No. 17-14968

United States Court of Appeals for the Eleventh Circuit

CAROL TIMS,

Plaintiff-Appellant,

v.

LGE COMMUNITY CREDIT UNION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia, No. 1:15-cv-04279-TWT, Honorable Thomas W. Thrash, Jr., Chief Judge

MOTION BY CREDIT UNION NATIONAL ASSOCIATION, GEORGIA CREDIT UNION LEAGUE, AND NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLEE LGE COMMUNITY CREDIT UNION

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, *amici curiae* Credit Union National Association ("CUNA"), Georgia Credit Union League ("GCUL"), and National Association of Federally-Insured Credit Unions ("NAFCU") hereby certify that they are nonprofit trade associations. None has a parent corporation. No publicly traded corporation owns 10% or more of any *amici*'s stock. *Amici* further certify that the following persons and entities have or may have an interest in the outcome of this appeal:

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Eleventh Circuit Rule 29-1, Credit Union National Association ("CUNA"), Georgia Credit Union League ("GCUL"), and National Association of Federally-Insured Credit Unions ("NAFCU") respectfully move for leave to file a brief as *amici curiae* in support of Defendant-Appellee LGE Community Credit Union ("LGE"). The proposed brief accompanies this motion. Defendant-Appellee consents to the filing of this brief. Plaintiff-Appellant was asked to consent but declined to do so.

CUNA is the largest organization representing America's 6,000 credit unions and their more than 110 million members. An important function of CUNA is to represent the interests of its members in matters before Congress, the Executive Branch, regulatory agencies, and the Courts. To that end, CUNA files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's credit unions.

The mandate of the GCUL is similar, but its focus is on matters affecting 110 credit unions operating in the State of Georgia. The credit unions represented by GCUL have approximately 2.1 million members and combined total assets of more than $22.8 million.

NAFCU is the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions. It provides

members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest and most sophisticated credit unions in the nation. NAFCU represents 70 percent of total federal credit union assets, 43 percent of all federally-insured credit union assets, and 64 percent of all federal credit union member-owners. NAFCU's membership also includes over 100 federally-insured state chartered credit unions.

This is a case of great importance to *amici* and the credit unions they represent. At least 40 credit unions and banks across the country have been sued in putative class actions alleging claims virtually identical to those being asserted in this case against Defendant-Appellee LGE. All of these cases challenge the financial institutions' practice of assessing overdraft fees based on the available balance in customers' or members' accounts. Some of these cases are still pending in federal and state courts across the country, others have been settled, and still others, like this one, were dismissed. This case, like the other virtually identical lawsuits filed by the same plaintiff counsel, presents a significant issue of first impression in the federal appellate courts and one with important ramifications for this nation's credit unions and banks: whether financial institutions that have imposed overdraft fees based on the available balance in their members' accounts

properly relied on a federally mandated model form to "opt" their members into a service that for a fee pays their overdrafts for non-recurring debit card and ATM transactions. The Board of Governors of the Federal Reserve System promulgated the specific model form in question to make it easier for credit unions and banks to comply with the opt-in requirement of Regulation E (12 C.F.R § 1005.17) of the Electronic Fund Transfer Act (15 U.S.C. §§ 1693 *et seq*.) (the "EFTA").

As explained in the accompanying brief, in arguing that financial institutions have improperly relied on the model form, Plaintiff urges this Court to adopt an interpretation of Regulation E that contradicts its regulatory history and would impose massive, retroactive liability on credit unions. The district court properly dismissed Plaintiff's claims as contrary to law, concluding that financial institutions that use the available-balance method are legally entitled to rely on Regulation E's model form to obtain their members' consent to overdraft services. That finding was correct as a matter of law and will have serious consequences for this nation's credit unions if reversed by this Court.

Given the number of lawsuits raising the issue presented in this case and the importance of the resolution of that issue to *amici*'s members both in terms of assessing their potential liability and complying with Regulation E going forward, the *amici curiae* have a strong interest in this litigation. In particular, *amici*'s members have a vital interest in having this Court affirm the district court's

decision to dismiss Plaintiff's lawsuit. Although it is likely that they ultimately would have rejected the plaintiffs' claims on the merits, some courts have permitted plaintiffs with identical claims to proceed past the motion to dismiss stage. That, in turn, has forced *amici*'s members to engage in expensive discovery and enter into costly settlements because, even though the lawsuits are unfounded, the potential liability is so great that it would be fiscally irresponsible to continue litigating the cases through trial.

Many credit unions are small businesses with extremely limited staff and resources, and they often serve smaller or rural communities that may otherwise have limited options for financial services. In the United States, nearly half of all credit unions employ five or fewer full time employees. More than half have assets of less than $50 million. Moreover, credit unions with less than $20 million in assets account for over 40% of all credit unions in the country. Given the relatively modest size of many credit unions, the cost of litigating cases like this one can cause profound harm. Accordingly, an order affirming the Northern District of Georgia's decision is necessary to stop the proliferation of these baseless lawsuits, which are adversely affecting the viability, growth, and survival of credit unions nationwide.

Amici collectively represent a large number of credit unions that are affected by cases like this one. *Amici*'s experience and expertise grant them unique and

beneficial insight into the errors of Plaintiff's position in this case. The accompanying brief explains those errors, providing additional analysis and support for why the judgment below should be affirmed. This insight expands on the information and arguments offered in the principal brief of Defendant-Appellee LGE. In particular, *amici* have identified crucial regulatory history as well as a critical due-process argument, neither of which is addressed in the parties' briefs. *Amici*'s assistance is particularly warranted in light of the fact that this is the first federal appellate court to consider the issues presented.

For all these reasons, *amici* respectfully request that this Court grant this motion and permit the filing of the accompanying *amicus curiae* brief in support of Defendant-Appellee LGE.

(*Signature page follows.*)

Dated: February 22, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this motion complies with the length limitations set forth in Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,056 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule of Appellate Procedure 27(a)(2)(B).

Dated: February 22, 2018

/s/ Howard R. Rubin
Howard R. Rubin

CERTIFICATE OF SERVICE

I certify that on the 22nd day of February 2018, I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Howard R. Rubin
Howard R. Rubin

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BRIEF OF CREDIT UNION NATIONAL ASSOCIATION, GEORGIA CREDIT UNION LEAGUE, AND NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE LGE COMMUNITY CREDIT UNION

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INTEREST OF *AMICI CURIAE*[1]

Credit unions are member-owned financial cooperatives with the statutory mission of meeting the credit and savings needs of their members, often in rural or underserved populations. Credit unions are unique in the financial services industry because they are not-for-profit entities that provide products and services to their member–owners in a manner fundamentally different from the largest financial institutions. Credit union revenue in excess of expenses is given back to members, for example in the form of dividends or lower-cost financial products and services. Thus, the assets of credit unions—the assets that are being used to pay for the lawsuits like the one filed against Defendant-Appellee LGE Community Credit Union ("LGE")—are owned by the account owners of the credit unions.

Amicus Credit Union National Association ("CUNA") is the largest organization representing the nation's 6,000 credit unions and their 110 million members. CUNA advocates for credit unions before Congress, state and federal agencies, and the courts. It also meets the needs of credit unions for training,

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and 11th Circuit Rule 29-2, CUNA, GCUL, and NAFCU certify that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person, other than CUNA, GCUL, and NAFCU, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

compliance, and operational resources, and it sponsors educational and networking opportunities for credit union volunteers and staff.

Amicus Georgia Credit Union League ("GCUL") represents 110 credit unions with over 2.1 million members that operate in the State of Georgia. Its activities are similar to those of CUNA, but its activities are focused on the State of Georgia.

Amicus National Association of Federally-Insured Credit Unions ("NAFCU") is the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions. It provides members with representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's economic environment. NAFCU proudly represents many smaller credit unions with relatively limited operations, as well as many of the largest and most sophisticated credit unions in the nation. NAFCU represents 70 percent of total federal credit union assets, 43 percent of all federally-insured credit union assets, and 64 percent of all federal credit union member-owners. NAFCU's membership also includes over 100 federally-insured state chartered credit unions.

In offering consumer financial services to their members, *amici*'s member credit unions must comply with the rules and regulations of the National Credit Union Administration (the "NCUA"), as well as certain rules promulgated by the

Board of Governors of the Federal Reserve System ("the Federal Reserve Board") and the Consumer Financial Protection Bureau ("CFPB"). *Amici*'s members are profoundly affected by lawsuits like this one that seek to impose class action liability for purported non-compliance with these rules. That is particularly true where, as here, credit unions relied on a model disclosure form promulgated by the Federal Reserve Board (and then the CFPB) that was specifically intended to ensure and ease the burden of compliance with the rules.

Accordingly, *amici* have a strong interest in this litigation and are well-positioned to provide the Court with additional and unique insight as to the error of Plaintiff-Appellant's regulatory arguments and why the district court's decision dismissing Plaintiff-Appellant's claims under the Electronic Fund Transfer Act ("EFTA") should be affirmed.

STATEMENT OF ISSUES

Whether credit unions that assess overdrafts on the basis of the available balance in their members' accounts lawfully relied on a federally mandated model form that was specifically intended to cover that practice?

INTRODUCTION AND SUMMARY OF ARGUMENT

This action is one of over 40 substantially similar putative class actions filed against large and small credit unions and banks in federal and state courts across the country challenging the longstanding practice of determining overdrafts based

on the "available balance" rather than the "ledger balance" in customer accounts. As the district court explained, the "ledger balance" refers to the full amount of all deposits in an account, less payments that have actually been posted (or processed). *See Tims v. LGE Cmty. Credit Union*, No. 1:15-CV-4279-TWT, 2017 WL 5133230, at *1 (N.D. Ga. Nov. 6, 2017). The "available balance" is the ledger balance minus funds for (i) "electronic transactions that the institutions have authorized (and therefore are obligated to pay) but not yet settled" and (ii) "holds on deposits that have not yet cleared." *Id.*

The plaintiffs in these lawsuits—including the Plaintiff in this case—assert that assessing overdraft fees based on the available balance violates their account agreements, as well as the requirement of Regulation E (12 C.F.R § 1005.17) of the EFTA (15 U.S.C. §§ 1693 *et seq.*). Regulation E requires that financial institutions obtain affirmative consent (an opt-in) to their overdraft services before charging overdraft fees for ATM and non-recurring debit card transactions (the "Opt-in Rule"). The plaintiffs claim that financial institutions unlawfully used a federally-created model form to opt in members or customers to an overdraft program that assesses fees based on the available balance. *See* 12 C.F.R. pt. 1005, app. A ("A-9–Model Consent Form for Overdraft Services (§ 1005.17)") (the "Model Form").

Although some courts have let plaintiffs proceed past motions to dismiss, many likely would have ultimately ruled for the defendants on the contract and statutory issues at stake. But many small credit unions with limited resources could not afford to litigate to judgment; the *in terrorem* effect of class action lawsuits[2] forced most of them to enter into costly settlements. *Amici* maintain that these cases can and should be decided as a matter of law at the motion to dismiss stage (as the court did below) to protect the rights of this nation's financial institutions—including its not-for profit, membership-based credit unions and the members of those credit unions, who are ultimately funding the settlements.

As explained below, the district court properly dismissed Plaintiff's breach-of-contract claim because LGE did not promise in either its account agreement or the Model Form to assess overdraft fees based on a member's ledger balance. To the contrary, the LGE account agreement (like most credit-union member agreements) makes clear that overdrafts are determined on the basis of "available" funds. The district court also properly dismissed Plaintiff's claim that LGE violated the EFTA by using the Model Form to opt its members in to an overdraft service that assesses fees based on the available balance. Plaintiff relies

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[2] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of '*in terrorem*' settlements that class actions entail . . . ."); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (noting the "the *in terrorem* character of a class action").

on the Model Form's language that "[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway." Specifically, Plaintiff argues that "enough money" means "ledger balance." But as the district court correctly recognized, "enough money" can also mean "available" money. *LGE Cmty. Credit Union*, 2017 WL 5133230, at *4, *6.

All the more important, the regulatory history shows that the Federal Reserve Board specifically intended "enough money" to mean "available" funds. Indeed, in the same notice in which the Federal Reserve Board announced the Opt-in Rule and the Model Form, it specifically rejected a proposed rule that would have placed limits on overdraft fees imposed on the available balance. That rejected proposal would have limited fees for overdrafts caused by a debit hold on a consumer's funds in an amount exceeding the actual transaction amount—the exact situation that creates the plaintiffs' so-called damages in these cases. Under these circumstances, the "enough money" language of the Model Form must be construed to include overdraft services that assess fees based on a member's available balance.

Even if the language of the Model Form were unclear (and it is not), liability cannot and should not be imposed against credit unions and other financial institutions that relied on the form in good faith. As the district court correctly concluded, the EFTA safe harbor provision—which protects institutions that utilize

"an appropriate model clause"—shields financial institutions that used the form from liability. *Id.* at *7; *see* 15 U.S.C. § 1693m(d)(2). Moreover, any retroactive application of liability based on an interpretation of the Model Form to mean solely assessing fees based on a member's ledger balance would run afoul of due-process principles because the federal government failed to provide fair (or any) notice of that interpretation. In short, this Court should not condone Plaintiff's attempt to impose liability against financial institutions based on the very form that the federal government enacted for their protection.

For these reasons and those presented in Defendant-Appellee's brief, this Court should affirm the district court's well-reasoned decision.

ARGUMENT

I. The Adoption of the Opt-in Rule and the Model Form

Financial institutions, including banks and credit unions, have long offered overdraft services for a fee for a variety of transactions, including checks, ACH transactions, ATM withdrawals, and debit-card transactions. The early 2000s saw the increasing use of debit cards and ATMs by consumers as a means of paying for small transactions or withdrawing small amounts of cash from their accounts. At the same time, more consumers began overdrawing their checking accounts with their debit cards, incurring fees charged by their financial institution. Studies showed that many consumers were unaware that they would be charged such fees;

many presumed their card transactions would be declined. *See* Electronic Fund Transfers, 74 Fed. Reg. 59,033, 59,035 (Nov. 17, 2009) (codified at 12 C.F.R. pt. 205).

In response to consumers' concerns, in late 2008, the Federal Reserve Board proposed a set of amendments to Regulation E (which implements the EFTA) relating to overdraft services. In November 2009, after receiving over 20,000 comments in response to the proposed rules, the Federal Reserve Board issued its final rules. *See* 74 Fed. Reg. at 59,033, 59,035. Specifically, the Board adopted the Opt-in Rule requiring financial institutions to provide consumers with the right to "opt-in" or affirmatively consent to an overdraft protection service for which they will be charged a fee on non-recurring debit card and ATM transactions. *See* 12 C.F.R. § 205.17 ("Requirements for overdraft services"). The Dodd-Frank Wall Street Reform and Consumer Protection Act transferred rulemaking authority under the EFTA from the Federal Reserve Board to the Consumer Financial Protection Bureau. *See* 12 U.S.C. §§ 5481(12), (14) and 5512(a), (b). The Opt-in Rule is now found at 12 C.F.R. § 1005.17.

The Opt-in Rule begins by defining "the term 'overdraft service'" as "a service under which a financial institution assesses a fee or charge on a consumer's account held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account."

12 C.F.R. § 1005.17(a). The Rule then provides that before a financial institution can "assess a fee or charge a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service," the institution must provide consumers with "a notice in writing, or if the consumer agrees, electronically" that "describ[es] the institution's overdraft service" and provides "a reasonable opportunity for the consumer to affirmatively consent, or opt in, to the service for ATM and one-time debit card transactions." *Id.* § 1005.17(b)(1). Subsection (d) sets forth the "[c]ontent and format" of the requisite notice, including the types of transactions for which a fee may be imposed, the dollar amount of any fees, including any daily fees, and any maximum fees. *Id.* § 1005.17(d). In addition, subsection (d) provides that the notice must "include all applicable items in this paragraph, and may not contain any information not specified in or otherwise permitted by this paragraph." *Id.*

To implement the Opt-in Rule, the Federal Reserve Board created Model Form A-9—a one-page model form (developed after several rounds of consumer comprehension testing, *see* 74 Fed. Reg. at 59,036, 59,047) that institutions may use to satisfy the notice and opt-in requirement. *See* 12 C.F.R. pt. 1005, app. A ("A-9–Model Consent Form for Overdraft Services (§ 1005.17)"). In language that is at the crux of plaintiffs' lawsuits around the country, the Model Form states that "[a]n overdraft occurs when you do not have enough money in your account to

cover a transaction, but we pay it anyway." *Id.* Regulation E requires the notice provided by financial institutions to be "substantially similar" to the Model Form. *See* 12 C.F.R. § 1005.17(d) ("The notice required by paragraph (b)(1)(i) of this section shall be substantially similar to Model Form A-9 set forth in appendix A of this part, include all applicable items in this paragraph, and may not contain any information not specified in or otherwise permitted by this paragraph.").[3]

The Federal Reserve Board specifically intended the Model Form to be used by institutions "to satisfy their disclosure obligations." 74 Fed. Reg. at 59,035; *see also id.* at 59,036 ("[T]he final rule adopts a revised model form that institutions may use to satisfy the notice requirement."); *id.* at 59,051 ("[T]he Board sought to reduce the burden on small entities, where possible, by adopting a model form that can be used to ease compliance with the final rule."); *id.* at 59,052 ("To ease the burden of compliance a model form that institutions may use is available in Appendix A."). The EFTA offers safe harbor protection from suits like this one for financial institutions that use the Model Form. *See* 15 U.S.C. § 1693m(d)(2) (no liability shall be imposed for "any failure to make disclosure in proper form if a financial institution utilized an appropriate model clause issued by the Bureau or the Board.").

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[3] The regulation only permits certain alterations of the Model Form's language. *See* 12 § 1005.17(d)(6). The permitted modifications do not include any changes to the "enough money" language.

II. The Federal Reserve Clearly Intended the Model Form to Include Overdraft Services That Utilize the Available-Balance Method.

As explained, the plaintiffs in this and other cases base their claims on the theory that the "enough money" language in the Model Form means only overdrafts assessed on the ledger balance. They have no support for that claim other than their conclusory say-so. By contrast, all of the available authorities, including numerous regulations and official commentaries, demonstrate that the Federal Reserve intended the "enough money" language of the Model Rule to apply to overdraft programs that assess fees based on the available balance.

To begin with, the regulation adopting the Opt-in Rule defines "overdraft service" as "a service under which a financial institution assesses a fee or charge on a consumer's account . . . when the consumer has insufficient or *unavailable* funds in the account." 12 C.F.R. § 1005.17(a) (emphasis added). Thus, the rule plainly contemplates that institutions can and do charge overdraft fees when funds are "unavailable." This is consistent with how financial institutions had assessed overdraft and non-sufficient funds fees for years. It is also consistent with the Federal Reserve's findings prior to adopting Model Form A-9, when it tested consumers' expectations regarding how overdraft fees would work for ATM and non-recurring debit card transactions. *See* MARCO INT'L, BOARD OF GOVERNORS OF THE FED. RESERVE SYS., REVIEW AND TESTING OF OVERDRAFT NOTICES 7 (2008), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/

bcreg20081218a6.pdf (finding that consumers tested understood they would be charged a fee if they sought to withdraw more money than they had available).

Although the Opt-in Rule and the Model Rule do not expressly use the term "available balance," the Federal Reserve Board clearly had no need to do so, because that method was the standard and prevailing method of assessing overdrafts at the time (as well as now). Indeed, in its notice announcing the final Opt-in Rule and Model Form, the Federal Reserve Board expressly noted that "under network rules, financial institutions must pay authorized debit card transactions, even if at settlement intervening transactions by the consumer have reduced the consumer's *available balance* below the authorized amount of the transaction" and expressly recognized that "institutions may debit the consumer's account for the amount of *the overdraft*." 74 Fed. Reg. at 59,046 (emphasis added). That statement makes clear that the Federal Reserve Board understood that an "overdraft" occurs when an institution makes a payment that is greater than a consumer's "available balance."

Unequivocally demonstrating the Federal Reserve Board's understanding (and approval) of overdraft programs that assess fees based on the available balance are the Board's comments regarding a proposed rule that it considered along with the Opt-in Rule that would have placed limits on overdraft fees caused by authorization holds for debit card transactions in excess of the actual

transaction. In its notice proposing the debit-hold rule, the Federal Reserve Board made clear that it, like all regulators, knew that it was standard practice to determine overdrafts based on the available balance.

Specifically, the Federal Reserve Board explained that, "[w]hen a consumer uses a debit card to make a purchase, a block, or hold, may be placed on funds in the consumer's account to ensure that the consumer has sufficient funds in his or her account when the transaction is presented for settlement." Electronic Fund Transfers, 74 Fed. Reg. 5212, 5228 (proposed Jan. 29, 2009). This type of block or hold "is commonly referred to as a 'debit hold.'" *See id.* The Board further explained that "[d]uring 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 in other transactions." *Id*. at 5228, 5229.

Although it understood that debit card holds affect a consumer's available funds and may cause an overdraft, the Federal Reserve Board proposed placing limits on such fees when the overdraft results from debit holds in excess of the actual transaction amount. The Board pointed out that in some instances (most commonly at restaurants and gas stations), the authorization and actual amounts of a transaction may diverge. *Id*. at 5229. Imagine, for example, that a consumer uses her debit card to buy $35 of gasoline at the fuel pump. *Id*. When she swipes her card at the pump, the gas station will typically obtain a $1 preauthorization to

ensure the card is valid. *Id.* at 5229 n.38. The card issuer may, however, increase that debit hold to $75, which is the issuer's maximum liability for fuel purchases under current card network rules. *Id.* That $75 debit hold will remain in place until the transaction is settled, which may take up to three days. *Id.* at 5228-29. If the consumer had $100 in her account before stopping at the gas station, she might reasonably believe she could stop at the grocery store and, using her debit card, purchase $50 of groceries that evening. *Id.* at 5229. Her transaction might very well go through, but she probably would be assessed an overdraft fee because her bank believes she only had $25 left in her account after she stopped at the gas station. *Id.*

To address this situation, the proposed rule prohibited financial institutions from charging a fee if the overdraft resulted from a debit hold placed on the account that exceeded the transaction settlement amount. *Id.* at 5236. The rule would only cover situations in which "the actual amount of the transaction can be determined by the merchant or other payee within a short period of time after the financial institution authorizes the transaction." *Id.* The proposal offered a safe harbor for institutions that have procedures and practices in place to ensure debit holds covered by the proposed rule are released within a reasonable period. *Id.*

Although the Federal Reserve Board ultimately rejected the proposed rule because it "raise[d] significant operational issues" (74 Fed. Reg. at 59,049,

59,050), its statements leave no doubt that it was aware of-—and fully approved—the standard practice of assessing overdrafts on the available balance in customer accounts, *i.e.*, a balance excluding funds put on hold to account for debit-card transactions that have been authorized but not yet posted. Indeed, the Board explicitly stated that "institution[s] may assess an overdraft fee or charge if the consumer's account is overdrawn" because of *"prior debit card transactions that may have been authorized but not yet presented for settlement*, or when a deposited check in the consumer's account is returned." 74 Fed. Reg. at 5230 (emphasis added). The Federal Reserve's example of a case where overdraft fees would be permissible under the proposed rules is illustrative:

> *Example of permissible overdraft fees in connection with a debit hold*. A consumer has $100 in a deposit account and is enrolled in a financial institution's overdraft service. The consumer makes a fuel purchase using her debit card. Before permitting the consumer to use the fuel pump, the merchant obtains a pre-authorization hold for $1, which the institution increases to $75, or the maximum amount it guarantees to the merchant for the authorized transaction. The consumer purchases $35 of fuel, but the transaction is not presented for settlement for two days. The next day, the consumer withdraws $75 at an ATM. *Notwithstanding the existence of the hold, the consumer's financial institution may charge the consumer an overdraft fee for the $75 ATM withdrawal because the consumer would have incurred the overdraft even if the debit hold had been for the actual amount of the fuel purchase*.

Id. at 5242 (emphasis added).[4]

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[4] Critically, there would be absolutely no need for this rule, proposed or not, if "enough money" meant only "ledger balance." Gas station or hotel "holds" by

In sum, the Federal Reserve Board clearly understood at the time it adopted the Opt-in Rule and the Model Form that most financial institutions determine overdrafts based on the available balance and impose fees when a customer's available balance is negative due to debit card transactions that have been authorized but not yet posted. Given that understanding (as well as the substantial testing by the Board to ensure that the form's language was sufficient),[5] the "enough money" language in the Model Form can—and must—be construed to cover fees based on "available balance."[6]

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definition do not affect a consumer's "ledger balance," which only reflects transactions that have actually cleared or posted. Accordingly, if the Federal Reserve Board had intended that "enough money" meant "ledger balance," the draft rule never would have been proposed or considered.

[5] The December 2008 Report to the Federal Reserve Board states that considerable research and testing was conducted to ensure that consumers understood the specific words in the Model Form, including "[t]he level of vocabulary used, to make sure that it was understandable to general consumers," and "[t]he wording and language used, to see whether sentences could be made shorter or simpler." *See* REVIEW AND TESTING OF OVERDRAFT NOTICES, *supra*, at 2.

[6] The Federal Reserve Board's overdraft disclosure rules in Regulation DD further reveal the Board's understanding that institutions impose overdraft fees based on the available balance. *See* 12 C.F.R. § 1030.11 ("Additional disclosure requirements for overdraft services"). The official interpretation of that rule specifically provides that "[f]or purposes of the balance disclosure requirement in § 1030.11(c), if an institution discloses balance information to a consumer through an automated system," a financial institution "may, but need not" include funds that are "*held by the institution to satisfy a prior obligation of the consumer (for example, to cover a hold for an ATM or debit card transaction that has been authorized but for which the bank has not settled*)." CFPB, OFFICIAL INTERPRETATION, 12 C.F.R. § 1030.11(c) (emphasis added). By authorizing

III. Because the Model Form Covers Overdraft Services That Use the Available-Balance Method, LGE and Other Financial Institutions Are Legally Entitled to Use That Form.

Plaintiff in this case attempts to impose liability against LGE for using an available-balance method rather than a ledger-balance method to determine overdrafts under two theories: breach of contract and violation of the EFTA. The first theory posits that LGE's use of the available-balance method breached a promise in both the account agreement and the LGE Opt-in Form (which is substantively identical to the Model Form) to use the ledger-balance method. The second theory is basically a rerun of the first and alleges that LGE violated the EFTA by using the Model Form to describe an overdraft service that uses the available-balance method. Neither theory has merit.

To begin with, Plaintiff does not and cannot state a claim for breach of contract. Like most account agreements that are the subject of the overdraft lawsuits, the LGE account agreement nowhere states that overdrafts are determined based on the "ledger balance." Instead, it states that overdrafts will be assessed if there are not "sufficient funds" in the member's account to pay for a transaction. *LGE Cmty. Credit Union*, 2017 WL 5133230, at *2. Various sections of the LGE

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institutions to disclose only the available balance for overdraft disclosure purposes, the Federal Reserve Board recognized once again that financial institutions can and do assess overdraft fees based on the available balance. The NCUA has adopted a similar rule and official interpretation for credit unions. *See* 12 C.F.R. § 707.11(c); *see* Truth in Savings, 74 Fed. Reg. 36,102, 36,105 (Aug. 5, 2010) (codified at 12 C.F.R. pt. 707).

account agreement (including its funds availability policy) further make clear that members may withdraw only funds that are "available." *Id.* at *4.

It follows that the word 'sufficient" in the overdraft section means "available." If members withdraw more than the amount of funds available, they may be charged an overdraft fee because their funds are not "sufficient." Thus, like most account agreements, the LGE agreement's references to "available funds" make clear that overdrafts are determined on the available balance. *See id.* ("LGE's funds availability policy would mean nothing if it had no actual effect on a customer's ability to withdraw funds."); *Chambers v. NASA Fed. Credit Union*, 222 F. Supp. 3d 1, 11 (D.D.C. 2016) ("It is true that the agreements do not contain a comprehensive definition of the available balance. But the 'Funds Availability Disclosure,' which 'describes [the customer's] ability to withdraw funds . . . ,' makes clear that not every dollar in a customer's account is immediately 'available' for withdrawal.").

As the court below properly concluded, "the most harmonious and natural reading of the Account Agreement, when considering all of its sections in context, leads to the use of the available balance method, not the ledger balance method." *LGE Cmty. Credit Union*, 2017 WL 5133230, at *4; *see also NASA Fed. Credit Union*, 222 F. Supp. 3d at 12-13 (dismissing similar claim where "the relevant agreements unambiguously convey[ed] that the Credit Union will impose overdraft

fees on debit transactions that overdraw the available balance" and plaintiff failed to identify "a promise by the Credit Union to impose overdraft fees only on debit transactions that overdrew her actual balance—a necessary element of her claim").

Nor does LGE's use of the available-balance method "breach" the LGE Opt-in Form. The LGE Opt-in Form adopts the Model Form's definition of an overdraft, explaining that an "overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway." 12 C.F.R. pt. 1005, app. A ("A-9–Model Consent Form for Overdraft Services (§ 1005.17)"). As explained earlier, the Federal Reserve Board intended this language to apply to overdraft services that use the available-balance method. Moreover, the LGE Opt-in Form must be read in conjunction with the LGE's account agreement's standard overdraft practices language, which the form incorporates and which provides for use of the "available" balance method. Thus, as the district court properly held, Plaintiff does not and cannot establish a breach of contract based on either the LGE Account Agreement or the LGE Opt-in Form. *See LGE Cmty. Credit Union*, 2017 WL 5133230, at *4; *see also NASA Fed. Credit Union*, 222 F. Supp. 3d at 11.

Likewise, Plaintiff has no statutory claim under the EFTA. According to the plaintiffs in this and other cases, a financial institution's use of the Model Form to describe an overdraft service that assesses fees based on the available balance violates the EFTA because the "enough money" language in the Model Form

means only that fees will be assessed on the ledger balance. Thus, Plaintiff-Appellant and plaintiffs in similar cases contend that LGE and other financial institutions have failed to secure the affirmative consent of members to participate in their overdraft programs.

But as already explained, the Model Form does not mean that overdrafts may only be assessed based on the ledger balance. To the contrary, the Federal Reserve Board specifically designed the Form to protect institutions that charge fees based on the available balance. Accordingly, financial institutions that use the Model Form to describe overdraft programs that assess fees on the available balance cannot be held liable for the purported failure of not obtaining their customers or members' consent in violation of Regulation E.[7]

In addition to the fact that the Model Form was intended to cover overdrafts based on a member's available balance, it bears emphasis that neither the Federal Reserve Board, the CFPB, nor any other agency has ever required financial institutions to disclose their balance-calculation method for determining overdrafts. That is particularly significant since the Federal Reserve Board has required disclosure of a number of other specific items relating to institutions' overdraft

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[7] While the Federal Reserve Board understood that financial institutions would use the Model Form to assess overdrafts on the available balance, it did not preclude use of the ledger balance. Banks and credit unions are free to adopt either method to assess overdrafts, and the "enough money" language is broad enough to cover either method.

services in Regulations E (12 C.F.R. § 1005.17(d)) and Regulation DD (12 C.F.R. § 1030.11). Given the lack of a disclosure requirement, there is no basis for requiring institutions to specify their balance-calculation method unless and until the federal government mandates that they do so.[8]

While Plaintiff relies on a few isolated irrelevant snippets from the CFPB in an attempt to support her claim (Appellant's Br. at 34), none of those snippets support her position. As explained in LGE's brief (Appellee's Br. at 37-38) and the decision below (2017 WL 5133230, at *6), those statements are taken out of context. Indeed, far from showing that credit unions and other financial institutions are inappropriately assessing fees based on the available balance, the CFPB passages cited by Plaintiff indicate the agency's understanding that available balance is a standard and acceptable way to assess overdrafts. Moreover, even though the CFPB has acknowledged that financial institutions charge overdraft fees on the available balance (*see* Appellant's Brief at 34), the CFPB did not change the "enough money" language when it recently proposed new Model A-9

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[8] Indeed, given that LGE never promised to assess overdraft fees only when members overdraw their ledger balance, Plaintiff's claims are basically grounded on an affirmative duty to disclose. As explained above, however, the Federal Reserve Board has set forth the particular disclosures that financial institutions must make with respect to overdraft programs and an institution's balance-calculation method is not among them. Accordingly, to the extent Plaintiff's state-law claims rest on a failure to disclose, they are squarely preempted by federal law. *See Guitierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 726 (9th Cir. 2012) (state law—whether statutory or common law—may not be used to "impose liability based on a [credit union's] failure to disclose" something related to its accounts).

Form "prototypes."[9] The only reasonable inference is that the "enough money" language is understood by applicable regulators to cover overdrafts being assessed on the available balance.

IV. Imposition of Liability Against LGE and Other Financial Institutions That Relied on the Model Form Would Violate the EFTA Safe Harbor and Principles of Due Process

The plaintiffs in this and other cases argue that even if the "enough money" language of the Model Form is not limited to ledger balance, it is unclear and therefore LGE and other credit unions should be held liable for violating Regulation's E's requirement that disclosures be made in a "clear and readily understandable" way. *See* 12 C.F.R. § 1005.4(a)(1). But even if the Court were to find that the "enough money" language of the Model Form is ambiguous, credit unions and other financial institutions should still be protected from liability for at least two reasons.

First, they are shielded by EFTA's safe harbor provision, which states that no liability shall be imposed for "any failure to make disclosure in proper form if a financial institution utilized an appropriate model clause issued by the Bureau or the Board"—notwithstanding that the "model clause is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C.

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[9] CFPB, CURRENT MODEL FORM A-9, *available at* https://files.consumerfinance.gov/f/documents/201708_cfpb_A-9-form-ficus_overdraft-model-forms-prototypes.pdf.

§ 1693m(d)(2). As the court below held, the Model Form is an "appropriate model clause" for financial institutions that assess fees based on available balance. *LGE Cmty. Credit Union*, 2017 WL 5133230, at *7. The Federal Reserve Board carefully drafted the Model Form's language after extensive consumer testing knowing nearly all banks and credit unions used the available balance to assess overdraft fees. Moreover, the Board specifically intended for institutions to use the Model Form "to satisfy their disclosure obligations." 74 Fed. Reg. at 59,035; *see also id*. at 59,036 ("[T]he final rule adopts a revised model form that institutions may use to satisfy the notice requirement."). If there is a problem with the Model Form it "is a problem with its precision, not its accuracy." *LGE Cmty. Credit Union*, 2017 WL 5133230, at *7. Because that is an "issue of form, not content," LGE and other financial institutions that have relied on the Model Form are protected by the EFTA safe harbor as a matter of law. *See id*. ("[B]ecause it used the Model Form as its Opt-in Agreement, LGE can rest assured that it is securely moored in EFTA's safe harbor.").

Second, any retroactive application of liability based on a construction of the Model Form to mean solely ledger balance would violate due process in light of the federal government's failure to provide fair notice. It is well-settled that due process "requires agencies to 'provide regulated parties fair warning of the conduct a regulation prohibits or requires.'" *PHH Corp. v. CFPB*, 839 F.3d 1, 46, 48 (D.C.

Cir. 2016), *reinstated in relevant part*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012)). Plaintiffs' theory of liability in these cases violates this maxim by effectively asking courts to punish banks and credit unions that have done that which the Federal Reserve Board and the CFPB have told them they may do for many years. Indeed, entities like LGE imposed overdraft fees via the available-balance method both before and after the enactment of the Opt-in Rule and the Model Form. The government did nothing to shut down that practice despite ample opportunity to do so. In fact, it did the opposite, effectively blessing the available-balance method through the rule-making process discussed above.

But the plaintiffs in this and similar cases now ask the courts to pull the rug out from under unsuspecting banks and credit unions by reinterpreting the applicable regulations to mandate the ledger-balance method and, worse still, to apply this change in the law retroactively. That would result in the precise injustice decried in *SmithKline Beecham Corp.* and *PHH Corp.* *See* 567 U.S. at 155-158 (rejecting retroactive reclassification of pharmaceutical sales representatives under the FLSA when the industry "had little reason to suspect that its longstanding practice" violated the law); 839 F.3d at 48 (vacating a $109 million penalty under RESPA imposed by the CFPB in light of PHH's "justifiable reliance on the interpretation stated by" a predecessor agency years prior). "Elementary

considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), and plaintiffs in these cases cannot, consistent with due process, impose massive liability on entities like LGE by applying the ledger-balance method on a retroactive basis.

* * *

In sum, credit unions should not be held liable for using a Model Form that the Federal Reserve Board specifically designed to apply to overdraft programs that assess fees on the available balance of members' accounts. Like the Board, the CFPB has also expressly acknowledged that available balance is a common and acceptable method for assessing overdrafts. That, coupled with the fact that the CFPB did not change the "enough money" language when issuing its new "prototype" Model A-9 Forms, demonstrates the federal agency's understanding that "enough money" covers fees based on the available balance. While Plaintiff wishes otherwise, neither the CFPB nor any other agency has ever prohibited using the available balance or enacted any rule requiring specific disclosure of that method. This Court should defer to the judgment of the federal agencies that created and implement the Model Form and reject Plaintiff's attempt to impose liability on financial institutions for using the very model form that was enacted to protect them.

CONCLUSION

For the foregoing reasons and those presented in Defendant-Appellee's brief, *amici* submit this Court should affirm the final judgment dismissing Plaintiff-Appellant's claims.

Dated: February 22, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this *amici curiae* brief complies with the length limitations set forth in Federal Rule of Appellate Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,275 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule of Appellate Procedure 32(f).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: February 22, 2018

/s/ Howard R. Rubin
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CERTIFICATE OF SERVICE

I certify that on the 22nd day of February 2018, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

Dated: February 22, 2018

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