: All Cobalt CU checking account holders who, during the applicable statute of limitations, were charged OD Fees on transactions that were authorized into a positive available balance (represented by Plaintiffs Beam and Randolph).

The Multiple Fee Class: All Cobalt CU checking account holders who,, during the applicable statute of limitations period through the present, were assessed multiple fees on an item on a Defendant checking account (represented by Plaintiff Randolph).

75. Excluded from the Classes are Cobalt CU, its parents, subsidiaries, affiliates, officers and directors, any entity in which Cobalt CU has a controlling interest, all personal accountholders who make a timely election to be excluded, governmental entities, and all judges assigned to hear any aspect of this litigation, as well as their immediate family members.

76. The members of the Classes are so numerous that joinder is impractical. The Classes consist of at least thousands of members, the identity of whom is within the knowledge of, and can be ascertained only by resort to, Cobalt CU's records. Cobalt CU claims to have at least 114,000 members who are nearly all account customers like Plaintiffs.

77. The claims of the representative Plaintiffs are typical of the claims of the Classes they seek to represent in that the representative Plaintiffs, like all members of the Classes, was charged improper and deceptive fees as alleged herein. The representative Plaintiffs, like all members of the Classes, were damaged by Cobalt CU's misconduct in that they were assessed OD Fees on APPSN transactions. The factual basis of Cobalt CU's misconduct is common to all members of the Classes and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Classes. And Cobalt CU has no unique defenses that would apply to Plaintiffs and not the Classes.

78. There are numerous questions of law and fact common to the Classes and those common questions predominate over any questions affecting only individual members of the Classes.

79. The questions of law and fact common to the Classes include, but are not limited to, the following:

- a. Has Cobalt CU's assessment of OD Fees on APPSN transactions breached its contracts with Plaintiffs and Class members?
- b. Has Cobalt CU's assessment of multiple fees breached its contracts with Plaintiffs and Class members?
- c. Has Cobalt CU engaged in one or more of the actions constituting breach of its account agreements as alleged above?
- d. Have one or more of the breaches caused damages?
- e. What is the measure of damages?

80. Plaintiffs' claims are typical of the claims of other members of the Class, in that they arise out of the same wrongful OD Fee and NSF Fee policies and practices. Plaintiffs suffered the harm

alleged and has no interests antagonistic to the interests of any other member of the Class.

81. Plaintiffs are committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions and consumer class actions against financial institutions. Plaintiffs are adequate representatives and will fairly and adequately protect the interests of the Classes.

82. Class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual member of the Classes' claim is small relative to the complexity of the litigation, and due to the financial resources of Cobalt CU, no member of the Class could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the members of the Classes will continue to suffer losses and Cobalt CU's misconduct will proceed without remedy.

83. Even if members of the Classes themselves could afford such individual litigation, the court system could not. Given the complex legal and factual issues involved, individualized litigation would significantly increase the delay and expense to all parties and to the Court. Individualized litigation would also create the potential for inconsistent or contradictory rulings. By contrast, a class action presents far fewer management difficulties, allows claims to be heard which might otherwise go unheard because of the relative expense of bringing individual lawsuits, and provides the benefits of adjudication, economies of scale and comprehensive supervision by a single court.

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

85. Cobalt CU has acted or refused to act on grounds generally applicable to each of the Classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each Classes as a whole.

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

**Breach of Contract, Including Breach of the Implied Covenant
(On Behalf of Plaintiffs and the Nationwide Class)**

87. All allegations above are renewed here.

88. Plaintiffs and Cobalt CU have contracted for bank account deposit, checking, ATM, and debit card services. That contract does not permit Cobalt CU to charge OD Fees on APPSN transactions. The contract also does not permit Cobalt CU to charge multiple fees on the same item.

89. Nowhere in the Account Agreement nor its Articles, Bylaws nor customer disclosures did Cobalt CU state that it would charge OD Fees on APPSN transactions or multiple fees on the same item.

90. Good faith is an element of every contract. Whether by common law or statute, all such contracts impose upon each party a duty of good faith and fair dealing. 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 and is a form of breach.

91. Subterfuge and evasion violate the obligation of good faith and fair dealing in performance even when an actor believes his conduct to be justified. A failure to act in good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Examples of violations of good faith and fair dealing include 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.

92. Plaintiffs and members of the Class have performed all, or substantially all, of the obligations imposed on them under the contract. Cobalt CU has breached the Agreement by making the overcharges and unauthorized charges described above.

93. Plaintiffs and members of the Class have sustained damages as a proximate result of Cobalt CU's breach of the contract.

Requests for Relief

On the foregoing basis, Plaintiffs request judgment as follows:

1. Plaintiffs' putative class be certified and given notice.
2. For Plaintiffs and for the Class for its damages for all Overdraft Fees charged and collected contrary to
3. and in breach of the account agreements of Plaintiffs and Class Members with Cobalt. Discovery is necessary to determine the amount of these damages.
4. For Plaintiffs and for the Class for its consequential damages for duplicative, redundant, and double Overdraft Fees charges. Discovery is necessary to determine the amount of these damages.
5. For pre-judgment interest at the maximum rate permitted

- by law.
6. For costs and necessary disbursements and attorney's fees for creation of the common pool recovered for Plaintiffs and the Class, as permitted by law.
 7. Directing that unpaid residue of the Judgment be distributed to the Nebraska Legal Aid and Services Fund in accord with *Neb Rev Stat* 25-319.01.
 8. Other necessary legal relief as permitted by law.

Jury Demand

Plaintiffs and putative Class Members demand trial by jury.

Alexander Beam and Kenneth
Randolph, Plaintiffs

By *David A. Domina* #11043

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Counsel for Plaintiffs & Putative Class

Certificate of Service

I certify that on August 1, 2025, I:

☒ Served the foregoing by filing with the Court using the Nebraska Judicial Branch “Justice” Efiling system which sent notice to counsel of record when accepted and filed.

☒ Served a copy by email on opposing counsel as follows

Earl G. Green, III
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Katie S. Wayne
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Eric T. Evans
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:

Attorneys for Defendant

/s/ David A. Domina

Certificate of Service

I hereby certify that on Friday, August 01, 2025 I provided a true and correct copy of the Amended Complaint to the following:

Cobalt Credit Union represented by GREENE, EARL G. III (Bar Number: 17054) service method: Electronic Service to eggreene@grsm.com

Cobalt Credit Union represented by WAYNE, KATIE S (Bar Number: 24745) service method: Electronic Service to kwayne@grsm.com

Signature: /s/ Domina,David,A (Bar Number: 11043)