

No. **22-6059**

**In The
SUPREME COURT OF THE UNITED STATES**

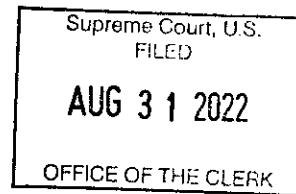
MAURICE OPARAJI,

Petitioners,

v.

MUNICIPAL CREDIT UNION ("MCU"),

Respondent.



**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

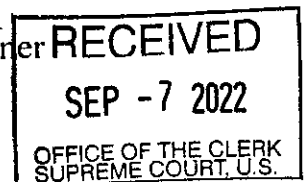
**APPLICATION TO THE HONORABLE JUSTICE
SOTOMAYOR AS CIRCUIT JUSTICE.**

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Dated this 30th day of August, 2022.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in dismissing Oparaji's complaint under Fed. R. Civ. P. 12(b) (6), alleging that Oparaji sets no factual allegations in support of his claim that would entitle him to relief.
2. Whether the district court erred in dismissing Oparaji's action for failure to state a claim under the Electronic Fund Transfer Act (EFTA).
3. Whether the district court erred in denying Oparaji's motion for partial summary judgment.
4. Whether the district court erred in holding that Oparaji sets no factual allegations in support of his claim that would entitle him to relief.
5. Whether any of the district court's procedural and evidentiary rulings constituted an abuse of discretion requiring reversal of the judgment.
6. Whether Oparaji's complaint gives Municipal Credit Union (MCU) fair notice of what the Oparaji's claim is and the ground upon which it rests.
7. Whether the Second Circuit failed to review a district court's dismissals under Rule 12(b) (6) de novo and decisions to abstain from exercising supplemental jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Maurice Oparaji humble and respectfully petitions for a writ of certiorari to review the decision of the Second Circuit below.

OPINION BELOW

The Second Circuit's Order is reproduced at Pet. App. 2a– 6a, and Order denying rehearing and rehearing en banc on May 18, 2022, at Pet. App. 1a. The district court's Opinion and Order is reproduced at Pet. App. 7a–17a.

JURISDICTION

The judgment of the district court was entered on June 14, 2021, Pet. App. 7a–17a. The Second Circuit entered its judgment on April 15, 2022, Pet. App. 2a– 6a, and denied rehearing and rehearing en banc on May 18, 2022, Pet. App. 1a. Petitioner filed extension of time within which to file a petition for a writ of certiorari on August 1, 2022 and this Court extended the time, to and including September 1, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

To address concerns raised by the increasing prevalence of electronic banking transactions, Congress enacted the Electronic Fund Transfer Act of 1978 (EFTA), 15 U.S.C. § 1693 et seq. Lawmakers viewed such transactions—

processed through computer networks without human interaction—as “much more vulnerable to fraud, embezzlement, and unauthorized use than the traditional payment methods. The Electronic Fund Transfer Act (EFTA) (15 USC 1693 et seq.) of 1978 is intended to protect individual consumers engaging in electronic fund transfers (EFTs). EFT services include transfers through automated teller machines, point-of-sale terminals, automated clearinghouse systems, telephone bill-payment plans in which periodic or recurring transfers are contemplated, and remote banking programs. For an account to or from which electronic fund transfers can be made, a financial institution shall send a periodic statement for each monthly cycle in which an electronic fund transfer has occurred; and shall send a periodic statement at least quarterly if no transfer has occurred. Consumers are required to report an unauthorized withdrawal within 60 days after the bank sends a monthly statement reflecting the withdrawal. Financial Institutions are required to obtain consumers’ affirmative consent for ATM and one-time debit card transactions.

Only after obtaining that consent could Financial Institutions/banks charge fees for the overdraft service, is reproduced at Pet. App. 124a–132a.

INTRODUCTION

In the decision below, the Second Circuit affirmed the district court’s decision on the ground that the EFTA regulations do not cover the transaction at

issue. Pet. App. 1a–6a. The court therefore dismissed petitioner Oparaji’s EFTA claim with prejudice, along with petitioner’s remaining state law. Pet. App. 1a–6a.

This matter involves a series of shady overdraft deceptive business practices wherein Municipal Credit Union imposed sixty-nine (69) charges for overdraft fees on petitioner’s checking account that were not authorized by the terms of the agreement between the parties. Pet. App. 29a.

Petitioner’s complaint had alleged three EFTA claims against MCU, which were not treated differently: Breach of the Opt-In Rule. Pet. App. 31a; Violation of Electronic Fund Transfers Act (Regulation E) C.F.R. § 1005 et seq. (authority derived from 15 U.S.C. § 1693 et seq. Pet. App. 32a-34a; and Deceptive Acts or Practices as to New Customers Pet. App. 36a.

Petitioner never gave affirmative consent. The EFTA requires financial institutions to provide periodic account statements to each consumer reflecting the date of the transfer, the amount involved, the type of transfer, and the recipient of the funds. Respondent never provided periodic account statements to petitioner. In three occasions, petitioner demanded periodic account statements from respondent, but never received any. Pet. App. 121a–123a; see also “On June 11th, 16th, and 22nd, you repeatedly requested transaction records for the period from Apr. to Jun. 11, 2016”. Pet. App. 119a.

In Violation of Electronic Fund Transfers Act (Regulation E), on May 3, 2016 Municipal Credit Union repeatedly charged petitioner's account \$30.00 as many as thirty-five (35) times. Pet. App. 29a. On April 26, 2016 Municipal Credit Union repeatedly charged plaintiff's account \$30.00 as many as twenty-five (25) times. Pet. App. 29a. And nine (9) times other days. Pet. App. 29a.

In its August 14, 2018 letter, respondent MCU admitted that it charged petitioner's account a \$30.00 fee 69 times. MCU's August 14, 2018 letter, stated in pertinent part, as follows:

"From Apr. 25 to May 6, 2016, your account was assessed a \$30.00 Non-Sufficient Funds ("NSF") fee 69 times; for a total of \$2,070.00 in fees. The records shows that your account was never overdrawn to pay a debit card or pre-authorized debit ("ACH") transaction. Your account was overdrawn only as a result of NSF fees". Pet. App. 119a.

Respondent's August 14, 2018 letter further stated that:

"Our investigation has determined that your initial complaints were not handled correctly. Although there is no evidence that any of the disputed transaction were fraudulent, the rules governing ACH transactions entitle the Receiver up to 60 calendar days to dispute and obtain a refund for allegedly unauthorized ACH withdrawals". Pet. App. 120a.

As an initial matter, the rules governing ACH transactions entitle the Receiver up to 60 calendar days to dispute and obtain a refund for allegedly unauthorized ACH withdrawals. FDIC Law, Regulations, Related Acts 6(b) (3). Pet. App. 124a-132a.

On August 2, 2018 petitioner sent a letter to New York State Department of Financial Services. Pet. App. 119a. In the letter, petitioner complained on MCU's refusal to respond to his letters requesting for his MCU account statement, including, all transaction, activities and MCU investigation documentation, from April 1, 2016; "on June 11th, 16th, and 22nd, you repeatedly requested transaction records for the period from Apr. to Jun. 11, 2016". Pet. App. 119a.

On or about August 14, 2018 petitioner received from Mr. William P. Birnbach, the Vice President of Member Service Operations. Pet. App. 119a-120a. Mr. William P. Birnbach's letter dated August 14, 2018 letter, directed by New York State Department of Financial Services, stated:

"Enclosed for your reference is a printout of all transactions posted to your MCU account from Mar. 1, 2016 to present. From Apr. 25 to May 6, 2016, your account was assessed a \$30.00 Non- Sufficient Funds ("NSF") 69 times". Pet. App. 119a.

From Apr. 25 to May 6, 2016, your account was assessed a \$30.00 Non-Sufficient Funds ("NSF") 69 times". Pet. App. 119a.

Petitioner filed a motion for partial summary judgment on September 6, 2020. The partial summary judgment was dismissed by the district court because the Court dismissed the federal claims under Rule 12(b) (6), stating:

“Finally, Oparaji uses his fifteenth objection to argue in support of his motion for partial summary judgment, insisting that there is no dispute of fact that MCU violated the EFTA’s Opt-in Rule by charging overdraft fees without prior consent. Objections at 44-46. Because the Court dismisses the federal claims under Rule 12(b)(6) and declines to exercise jurisdiction over the remaining state-law claim, the Court denies Oparaji’s motion for partial summary judgment, Dkt. 35, as moot, and overrules his fifteenth objection”. Pet. App. 17a.

Respondent Municipal Credit Union failed to file written objection to the USMJ Sarah Netburn’s Report and Recommendation pursuant to 28 U.S.C.636 (b) (1) and Fed. R. Civ. P. 72(b), and failed to respond to Plaintiff Oparaji’s Objections to USMJ Sarah Netburn’s Report and Recommendation pursuant to Fed. R. Civ. P. 72(b) (2).

A. The District Court’s June 14, 2021, Opinion and Order, Dismissing Petitioner’s Claims under Rule 12(b) (6) failed to accept the Truth of all Allegations of the Complaint and Draws all Reasonable Inferences in Favor of the Petitioner; yet, the Second Circuit Affirmed the Order.

Till date, respondent Municipal Credit Union has not returned or reissue debit Card it collected from plaintiff. Also, respondent Municipal Credit Union has not refunded the monies it assessed from petitioner’s account. Petitioner’s complaint

pertinently stated:

“On May 3, 2016 Municipal Credit Union repeatedly charged plaintiff’s account \$30.00 as many as thirty-five (35) times totaling \$1050.00;

On April 26, 2016 Municipal Credit Union repeatedly charged plaintiff’s account \$30.00 as many as twenty-five (25) times totaling \$750.00 and nine (9) times other days”. Pet. App. 29a.

Respondent Municipal Credit Union refused to the monies it assessed from plaintiff's account:

"MCU refusal to refund the monies it assessed from plaintiff's account created significant emotional distress for plaintiff. Though previously physically and mentally healthy, plaintiff began suffering from depression, which culminated in constant headache". Pet. App. 30a.

Respondent Municipal Credit Union produced no evidence that it has refunded the monies that it assessed from petitioner's account; yet in its June 14, 2021, Opinion and Order, without evidence presented, the district Court stated that MCU "provided evidence that Municipal Credit Union refunded the overdraft fees it had charged". Pet. App. 14a.

No evidence that respondent Municipal Credit Union presented that it refunded the overdraft fees to petitioner; till date, respondent Municipal Credit Union has not refunded any money to petitioner. Pet. App. 30a.

Here, the district court failed to accept as true all factual claims in petitioner's complaint and draw all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740-41 (2d Cir. 2013). In addition, it failed to rely on the factual allegations in petitioner's complaint and the exhibits attached thereto. *See Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005). In its June 14, 2021 decision, the district court dismissed petitioner's EFTA claims with prejudice, along with petitioner's remaining state law and the Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

REVIEW IS NECESSARY FOR THIS COURT TO RESOLVE A SPLIT AMONGST THE CIRCUITS AND TO RESOLVE A CIRCUIT DEPARTURE FROM THIS COURT'S BINDING PRECEDENT THAT "A COMPLAINT ATTACKED BY A RULE 12(b)(6) MOTION TO DISMISS DOES NOT NEED DETAILED FACTUAL ALLEGATION"

The Court should grant review because the Second Circuit's decision conflicts other circuits, including its own decision in *L.S. v. Webloyalty, Inc.*, No. 18-3639 (2d Cir. 2020). (Pet. App. 39a-56a); Ninth Circuit's decision in *Margaretha Natalia Widjaja v. JPMorgan Chase Bank, N.A.* (Pet. App. 57a-69a); and Eleventh Circuit's decision in *Carol Tims v. LGE Community Credit Union*. (Pet. App. 70a-98a). These circuits answered:

- i. Whether the financial institution should reimburse a consumer for unauthorized withdrawals through its internal dispute resolution process for the losses the consumer suffered, as required by the Electronic Fund Transfer Act (EFTA). See 15 U.S.C. §§ 1693f(a), 1693g(a); 12 C.F.R. § 1005.6(b)(3).¹ Pet. App. 124a-132a.

¹ Regulation E, which implements the EFTA, was originally promulgated by the Board of Governors of the Federal Reserve System and published in Part 205 of Title 12 of the Code of Federal Regulations. Pet. App. 124a-132a.

- ii. Whether the Electronic Fund Transfer Act (EFTA) requires consumers to report an unauthorized withdrawal within 60 days after the bank sends a monthly statement reflecting the withdrawal². Pet. App. 124a-132a.
- iii. Whether it is disputed that petitioner reported the withdrawals at issue within time frame required by EFTA regulation. Pet. App. 124a-132a.
- iv. Whether the district court improperly held that the EFTA regulations do not cover the transaction at issue. Pet. App. 124a-132a.
- v. Whether the Electronic Fund Transfer Act (EFTA) authorizes a private right of action against a bank that “fails to comply” with any provision of the Act, including the provision limiting a consumer’s liability for unauthorized transfers. § 1693m (a). When, as here, respondent MCU concludes that it violated the Electronic Fund Transfer Act (EFTA) rules; “Although there is no evidence that any of the disputed transaction were fraudulent, the rules governing ACH transactions entitle the Receiver up to 60 calendar days to dispute and obtain a refund for allegedly unauthorized ACH withdrawals”. See 12 C.F.R. § 1005.6(b)). Pet. App. 124a-132a.

² The official staff interpretations of Regulation E, state that notice may also be provided by “a person acting on the consumer’s behalf.” 12 C.F.R. pt. 1005, Supp. I, 6(b) (5) ¶ 2. Municipal Credit Union does not contend that petitioner Oparaji did not notified Municipal Credit Union within the 60-day period. Pet. App. 119a-120a.

A. The Second Circuit failed to review a district court's dismissals under Rule 12(b) (6) de novo and decisions to abstain from exercising supplemental jurisdiction "accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Fink v. Time Warner Cable*, 714 F.3d 739, 740-41 (2d Cir. 2013). And failing to rely on the factual allegations in Oparaji's complaint (the "complaint") and the exhibits attached thereto. See *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005)

In his Complaint dated May 6, 2019, petitioner Oparaji pertinently stated:

"On April 4, 2016 plaintiff travelled out of jurisdiction; plaintiff returned back on May 17, 2016, and discovered that his Municipal Credit Union's account number XXXX690 had been compromised. Plaintiff immediately reported to the Municipal Credit Union's 212-693-4900. Plaintiff was also instructed to report to any Municipal Credit Union branch and file a report in writing. Subsequently, plaintiff filed a Report in writing with the Municipal Credit Union branch at Springfield Garden in Queens County. In the course of this report at Springfield Garden in Queens County, plaintiff was issued with transaction summary from April 25, 2016 through May 6, 2016.

Based upon plaintiff's review of the transaction summary, as well as his debriefing of the staffs who made the transaction summary available, plaintiff learned that: On May 3, 2016 Municipal Credit Union repeatedly charged plaintiff's account \$30.00 as many as thirty-five (35) times totaling \$1050.00.

On April 26, 2016 Municipal Credit Union repeatedly charged plaintiff's account \$30.00 as many as twenty-five (25) times totaling \$750.00 and nine (9) times other days; After the discovery of repeated charged on his account, plaintiff requested statement and transaction activities from Municipal Credit Union. But Municipal Credit Union refused to release plaintiff's account information to him.

On June 3, 2016, plaintiff received a call from one Ms. Sharon Porter, who introduced herself as defendant MCU's Senior Investigator and Negative Balance Collector. Ms. Sharon Porter requested plaintiff's email address and told him that she

will send an email to plaintiff and that plaintiff should visit the Springfield Garden Branch and then the email and put in writing that all the PayPal transaction on your account is fraud, and you would like to have your fees refunded.

Plaintiff visited the Springfield Branch June 3, 2016 and put in writing that the PayPal transaction on his account is fraud, and that he would like the fees refunded.

Plaintiff handed over the written demand together with Ms. Sharon Porter's email letter to Frank, MCU's Springfield branch manager, who collected the written demand acknowledged receipt by stamping with his initial.

On June 11, 2016, when plaintiff did not hear from MCU, plaintiff called defendant's (212-693-4900 number and also send emails requesting for statement and transaction activities.

Plaintiff has suffered, and will continue to experience, extreme emotional distress with physical sequelae thereof, as well as other adverse effects upon his daily, social and family life.

MCU refusal to refund the monies it assessed from plaintiff's account created significant emotional distress for plaintiff. Though previously physically and mentally healthy, plaintiff began suffering from depression, which culminated in constant headache" Pet. App. 29a-30a.

Oparaji's Complaint stated sufficient factual allegations for a Claim for Breach of the Opt-In Rule, and Violation of Electronic Fund Transfers Act, Pet. App. 18a-38a.

The district court failed to follow Rule 12(b) (6) standards and construe the evidence in the light most favorable to petitioner Oparaji on motion to dismiss.

Petitioner's Complaint, when viewed under Rule 12(b) (6) standards would allow a reasonable jury to find that Municipal Credit Union violated Breach of the Opt-In Rule, and Violation of Electronic Fund Transfers Act. With Rule 12(b) (6) legal standard in

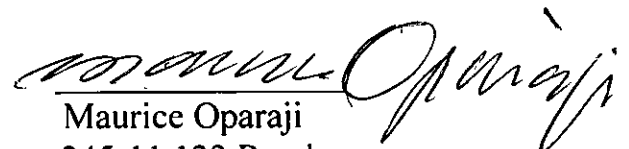
mind, it is axiomatic that in deciding a motion under Rule 12(b) (6), a district court is required to view the evidence in the light most favorable to the nonmovant – here, Oparaji – and to draw all reasonable inferences in his favor. See *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568 (4th Cir. 2015).

The Second Circuit failed to review a district court's dismissals under Rule 12(b) (6) de novo and decisions to abstain from exercising supplemental jurisdiction. *Fink v. Time Warner Cable*, 714 F.3d 739, 740-41 (2d Cir. 2013); and failed to rely on the factual allegations in Oparaji's complaint. See *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96, 100 (2d Cir. 2005); and the district court viewed the facts in a light favorable to respondent, this Court should grant the writ to ensure the protection of all participants in electronic funds transfer activities.

CONCLUSION

For these reasons, the Court should grant review.

Respectfully submitted.



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Dated this 30th day of August, 2022.