

IN THE SUPERIOR COURT
FOR THE STATE OF WASHINGTON
FOR KING COUNTY

JOHN J. DIEL, JR. and REBECCA L.
CLEVELAND, husband and wife, on behalf
of themselves and all others similarly
situated,

Plaintiffs,

vs.

SALAL CREDIT UNION,

Defendant.

No. 19-2-10266-7 KNT

FIRST AMENDED CLASS ACTION COMPLAINT

I. NATURE OF THE ACTION

1. Plaintiffs John J. Diel, Jr. and Rebecca L. Cleveland, on their own behalf and on behalf of all others similarly situated, bring this action against Defendant Salal Credit Union. Mr. Diel and Ms. Cleveland allege that Salal has engaged, and continues to engage, in unfair and deceptive acts and practices with respect to its overdraft fee program for checking accounts. Specifically, Salal employs systematic practices to manipulate transactions so as to put its

1 members' accounts into a negative balance as quickly as possible and to artificially increase the
2 number of punitive overdraft fees it charges its members.

3 2. Rather than posting transactions in the manner consistent with what it shows its
4 customers in written statements, and through its online and mobile banking portals, or posting
5 transactions in a way that will be protective of its members' funds, Salal has deliberately and
6 secretly employed various schemes to increase the number of transactions it considers to be
7 subject to overdraft fees. As a result, Salal has repeatedly levied overdraft fees and removed
8 money from its members' accounts based on transactions for which it received all information
9 required to debit the account at times when the accounts had sufficient funds to cover the
10 transactions. Plaintiffs seek actual damages, exemplary damages, injunctive relief, and
11 attorneys' fees and costs against Salal based on these unfair and deceptive practices.

12 **II. PARTIES**

13 3. At all times relevant, Plaintiffs John Diel and Rebecca Cleveland were residents of
14 Covington, Washington, and members of Salal.

15 4. Defendant Salal is a Washington credit union headquartered in Seattle,
16 Washington. Salal has five branches in Washington.

17 **III. VENUE AND JURISDICTION**

18 5. This Court has jurisdiction under the Washington Constitution, Article IV,
19 Section 6; RCW 4.12.020; and RCW 19.86.090.

20 6. Venue is proper under RCW 4.12.020; RCW 4.28.185(a) & (b); and CR 82.

21 7. The claims of Plaintiffs and the Class members are brought under state law
22 causes of action. No federal question exists in this matter.

1 or decline the transaction at the moment it is made. Salal members may also write checks,
2 schedule Automated Clearing House (ACH) payments, and engage in other transactions that
3 debit from their checking accounts.

4 11. Though Salal approves POS and ACH transactions instantaneously, it processes
5 transactions of the course of several days. If Salal concludes that the amount of the transaction
6 exceeded the funds it deemed available at one of any number of times during this internal
7 process, Salal will charge a \$29 overdraft fee against the member's account no matter the size
8 of the underlying transaction. This process, which is performed in secret, gives Salal enormous
9 flexibility in terms of the times in which it runs its reconciliations, how it sequences
10 transactions, the manner in which it treats credit as opposed to debit transactions, and a
11 number of other factors. Salal has meticulously employed its process in a manner that
12 maximizes overdraft fees to the detriment of its members. Often, it will levy overdraft fees
13 based on transactions made when there were sufficient funds in the member's account at the
14 time Salal received the information needed to decide whether to accept the transaction and to
15 debit the member's account.

16 **A. The recognized unfairness, deceptiveness, and punitive nature of overdraft programs.**

17 12. Most of the time, the high cost of an overdraft fee is unfairly punitive. In one
18 study, more than 90 percent of the customers who were assessed these fees had over-drafted
19 their accounts by mistake. The Pew Center on the States, *Overdraft America: Confusion and*

1 *Concerns about Bank Practices* 4 (May 2012).¹ And more than 60 percent of the transactions
2 resulting in an overdraft fee were under \$50. The Pew Charitable Trusts, *Overdrawn* 8 (June
3 2014).² A majority of consumers who were assessed overdraft fees do not recall opting-in to an
4 overdraft program, and more than two-thirds of them would have preferred that the financial
5 institution decline the transaction rather than pay and charge a fee. *Id.* at 5, 10.

6 13. Almost by definition, the most financially vulnerable consumers are the ones
7 most likely to be assessed overdraft fees. *Id.* at 1. For example, a 25-year-old is 133 percent
8 more likely to pay an overdraft penalty fee than a 65-year-old. *Id.* at 3. And people of color,
9 who are disproportionately people of low-economic status, are 83 percent more likely to incur
10 an overdraft fee than those who are white. *Id.* More than 50 percent of the customers assessed
11 overdraft fees earn under \$40,000 per year. *Id.* at 4.

12 14. A 2008 FDIC report also detailed the abusive practices various financial
13 institutions employed in their overdraft programs. The report found overdraft fees can carry an
14 effective interest rate that exceeds 3,500 percent. It also found that more than 38 percent of
15 accounts held by customers in lower-income areas are assessed overdraft charges. See Fed.
16 Deposit Ins. Corp., *FDIC Study of Bank Overdraft Programs* at 77 (Nov. 2008).³ Moreover, these
17 fees have the tendency to create a domino effect in that the imposition of a single overdraft fee
18 makes additional fees more likely. Recurrent overdrafts were similarly more prevalent among
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21 ¹ https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/SCIBOverdraft20America1pdf.pdf.

22 ² https://www.pewtrusts.org/~media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf.

³ https://www.fdic.gov/bank/analytical/overdraft/fdic138_report_final_v508.pdf.

1 lower income groups. The report found that among low-income customers, 16.7 percent of
2 accounts had 1 to 4 overdraft transactions, and 7.5 percent had 20 or more overdraft
3 transactions. These percentages were significantly lower for middle-income and higher income
4 groups. *Id.* at 77-78.

5 15. Substantial litigation has occurred over the past few years regarding the unfair
6 and deceptive overdraft fee practices engaged in by financial institutions. This litigation
7 included a full bench trial in Federal District Court in the Northern District of California that
8 resulted in a \$203 million verdict against Wells Fargo Bank. The court’s ensuing findings of fact
9 and conclusions of law detailed the bank’s overdraft practices and emphatically condemned
10 them as “gouging and profiteering.” *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080,
11 1104 (N.D. Cal. 2010). The court found the bank practices to generate overdraft fees to be “so
12 pernicious that it should be allowed, if at all, only upon a showing that it was within the
13 reasonable expectations of the parties. Here the proof is the opposite.” *Id.* At 1123-24.

14 16. Significant litigation against dozens of banks and credit unions, along with
15 nationwide settlements, based on allegations of unfair and deceptive overdraft practices have
16 followed the Wells Fargo verdict. Banks and credit unions have cumulatively returned nearly
17 two billion dollars in overdraft fees taken from their respective customers and members. A
18 number of settlements have included commitments by banks to change their practices. Bank of
19 America, for example, committed to cease allowing debit card transactions to create
20 overdrafts, while Iberia Bank committed to cease manipulating the order in which it posted

1 transactions and to instead to post transactions in chronological order—which is consistent
2 with consumer expectations and results in fewer overdraft occurrences.

3 17. The federal government has also stepped in to protect consumers from abusive
4 overdraft policies by promulgating rules that discourage the use of overdraft fees to generate
5 revenue. In 2010, for example, the Federal Reserve Board promulgated Regulation E, which
6 provides that financial institutions are only permitted to charge overdraft fees on ATM and one-
7 time debit card charges if they obtain the affirmative consent of the customer. 14 C.F.R.
8 § 1005.17.

9 18. To qualify as affirmative consent, the opt-in notice and agreement must include
10 the following:

11 a. The customer must be given the overdraft policy, including the dollar
12 amount of any fees that will be charged for an overdraft;

13 b. The opt-in consent must be obtained separately from other consents and
14 acknowledgements;

15 c. The consent cannot serve any purpose other than opting-in to the
16 overdraft program;

17 d. The consent cannot be a pre-selected checked box; and

18 e. The financial institution may not provide different terms for the account
19 depending on whether the customer opted-in to the overdraft program.

1 19. If a financial institution fails to obtain the affirmative consent of a consumer in a
2 manner that meets all requirements of the opt-in rule, then the institution is not allowed to
3 charge the consumer overdraft fees on ATM and one-time debit card transactions.

4 20. As a result of litigation and regulation, banks have been forced to scale back on
5 efforts to create revenue from overdraft fees. Moebs, an independent industry research firm,
6 recently reported that the instances of overdraft transactions at national and state banks
7 continued a multi-year declining trend and declined by 6.93 percent in 2018. But this decrease
8 has been offset by credit unions who have increasingly turned to overdraft fees as a lucrative
9 profit center in recent years. In 2018 alone, credit union overdraft revenue rose by an
10 additional 5.72 percent. *See Moebs Services Inc., Overdraft Revenue Inches Up in 2018* (March
11 27, 2019).⁴

12 21. The Consumer Financial Protection Bureau similarly reports that credit unions
13 nationally generated \$7.4 billion in overdraft fees in 2012. CFPB Study of Overdraft Programs 14
14 (June 2013).⁵ That reflected a 15-percent increase in overdraft fees from 2007. *Id.* at 16. At the
15 time of the study, overdraft and NSF fees generated more 50 percent of all fee income for
16 credit unions and constituted 11.6 percent of net income. *Id.* at 15.

21 ⁴<http://www.moebs.com/Portals/0/pdf/Articles/Overdraft%20Revenue%20Inches%20Up%20in%202018%200032719-1.pdf?ver=2019-03-27-115625-283>.

22 ⁵ http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf.

1 **B. Salal’s revenue generating overdraft program.**

2 22. At all times relevant to this complaint, Salal has had a program in place for
3 assessing overdraft fees on checking account transactions, including ATM and debit card
4 transactions, that is unfair and deceptive.

5 23. Salal employed deceptive written explanations and other measures to encourage
6 its members to opt-in to its overdraft program and to incur overdraft fees they would not
7 otherwise have incurred. For example, in a document titled “What you Need to Know About
8 Overdrafts and Overdraft Fees,” Salal represented that “standard” overdraft services (in effect
9 for those who do not opt-in) include the service of covering checks and ACH payments when
10 there are insufficient funds in the account, subject to a \$29 overdraft fee. The document
11 encourages members to opt-in to Salal’s overdraft program it terms “Courtesy Pay Plus,” which
12 will cover debit card and ACH transactions that cause overdrafts. In contrast with the
13 information it provides regarding its “standard” overdraft coverage, Salal omits disclosing that
14 members will be charged a \$29 fee for each ATM or debit card transaction it deems to cause an
15 overdraft. This omission naturally leads members to conclude that one of the purposes of
16 opting-in to Salal’s “Courtesy Pay Plus” program is to avoid having overdraft fees imposed.

17 24. Moreover, Salal represents that it will honor its members’ checks that overdraw
18 an account, subject to a fee. But Salal regularly dishonors such checks, charges a fee, and then
19 uses the event to induce members to opt-in to its “Courtesy Pay Plus” program – thereby
20 exposing themselves to overdraft fees they would not have otherwise incurred.

1 25. In written disclosures to members, Salal has represented that it will assess
2 overdraft fees only when the funds in a checking account are insufficient to pay a given
3 transaction at the time it occurs. Salal has omitted material information that a reasonable
4 customer would need to know to understand anything different from this representation.

5 26. For example, in its “What You Need To Know About Overdrafts And Overdraft
6 Fees” document, Salal represented that “[a]n overdraft occurs when you don’t have enough
7 money in your account to cover a transaction, but we pay it anyway.”

8 27. A reasonable consumer would expect Salal to avoid assessing overdraft fees
9 when there are sufficient funds in the account to cover a transaction at the time that
10 transaction occurs. A reasonable consumer would also not expect that Salal would impose a
11 series of cascading overdraft fees based on multiple transactions during a single time when an
12 account is overdrawn.

13 28. In its account agreement and in various other documents, Salal refers members
14 to a document entitled “Miscellaneous Account Fees” that purports to list the types of fees
15 Salal charges based on various events and services. This document itemizes fees for more than
16 30 different events and services including: fees for checks sent to collections, fees for wire
17 transfers, fees based on excessive transactions in a single month, fees for cashiers’ checks,
18 debit card slips, for copies of bank statements, and for various other services and based on
19 various other events. But Salal omits any mention of overdraft fees that result from debit card
20 or ATM transactions.

1 29. Salal has engaged, and continues to engage, in a practice of assessing overdraft
2 fees based on an artificial calculation known as the “available balance” rather than a member’s
3 actual balance. The “available balance” is determined by subtracting *anticipated* debits and
4 credits, which may or may not occur, from a member’s actual balance. The use of this “available
5 balance” rather than the actual balance to determine whether a transaction is overdrawn and
6 subject to an overdraft fee is unfair and deceptive. And the result is that Salal assesses
7 overdraft fees despite there being sufficient funds in member checking accounts at the time of
8 the transactions.

9 30. Among the methods to calculate the funds in a consumer’s account is one
10 commonly known as the ledger-balance method and another known as the available-balance
11 method. According to the Consumer Financial Protection Bureau, “[the] ledger-balance method
12 factors in only settled transactions in calculating an account’s balance,” whereas “[the]
13 available-balance method calculates an account’s balance based on electronic transactions that
14 the institutions have authorized (and therefore are obligated to pay) but not yet settled, along
15 with settled transactions. An available balance also reflects holds on deposits that have not yet
16 cleared.” Consumer Financial Protection Bureau, *Supervisory Highlights* 8 (Winter 2015).⁶

17 31. Whether a financial institution uses the ledger-balance method versus the
18 available-balance method is a primary concern for the Consumer Financial Protection Bureau
19 because the available-balance method can cause substantial harm to customers in the form of
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22 ⁶ https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf.

1 overdraft fees. *Id.* (“Examiners observed that in some instances, transactions that would not
2 have resulted in an overdraft (or an overdraft fee) under a ledger-balance method did result in
3 an overdraft (and an overdraft fee) under an available-balance method.”).

4 32. The Consumer Financial Protection Bureau has concluded that overdraft fee
5 practices like Salal’s are damaging to consumers based on a study of actual practices by
6 financial institutions. *See* Consumer Financial Protection Bureau, *Data Point: Checking account*
7 *overdraft* (July 2014).⁷ That study shows, among other things, that ATM and debit card
8 transactions trigger the greatest number of overdraft fees; that account holders who opt-in to
9 an overdraft program have seven times as many overdrafts as account holders who do not opt-
10 in to the program; and that overdraft fee practices based on available balance (rather than the
11 ledger balance) substantially harm consumers. *See generally id.*

12 33. Examiners with the Consumer Financial Protection Bureau observed that the
13 following scenario has often occurred with the available-balance method: “a financial
14 institution authorized an electronic transaction, which reduced a customer’s available balance
15 but did not result in an overdraft at the time of authorization; settlement of a subsequent
16 unrelated transaction that further lowered the customer’s available balance and pushed the
17 account into overdraft status; and when the original electronic transaction was later presented
18 for settlement, because of the intervening transaction and overdraft fee, the electronic

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22 ⁷ http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

1 transaction also posted as an overdraft and an additional overdraft fee was charged.”

2 *Supervisory Highlights* at 8.

3 34. The Consumer Financial Protection Bureau has determined that when a financial
4 institution uses the available-balance method, consumers are routinely “misled as to the
5 circumstances under which overdraft fees [will] be assessed.” *Id.* at 8. Specifically, consumers
6 “ha[ve] no reason to anticipate th[e] practice” identified in the previous paragraph because it
7 “[is] not appropriately disclosed.” *Id.*

8 35. Where “misleading practices” are “material to a reasonable consumer’s decision-
9 making and actions,” the Bureau has found those practices to be “deceptive.” *Id.* Likewise,
10 “because consumers [are] substantially injured or likely to be so injured by overdraft fees
11 assessed contrary to the overall net impression created by [an institution’s] disclosures (in a
12 manner not outweighed by countervailing benefits to consumers or competition), and because
13 consumers [can]not reasonably avoid the fees (given the misimpressions created by the
14 disclosures),” the Bureau has found the practice of assessing fees under these circumstances
15 “to be unfair.” *Id.* at 9.

16 36. Salal uses the ledger balance to report its deposits to regulators, members, and
17 the public. The ledger balance is the deposit balance Salal provides to regulators in call reports
18 and reserve reports. Salal also uses the ledger balance in financial reports to shareholders and
19 internal financial reporting. The ledger balance is the balance that credit reporting agencies use
20 to determine and provide credit ratings that apply to Salal itself.

1 37. In contrast, Salal uses the available-balance accounting method to assess
2 overdraft fees but fails to adequately disclose the circumstances under which those fees will be
3 assessed.

4 38. An additional tactic Salal uses to hide the true balance from members and to lure
5 them into additional overdrafts involves the practice posting transactions out of the order in
6 which the member originated the transactions (and out of the order in which Salal received the
7 information it needed to accept or decline the transactions). This re-sequencing often resulted
8 in reducing the balance available to a member. But Salal did not share this information with
9 members who checked their transaction history. Salal’s omissions led members to believe they
10 had a larger balance in their account than Salal was using to determine overdrafts and to incur
11 additional overdraft fees as a result.

12 39. Yet another practice Salal employs to create additional overdraft transactions
13 and to generate additional overdraft revenue involves the practice of placing “holds” on
14 accounts reflecting all or parts of certain transactions. In some cases, when Salal authorizes a
15 debit or accepts a deposit, it places a “hold” on the account and secretly reduces the
16 customer’s balance. The hold remains in place until the transaction posts to the account—
17 which may take several days. Salal then charges an overdraft fee if another transaction posts at
18 the time when the available balance was reduced below zero because of the hold. At no time
19 during this process does Salal notify its members that the balance has been artificially reduced.

20 40. Still another practice Salal employs involves splitting a single transaction into
21 multiple transactions and then assessing multiple overdraft fees. When a customer purchases
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1 multiple items from an online retailer, the customer places the items into a virtual “cart” and
2 then pays the total amount due in a single transaction. But Salal does not treat the event as a
3 single transaction but will post separate transactions for each of the items separately. In cases
4 where a member’s account is in a negative balance, Salal will then levy a separate \$29 overdraft
5 fee for each item purchased in the transaction. Moreover, Salal manipulates the dates of
6 posting each of the divided transactions and will post different component parts of a
7 transaction that the customer made with a single click of the mouse on different days.
8 Members, including Plaintiffs Diel and Cleveland, have been hit with as many as six or seven
9 overdraft fees based on a single online purchase.

10 **C. Salal cloaked accurate balance information from its members.**

11 41. Salal actively promotes the convenience of its debit cards, online portals, and
12 other electronic services but fails to provide its members with accurate balance information.
13 When members execute transactions, they do not have access to an accurate balance register
14 or balance information because any manual register they use cannot take into account the
15 devices Salal employs to manipulate transactions and balances.

16 42. Salal advertises that retrieving balance and transaction information from its
17 online banking website and from the mobile banking product it offers constitute an effective
18 way for members to manage their accounts. Both the online and the mobile banking products
19 display historical records of transactions and a running account balance. Neither of these
20 products displays the actual available balance, neither accounts for any holds placed on the
21 account, and neither accounts for the ways in which Salal may ultimately re-sequence

1 transactions. By omitting the information Salal uses to determine overdraft fees, Salal lures its
2 members to initiate overdraft transactions and to incur overdraft fees.

3 43. Salal's website explains to members what they can expect when using Salal debit
4 cards, online banking, mobile banking, and electronic bill pay features. Salal does not, however,
5 clearly inform members of its various practices of manipulating transactions and available
6 balances. Often, Salal informs its members that they have a positive balance when, according to
7 Salal's secret calculations, Salal considers the balance to be negative. And while Salal has actual
8 knowledge that it deems the account to be in a negative position, and though it has the ability
9 to alert its member to that fact, Salal allows the member to believe the account has a positive
10 balance and to initiate transactions based on that belief.

11 44. Reasonable consumers, including Plaintiffs and Class members, could not have
12 anticipated the harm resulting from Salal's overdraft fee practices. The ledger balance is the
13 official record of activity in a customer's account. It is the balance provided to the customer
14 both in monthly statements and in running daily totals. It is also the balance used to determine
15 interest on deposits and any minimum balance requirements.

16 45. Salal's unlawful overdraft fee acts and practices have caused injury to
17 consumers. Specifically, Salal has unlawfully retained possession of funds to which consumers
18 were entitled, as well as any interest owed on those funds, causing injury to their business or
19 property.

1 **D. Salal’s overdraft schemes are contrary to recognized best practices.**

2 46. By engaging in the conduct described herein, Salal has failed to follow the “best
3 practices” for overdraft programs set forth over a decade ago in multiple proposed rules
4 entitled “Joint Guidance on Overdraft Protection Programs” (“Joint Guidance”) that were issued
5 by the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal
6 Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), and National Credit
7 Union Administration (NCUA) (collectively “the Agencies.”)

8 47. According to the Agencies, “injury [caused by overdraft charges] is not
9 outweighed by countervailing benefits. ... This is particularly the case for ATM withdrawals and
10 POS debit card transactions where, but for the overdraft service, the transaction would typically
11 be denied, and the consumer would be given the opportunity to provide other forms of
12 payment without incurring any fee.” 73 F.R. 28904-01 (May 19, 2008).

13 48. The Joint Guidance also advises financial institutions to “[a]lert customers before
14 a transaction triggers any fees. When consumers attempt to withdraw or transfer funds made
15 available through an overdraft protection program, provide a specific consumer notice, where
16 feasible, that completing the withdrawal may trigger the overdraft fees.” 70 F.R. 9127, 9132
17 (February 24, 2005). The Joint Guidance further advises that “[t]his notice should be presented
18 in a manner that permits customers to cancel the attempted withdrawal or transfer after
19 receiving the notice.” *Id.*

20 49. Similarly, the list of “best practices” regarding overdraft protection that the
21 American Bankers Association has recommended includes informing customers, before they

1 access funds, that a particular Point of Sale or ATM transaction will cause them to incur an
2 overdraft fee.

3 50. As the Joint Guidance recognized, overdraft policies like the ones Salal currently
4 employs make it nearly impossible for customers to avoid injury—even if they carefully track
5 the balance in their account—because “[c]onsumers often lack sufficient information about key
6 aspects of their account.” 73 F.R. 28904-01, 28929.

7 **E. Salal’s overdraft schemes ensnared Plaintiffs Diel and Cleveland.**

8 51. Plaintiffs Diel and Cleveland were injured by Salal’s practice of charging overdraft
9 fees when there were sufficient funds in their checking account to cover the transactions. Salal
10 charged them separate fees based on the use of a hidden available balance rather than the
11 disclosed ledger balance; fees that resulted from secret holds Salal placed on their account;
12 fees that Salal generated by debiting transactions in an order different from those in which Salal
13 knew the transactions occurred; and fees that resulted from Salal’s practice of posting multiple
14 component transactions based on a single online purchase. The following serve as examples:

15 52. On December 18, 2016, Plaintiffs had a beginning balance of \$370.69. Plaintiff
16 withdrew \$203 from an ATM, leaving a balance of \$167.69. Salal then leveled a \$29 overdraft
17 fee (which it ironically termed a “Courtesy Pay Fee”) on the ATM transaction. Plaintiffs were
18 therefore charged an overdraft fee despite having sufficient funds in their account to cover the
19 transaction and to leave a positive balance of \$167.69 afterward.

20 53. On May 8, 2018, Plaintiffs’ account began with a balance of \$3,523.24. Plaintiffs
21 deposited \$400 into their account on May 9, to bring their balance up to \$3,923.24. Later, a
22 check for \$3,887.82 was debited against Plaintiffs’ account. Plaintiffs’ written account

1 statement, online transaction history, and mobile balance all showed that the \$400 deposit was
2 credited before the \$3,887.82 check was debited. Unbeknownst to Plaintiffs, however, Salal
3 debited the check before it credited the deposit and then charged Plaintiffs \$29 what it termed
4 a “Withdrawal Overdraft Fee.” Had Salal posted the transactions in the order it received them,
5 and in the order reflected in its account statements, or had it posted the credit before the
6 debits as consumers expect, Plaintiffs would not have been charged this \$29 fee.

7 54. The \$29 “Withdrawal Overdraft Fee” Salal levied on May 9 brought Plaintiffs’
8 balance down to \$6.42 rather than the \$35.42 balance the account would have had without the
9 improper fee Salal levied. On May 9, Plaintiffs used their debit card online to make a \$21.63
10 purchase. Salal charged Plaintiffs another \$29 “Courtesy Pay Fee.” Had Salal not charged the
11 previous Withdrawal Overdraft Fee, Plaintiffs would have had enough money in their account
12 to cover the \$21.63 transaction and would not have been charged this \$29 fee either.

13 55. On May 12, 2018, Plaintiffs deposited \$500 into their account at an ATM and
14 then withdrew \$400—also from an ATM. Rather than treat the transactions as Plaintiffs
15 obviously intended (depositing \$500, and then taking out \$400), Salal debited the \$400
16 transaction against the account before it credited the \$500 deposit. Salal then declared yet
17 another overdraft and charged Plaintiffs yet another “Courtesy Pay Fee.” Had Salal credited the
18 deposit before it withdrew the debit, Plaintiffs would not have incurred this \$29 charge. Also,
19 had Salal notified Plaintiffs at the ATM that it considered the account overdrawn, Plaintiffs
20 would have had the opportunity to avoid this charge.

1 56. Between May 9 and May 14, 2018, Salal levied five separate overdraft charges
2 totaling \$145 against Plaintiffs’ account. At least four of these charges resulted from the unfair
3 and deceptive tactics described above. At no time during these five days did Salal provide any
4 notice alerting Plaintiffs to the fact that despite their \$900 of deposits, Salal still considered
5 their account to be in a negative balance and subject to overdraft fees.

6 57. On March 27, 2019, a deposit entered Plaintiffs’ account that brought their
7 balance to \$1,060.11. Over the next two days, Plaintiffs initiated or incurred a series of charges
8 totaling \$993.60. On March 28, Salal debited Plaintiffs’ account for two separate \$29 “Courtesy
9 Pay Fees” despite the fact that Plaintiffs’ debits never exceeded their account balance.

10 58. The first March 28 “Courtesy Pay Fee” resulted from an ATM withdrawal of \$61
11 that Plaintiff Diel initiated on March 28. Both the balance inquiry he made at the time of the
12 ATM withdrawal and the subsequent monthly account statement showed the account as
13 containing a balance greater than \$61. Salal gave no notice at the ATM that it considered the
14 transaction as causing an overdraft.

15 59. The second March 28 “Courtesy Pay Fee” resulted from a debit of \$19.55 for a
16 purchase made from Amazon.com. According to Plaintiffs’ written account statement, ten
17 separate charges to Amazon posted on March 27 and March 28. In actuality, Ms. Cleveland
18 made two purchases from Amazon—one on March 27 and one on March 28. While each of
19 these purchases contained multiple items, she only paid once for each purchase. But Salal
20 debited the transactions as 10 separate transactions—the last of which caused an overdraft

1 charge despite the fact that Plaintiffs had sufficient funds in their account to cover the
2 transaction.

3 60. The records currently available to Plaintiffs show that Salal levied over \$3,300 in
4 overdraft charges against the account of Mr. Diel and Ms. Cleveland between January 2018 and
5 March 2019. Salal levied most of these charges either at a time when the account had sufficient
6 funds to cover the debits Plaintiffs initiated or as a result of the domino effect that is one of the
7 harms inherent in deceptive overdraft programs. Salal levied all of these overdraft fees without
8 providing notice in a manner that would have given Plaintiffs the opportunity to avoid the fee.

9 61. A complete review of Salal's records is expected to show that Salal improperly
10 assessed additional overdraft fees on Plaintiffs' checking account even though there were, or
11 should have been, sufficient funds in their account to cover the underlying transactions. This
12 improper assessment of overdraft fees reduced the balance of the checking account and caused
13 additional overdraft fees to be assessed for subsequent transactions that would not have
14 otherwise exceeded the funds in the account. A complete evaluation of Salal's internal records
15 for the time spanning the class period is needed to determine the full extent of Plaintiffs' harm
16 from this practice.

17 62. As a result of its unlawful overdraft fee acts and practices, Salal retained
18 possession of funds to which Plaintiffs were entitled, as well as any interest owed on those
19 funds, causing injury to their business or property.

20 **V. CLASS ACTION ALLEGATIONS**

21 63. Plaintiffs Diel and Cleveland bring this case as a class action under CR 23(a) and
22 (b)(3).

1 64. The proposed Classes are defined as follows:

2 1. Sufficient Fund Class:

3 All Washington residents who were Salal Credit Union members
4 and who at any point from April 15, 2015 through the date of final
5 judgment incurred overdraft fees for a transaction where Salal
6 received information necessary to approve or decline the
7 transaction when there were sufficient funds in the account to pay
8 the transaction or there would have been such funds had Salal not
9 improperly levied previous overdraft fees.

10 2. Lack of Notice Class

11 All Washington residents who were Salal Credit Union members
12 and who at any point from April 15, 2015 through the date of final
13 judgment incurred overdraft fees for a POS Debit Card or ATM
14 transaction where Salal did not notify the individual that the
15 specific transaction would trigger an overdraft fee.

16 Excluded from the Classes is any entity in which Salal has a controlling interest, officers or
17 director of Salal, this Court and any employees assigned to work on the case, and all employees
18 of the law firms representing Plaintiffs and the Classes. Certification of Plaintiffs' claims for
19 class-wide treatment is appropriate because Plaintiffs can prove the elements of their claims on
20 a class-wide basis using the same evidence that would be used to prove those elements in
21 individual actions alleging the same claims.

22 65. Numerosity (CR 23(a)(1)—The members of each Class are so numerous that a
joinder of all members would be impracticable. Defendant Salal is a major credit union in the
state of Washington with more than 40,000 members. While the exact number of Class
members is unknown at this time, it is reasonable to assume each Class includes hundreds or
thousands of members.

1 66. Defendant Salal retains databases and other documentation of transactions and
2 account enrollment that can be used to ascertain all members of each Class. Further, each Class
3 definition describes a set of common and objective characteristics sufficient to allow a member
4 of each group to identify himself or herself as having a right to recover.

5 67. Commonality and Predominance (CR 23(a)(2) and CR 23(b)(3))—The action
6 involves common questions of law and fact. Those common questions of law or fact
7 predominate over questions that may affect only individual Class members. The questions of
8 law and fact common to Plaintiffs and the Class members include, among others, the following:

9 a. Whether Salal has engaged in a common course of using the available-
10 balance method of accounting for purposes of assessing overdraft fees;

11 b. Whether Salal has engaged in a common course of re-sequencing
12 transactions in a manner that deliberately increases the number of overdraft fees it assesses;

13 c. Whether Salal has engaged in a common course of placing undisclosed
14 holds on accounts so as to increase the number of overdraft fees it assesses;

15 d. Whether Salal has engaged in a common course of debiting accounts for
16 multiple separate transactions by dividing a single transaction into component parts and
17 thereby increasing the number of overdraft fees it assesses;

18 e. Whether Salal has engaged in a common course of withholding notice to
19 members that would allow them to avoid incurring overdraft fees based on a POS or ATM
20 transactions;

1 f. Whether Salal has engaged in a common course of not providing
2 contemporaneous notice of an impending overdraft at a time when such notice would allow
3 the member to cancel the transaction;

4 g. Whether Salal has engaged in a common course of failing to adequately
5 disclose the circumstances under which overdraft fees will be assessed;

6 h. Whether Salal has engaged in a common course of omitting from any
7 disclosures material information that reasonable consumers would need to know to understand
8 the circumstances under which overdraft fees will be assessed;

9 i. Whether Salal's common courses of conduct are unfair within the
10 meaning of RCW 19.86.020;

11 j. Whether Salal's common courses of conduct are deceptive within the
12 meaning of RCW 19.86.020;

13 k. Whether Salal's common courses of conduct occurred in trade or
14 commerce and are injurious to the public interest;

15 l. Whether Salal's common courses of conduct have caused Plaintiffs and
16 members of the Class to be injured in their business or property;

17 m. Whether Salal unlawfully converts money belonging to Plaintiffs and to
18 members of the Class through its overdraft policies and practices;

19 n. Whether Salal is unjustly enriched through its overdraft policies and
20 practices;

1 o. Whether injunctive relief is appropriate to remedy Salal’s unfair and
2 deceptive acts and practices; and

3 p. The nature and extent of Class-wide injury and the measure of
4 compensation for such injury.

5 68. Typicality (CR 23(a)(3))—Plaintiffs’ claims are typical of all of the members of
6 each Class. The evidence and the legal theories regarding Defendant Salal’s alleged wrongful
7 conduct are substantially the same for Plaintiffs and all of the Class members, as the relevant
8 agreements and the challenged overdraft fee practice that was applied to customers’ accounts
9 are uniform for all Class members.

10 69. Adequacy (CR 23(a)(4))—Plaintiffs will fairly and adequately protect the interests
11 of the Class members. Plaintiffs have retained competent counsel experienced in consumer
12 rights litigation to ensure such protection. There are no material conflicts between the claims of
13 the representative Plaintiffs and the members of each Class that would make class certification
14 inappropriate. Plaintiffs and their counsel intend to prosecute this action vigorously.

15 70. Superiority (CR 23(b)(3))—The class action is superior to all other available
16 methods for the fair and efficient adjudication of this case or controversy. Because the injury
17 suffered by the individual Class members may be relatively small, the expense and burden of
18 individual litigation make it virtually impossible for Plaintiffs and Class members individually to
19 seek redress for the alleged wrongful conduct. Even if Class members could afford individual
20 litigation, it would be unduly burdensome to the courts in which those lawsuits would proceed.
21 The class action device is preferable to individual lawsuits because it provides the benefits of

1 unitary adjudication, economies of scale, and comprehensive adjudication by a single court. In
2 contrast, the prosecution of separate actions by individual Class members would create a risk of
3 inconsistent or varying adjudications with respect to individual Class members that would
4 establish incompatible standards of conduct for the party (or parties) opposing the Class and
5 would lead to repetitious trials of the numerous common questions of fact and law. Plaintiffs
6 know of no difficulty that will be encountered in the management of this litigation that would
7 preclude its maintenance as a class action. As a result, a class action is superior to other
8 available methods for the fair and efficient adjudication of this controversy. Absent a class
9 action, Plaintiffs and the Class members will continue to suffer losses, thereby allowing these
10 violations of law to proceed without remedy and allowing Defendant Salal to retain the
11 proceeds of its ill-gotten gains.

12 71. Plaintiffs contemplate the eventual issuance of notice to the proposed members
13 of each Class setting forth the subject and nature of the instant action. Upon information and
14 belief, Defendant Salal's own business records and electronic media can be utilized for the
15 contemplated notices.

16 VI. CLAIMS

17 FIRST CAUSE OF ACTION

18 (Violation of the Washington Consumer Protection Act, Chapter 19.86 RCW— 19 Unfair Acts and Practices)

20 72. Plaintiffs reallege and incorporate by reference each and every allegation set
21 forth in the preceding paragraphs.

1 73. Plaintiffs Diel and Cleveland, along with all Class members are “persons” within
2 the meaning of RCW 19.86.010(1).

3 74. Defendant Salal is a “person” within the meaning of RCW 19.86.010(1).

4 75. Defendant Salal’s common courses of unfair conduct in violation of RCW
5 19.86.020 have caused and are likely to continue causing substantial injury to consumers that is
6 not reasonably avoidable by the consumers nor outweighed by countervailing benefits to
7 consumers or competition.

8 76. Salal’s common courses of unfair conduct occur in trade or commerce and
9 impact the public interest because Salal is in the business of providing financial services to tens
10 of thousands of consumers in Washington. Thousands of Washingtonians have been affected
11 by Defendant Salal’s unfair acts and practices.

12 77. Salal’s common courses of unfair conduct caused injury to the business or
13 property of Plaintiffs and Class members.

14 78. Plaintiffs and members of each Class have been damaged in amounts to be
15 determined at trial and under RCW 19.86.090, Plaintiffs and the Class are entitled to recover
16 such damages, including interest thereon, as well as exemplary damages, attorneys’ fees and
17 costs.

18 79. Under RCW 19.86.090, Plaintiffs and the Class members are entitled to an order
19 enjoining Defendant Salal from engaging in the illegal acts and practices described above.

20 80. Plaintiffs and the Class members are entitled to additional equitable relief as the
21 Court deems appropriate, including but not limited to disgorgement for the benefit of the Class

1 members of all or part of the ill-gotten gains Defendant Salal has received in connection with
2 the illegal acts described above.

3 **SECOND CAUSE OF ACTION**

4 **(Violation of the Washington Consumer Protection Act, Chapter 19.86 RCW—
5 Deceptive Acts and Practices)**

6 81. Plaintiffs reallege and incorporate by reference each and every allegation set
7 forth in the preceding paragraphs.

8 82. Defendant Salal’s common courses of conduct have had the capacity to deceive
9 a substantial portion of the public.

10 83. Salal’s common courses of deceptive conduct occur in trade or commerce and
11 impact the public interest because Salal is in the business of providing financial services to tens
12 of thousands of consumers in Washington. Thousands of Washingtonians have been affected
13 by Defendant Salal’s deceptive acts and practices.

14 84. Salal’s common courses of deceptive conduct caused injury to the business or
15 property of Plaintiffs and Class members.

16 85. Plaintiffs and members of each Class have been damaged in amounts to be
17 determined at trial and under RCW 19.86.090, Plaintiffs and the Class are entitled to recover
18 such damages, including interest thereon, as well as exemplary damages, attorneys’ fees and
19 costs.

20 86. Under RCW 19.86.090, Plaintiffs and the Class members are also entitled to an
21 order enjoining Defendant Salal from engaging in the illegal acts and practices described above.

1 94. These funds are properly owned by Plaintiffs and the members of each Class, not
2 Salal, which now claims that it is entitled to their ownership, contrary to the rights of Plaintiffs
3 and the members of each Class.

4 95. Plaintiffs and the members of each Class are entitled to the immediate
5 possession of these funds.

6 96. Salal has wrongfully converted these specific and readily identifiable funds in
7 violation of law.

8 97. Salal's conduct is continuing.

9 98. As a proximate result of this wrongful conversion, Plaintiffs and the members of
10 each Class have suffered and continue to suffer damages.

11 99. By reason of the foregoing, Plaintiffs and the members of each Class are entitled
12 to recover from Salal all damages and costs permitted by law, including all amounts that Salal
13 has wrongfully converted.

14 100. The financial benefits derived by Salal rightfully belong to Plaintiffs and the Class
15 members. Salal should be compelled to disgorge in a common fund for the benefit of Plaintiffs
16 and the Class members all wrongful or inequitable proceeds it received. A constructive trust
17 should be imposed upon all wrongful or inequitable sums Salal received that is traceable to
18 Plaintiffs and the Class members.

FOURTH CAUSE OF ACTION
(Unjust Enrichment)

1
2
3 101. Plaintiffs reallege and incorporate by reference each and every allegation set
4 forth in the preceding paragraphs.

5 102. By means of Salal’s wrongful conduct alleged herein, Salal knowingly provides
6 banking services to Plaintiffs and members of the Class that are unfair, unconscionable, and
7 oppressive.

8 103. Salal knowingly received and retained wrongful benefits and funds from Plaintiffs
9 and the Class members. In so doing, Salal acted with conscious disregard for the rights of
10 Plaintiffs and Class members.

11 104. As a result of Salal’s wrongful conduct as alleged herein, Salal has been unjustly
12 enriched at the expense of, and to the detriment of Plaintiffs and the Class members.

13 105. Salal’s unjust enrichment is traceable to, and resulted directly and proximately
14 from the conduct alleged herein.

15 106. Under the common law doctrine of unjust enrichment, it is inequitable for Salal
16 to be permitted to retain the benefits it received, and is still receiving, without justification,
17 from the imposition of overdraft fees on Plaintiffs and Class members in an unfair,
18 unconscionable, and oppressive manner. Salal’s retention of such funds under circumstances
19 making it inequitable to do so constitutes unjust enrichment.

20 107. The financial benefits derived by Salal rightfully belong to Plaintiffs and the Class
21 members. Salal should be compelled to disgorge in a common fund for the benefit of Plaintiffs
22 and the Class members all wrongful or inequitable proceeds it received. A constructive trust

1 should be imposed upon all wrongful or inequitable sums Salal received that is traceable to
2 Plaintiffs and the Class members.

3 108. Plaintiffs and the Class members have no adequate remedy at law.

4 **VII. PRAYER FOR RELIEF**

5 WHEREFORE, Plaintiffs, on their own behalf and on behalf of Class Members, pray this
6 Court enter judgment against Defendant Salal as follows:

7 A. Certify this action as a class action;

8 B. Appoint Plaintiffs Diel and Cleveland as representative of each of the Classes and
9 appoint their attorneys as Class counsel;

10 C. Enter judgment in favor of Plaintiffs and the Classes and against Defendant Salal
11 on all causes of action alleged;

12 D. Declare that the acts and practices of Defendant Salal violate Washington law;

13 E. Issue a permanent injunction under RCW 19.86.090 enjoining and restraining
14 Defendant Salal from continuing to engage in the unlawful conduct alleged in this complaint;

15 F. Award Plaintiffs and Class members actual and exemplary damages in amounts
16 to be proven at trial;

17 G. Award Plaintiffs' counsel attorneys' fees, costs, and expenses as allowed by law;

18 H. Award Plaintiffs and the Classes pre-judgment and post-judgment interest as
19 allowed by law; and

20 I. Grant Plaintiffs and the Classes such other and additional relief as is just and
21 proper under applicable law.

1 RESPECTFULLY SUBMITTED AND DATED this 14th day of May, 2019.

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