

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

VERONICA MCLAMB,	:	
	:	
	:	Civil Action No. <u>3:17cv00812</u>
Plaintiff,	:	
	:	
v.	:	
	:	
VIRGINIA CREDIT UNION	:	
	:	
Defendant.	:	
	:	

CLASS ACTION COMPLAINT

COME NOW the Plaintiff, Veronica McLamb, by counsel, and for her Class Action Complaint against the Defendant, she alleges as follows:

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Virginia Credit Union (“VACU”), arising from a) the unfair and unconscionable assessment and collection of “Overdraft Fees” (“OD Fees”) on accounts that were never actually overdrawn.

2. Besides being deceptive, unfair and unconscionable, these practices breach contract promises made in the VACU’s adhesion contracts—specifically, the promise to charge OD Fees only on transactions which actually overdraw an account.

3. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that the VACU will only charge OD Fees on transactions with insufficient funds to “cover” a given transaction.

4. As happened to Plaintiff, however, VACU charges OD Fees even when the transaction has not overdrawn an account. For example, Plaintiff McLamb was charged three OD Fees on October 12, 2017. But, according to the monthly account statement prepared by VACU, *Plaintiff's account balance was never negative during the entire two weeks preceding the supposed overdraft event.* By definition, then, there were always funds to “cover” that transaction—yet VACU assessed an OD Fee on it anyway.

5. In short, VACU 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. Its assessment of OD Fees in this manner also violates federal Regulation E, which requires full and fair disclosure of overdraft practices.

6. Plaintiff and other VACU customers have been injured by VACU's practices. On behalf of herself and the putative class, Plaintiff seeks damages, restitution and injunctive relief for VACU's breach of contract and violation of Regulation E.

JURISDICTION

7. This Court has jurisdiction pursuant to 18 U.S.C. § 1965 and 15 U.S.C. § 1692k(d). The Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. §§ 1367 and 1332(d)(2).

PARTIES

8. Plaintiff Veronica McLamb is a natural person who resides in Virginia.

9. Defendant VACU is a credit union with approximately \$3.5 billion in assets. VACU is one of the 55 largest credit unions in the country. VACU is headquartered in Richmond, VA and does business across the state of Virginia.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

10. Plaintiff has a checking account with VACU, and until very recently she had chosen to opt-in to VACU's overdraft standard overdraft practices.

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

12. Pursuant to its standard account agreement, VACU charges fees (currently in the amount of \$20 for the first overdraft per year and \$35 for each additional overdraft) for debit card transactions that purportedly result in an overdraft.

A. Mechanics of a Debit Card Transaction

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

14. At this step, if the transaction is approved, VACU immediately decrements the funds in a consumer's account and sequesters funds in the amount of the transaction, but does not yet transfer the funds to the merchant.

15. Sometime thereafter, the funds are actually transferred 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.

B. VACU Account Documents

16. Plaintiff's checking account with VACU was, at all relevant times, governed by VACU's standardized contract for deposit accounts, the material terms of which are drafted by VACU, amended by VACU from time to time at its convenience and complete discretion, and imposed by VACU on all of its customers.

17. In plain, clear, and simple language, the checking account contract documents discussing OD Fees promise that the VACU will only charge OD Fees on transactions with insufficient funds to "cover" a given transaction:

If your share balance or any applicable credit limit is **insufficient to cover** the indebted or obligation you owe to VACU for transfers/transactions such as drafts, withdrawals, fees or other items, then we will cover those amounts according to your overdraft authorization on record.

"VACU Membership Rules and Regulations" (emphasis added).

18. Similarly, the account's Fee Disclosure states that an "NSF fee (return check, ATM or other electronic debit *due to non-sufficient available funds* of more than \$5[.])" (emphasis added).

19. The account documents never describe the transaction posting order used by VACU.

20. Federal law requires that banks and credit unions receive affirmative consent from accountholders before charging overdraft fees for ATM and/or non-recurring debit card purchases.

21. Regulation E required VACU to provide its customers the information required to obtain their legally binding informed consent because. But VACU failed to do this, because its opt-in disclosures contained the same or similar misrepresentations regarding VACU's true overdraft policies as the account contract documents did.

22. The importance of Regulation E is highlighted by the fact that the Consumer Financial Protection Bureau's ("Bureau") study of actual practices found that: 1) ATM and debit card transactions are by far the most frequent transactions that occur; 2) overdraft fee policies entail expensive fees at very little risk to the financial institutions; and 3) opted-in accounts have seven times as many overdrafts that result in fees as not opted-in accounts.

C. Plaintiff's Experience

23. On October 12, 2017, Plaintiff McLamb was assessed three OD Fees in the amount of \$35 each. This is despite the fact that, according to the bank statement issued by VACU, her account never went negative within the two week period prior; her account never went negative even after the transactions that supposedly caused the OD Fees were posted; and her account, in fact, was only deemed went negative until after VACU assessed \$105 in OD Fees (and even then, only by \$2.52). With a positive balance of \$125.21 on October 11, 2017, and three debit card transactions of \$5.92, \$8.51, and \$8.30 posting to the account on October 12, 2017, the remaining positive balance should have been reflected as \$102.48. Contrary to the account agreement, the OD Fees were charged and actually pushed the account to be negative. In short, Plaintiff always had sufficient funds to cover the transactions that supposedly caused OD Fees.

24. Similarly, on November 7, 2017, Plaintiff was charged overdraft fees even though her account balance did not go negative, according to her bank statement.

25. VACU denotes OD Fees assessed to debit card transactions as "Paid EOD NSF FEE" on its monthly account statements. Its Fee Disclosure refers to "Paid NSF fee" as an "overdraft created by check, withdrawal, ATM or other electronic means due to non-sufficient available funds of more than \$5, limited to 6 NSF or overdraft fees per day)."

CLASS ALLEGATIONS

26. Plaintiff bring this action on behalf of herself 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.

27. The proposed class is defined as:

All VACU checking account holders in the United States who within the applicable statute of limitations were charged OD Fees on transactions that did not overdraw their checking accounts.

28. Plaintiff reserves the right to modify or amend the definition of the proposed Class before the Court determines whether certification is appropriate.

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

30. The members of the Class are so numerous that joinder is impractical. The Class consist of thousands of members, the identity of whom is within the knowledge of and can be ascertained only by resort to VACU's records.

31. The claims of the representative Plaintiff are typical of the claims of the Class in that the representative Plaintiff, like all Class members, was charged OD Fees by VACU as a result of charging OD Fees on transactions that did not actually overdraw checking accounts. The representative Plaintiff, like all Class members, has been damaged by VACU's misconduct in that they have been overdraft charges that violate the account contract. Furthermore, the factual basis of VACU's misconduct is common to all Class members, and represents a common thread of unfair and unconscionable conduct resulting in injury to all members of the Class.

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

33. Among the questions of law and fact common to the Class are whether VACU:

a. Imposed OD Fees on debit card transactions when those transactions did not overdraw accounts.

b. Imposed OD Fees on debit card transactions in violation of the Electronic Funds Transfer Act.

Other questions of law and fact common to the Class include:

c. The proper method or methods by which to measure damages, and

d. The declaratory relief to which the Class are entitled.

34. Plaintiff's claims are typical of the claims of other Class members, in that they arise out of the same wrongful overdraft policies and practices of VACU's account contract. Plaintiff has suffered the harm alleged and has no interests antagonistic to the interests of any other Class member.

35. Plaintiff is committed to the vigorous prosecution of this action and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers and against financial institutions. Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect the interests of the Class.

36. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Since the amount of each individual Class member's claim is small relative to the complexity of the litigation, and due to the financial resources of VACU, no Class member could afford to seek legal redress individually for the claims alleged herein. Therefore, absent a class action, the Class members will continue to suffer losses and VACU's

misconduct will proceed without remedy.

37. Even if Class members 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.

FIRST CLAIM FOR RELIEF

Breach of Contract
(On Behalf of the Class)

38. Plaintiff repeats paragraphs 1 through 34 above.

39. Plaintiff and VACU have contracted for bank account deposit, checking, ATM, and debit card services.

40. VACU breached promises included in the account documents as described herein when it charged overdraft fees on transactions that did not overdraw checking accounts.

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

42. Plaintiff and members of the Class have sustained damages as a result of VACU's breach of the contract.

SECOND CLAIM FOR RELIEF

Violation of Electronic Fund Transfers Act (Regulation E)
C.F.R. § 1005 et seq. (authority derived from 15 U.S.C. § 1693 et seq.)
(On Behalf of the Class)

43. The preceding allegations are incorporated by reference and re-alleged as if fully set forth herein.

44. By charging overdraft fees on ATM and nonrecurring transactions, VACU violated Regulation E (12 C.F.R. §§1005 et seq.), whose “primary objective” is “the protection of consumers” (§1005.1(b)) and which “carries out the purposes of the [Electronic Fund Transfer Act 15 U.S.C. §§1693 et seq.), the “EFTA”] (§1005. 1(b)), whose express “primary objective” is also “the provision of individual consumer rights” (15 U.S.C. §1693(b)).

45. Specifically, the charges violated what is known as the “Opt In Rule” of Regulation E (12 C.F.R. § 1005.17.) The Opt In Rule states: “a financial institution ... shall not assess a fee or charge ... pursuant to the institution's overdraft service, unless the institution: (i) [p]rovides the consumer with a notice in writing [the opt-in notice]. . . describing the institution's overdraft service” and (ii) “[p]rovides a reasonable opportunity for the consumer to affirmatively consent” to enter into the overdraft program. (Id.) The notice “shall be clear and readily understandable.” (12 C.F.R. §205.4(a)(1).) To comply with the affirmative consent requirement, a financial institution must provide a segregated description of its overdraft practices that is accurate, non-misleading and truthful and that conforms to 12 C.F.R. § 1005.17 prior to the opt-in, and must provide its customers a reasonable opportunity to opt-in after receiving the description. The affirmative consent must be provided in a way mandated by 12 C.F.R. § 1005.17, and the financial institution must provide confirmation of the opt-in in a manner that conforms to 12 C.F.R. § 1005.17.

46. The intent and purpose of this Opt-In Contract is to “assist customers in understanding how overdraft services provided by their institutions operate by explaining the institution's overdraft service ... in a clear and readily understandable way”-as stated in the Official

Staff Commentary (74 Fed. Reg. 59033, 59035, 59037, 5940, 5948), which is “the CFPB’s official interpretation of its own regulation,” “warrants deference from the courts unless ‘demonstrably irrational,’” and should therefore be treated as “a definitive interpretation” of Regulation E. *Strubel v. Capital One Bank (USA)*, 2016 U.S. Dist. LEXIS 41487, *11 (S.D. N.Y. 2016) (quoting *Chase Bank USA v. McCoy*, 562 U.S. 195, 211 (2011)) (so holding for the CFPB’s Official Staff Commentary for the Truth In Lending Act’s Regulation Z)).

47. VACU failed to comply with Regulation E, 12 C.F.R. § 1005.17, which requires affirmative consent before a financial institution is permitted to assess overdraft fees against customers’ accounts through an overdraft program for ATM and non-recurring debit card transactions. VACU has failed to comply with the 12 C.F.R. § 1005.17 opt-in requirements, including failing to provide its customers with a valid description of the overdraft program which meets the strictures of 12 C.F.R. § 1005.17. VACU’s opt-in method fails to satisfy 12 C.F.R. § 1005.17 because, inter alia, it states that an overdraft occurs when there is not enough money in the account to cover a transaction but VACU pays it anyway, when in fact VACU assesses overdraft fees when there is enough money in the account to pay for the transaction at issue.

48. According to VACU’s Regulation E Opt-in form: “An **overdraft** occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway.”

49. As exhibited by the transactions above, Plaintiff’s account had funds to cover the transactions, which were paid, yet VACU charged overdraft fees.

50. As a result of violating Regulation E’s prohibition against assessing overdraft fees on ATM and non-recurring debit card transactions without obtaining affirmative consent to do so, VACU has harmed Plaintiff and the Class.

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JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Veronica McLamb

(b) County of Residence of First Listed Plaintiff Stafford
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Kristi C. Kelly, Kelly & Crandall, LC
3925 Chain Bridge Road, Suite 202, Fairfax, VA 22030
(703) 424-7572

DEFENDANTS

Virginia Credit Union, Inc.

County of Residence of First Listed Defendant Chesterfield
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. § 1693

Brief description of cause:

Violation of the Electronic Funds Transfer Act and Breach of Contract

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

12/8/17

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Consumer Alleges Virginia Credit Union Collects Improper Overdraft Fees](#)
