

Nos. 12-2790, 12-2797

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

JAREK CHARVAT,
Plaintiff-Appellant,
v.

MUTUAL FIRST FEDERAL CREDIT UNION,
Defendant-Appellee.

JAREK CHARVAT,
Plaintiff-Appellant,
v.

FIRST NATIONAL BANK OF WAHOO,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Nebraska

JOINT APPENDIX

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November 9, 2012

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APPEAL,CLOSED,TRIAL-OMAHA

U.S. District Court
District of Nebraska (8 Omaha)
CIVIL DOCKET FOR CASE #: 8:12-cv-00011-LSC-FG3

Charvat v. Mutual First Federal Credit Union
Assigned to: Chief Judge Laurie Smith Camp
Referred to: Magistrate Judge F.A. Gossett
Case in other court: USCA - 8th Circuit, 12-02790
USDC-NE, 8:12cv12
USDC-NE, 8:12cv13
Cause: 15:1601 Truth in Lending

Date Filed: 01/08/2012
Date Terminated: 07/12/2012
Jury Demand: Plaintiff
Nature of Suit: 371 Truth in Lending
Jurisdiction: Federal Question

Plaintiff

Jarek Charvat
*Individually and on behalf of all others
similarly situated*

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Date Filed	#	Docket Text
01/08/2012	1	COMPLAINT with jury demand against Mutual First Federal Credit Union (Filing fee \$ 350, receipt number 0867-2191032), by Attorney Tracy L. Hightower-Henne on behalf of Jarek Charvat(Hightower-Henne, Tracy) (Entered: 01/08/2012)
01/08/2012	2	Summons Requested as to regarding Complaint 1 . (Hightower-Henne, Tracy) (Entered: 01/08/2012)
01/09/2012	3	TEXT NOTICE OF JUDGES ASSIGNED: Chief Judge Laurie Smith Camp and Magistrate Judge F.A. Gossett assigned. (MKR) (Entered: 01/09/2012)
01/09/2012	4	Summons Issued as to defendant Mutual First Federal Credit Union regarding Complaint 1 . YOU MUST PRINT YOUR ISSUED SUMMONS, WHICH ARE ATTACHED TO THIS DOCUMENT. PAPER COPIES WILL NOT BE MAILED. (MKR) (Entered: 01/09/2012)
01/13/2012	5	SUMMONS Returned Executed upon defendant Mutual First Federal Credit Union on 1/11/2012. (Hightower-Henne, Tracy) (Entered: 01/13/2012)
02/01/2012	6	ANSWER to Complaint 1 by Attorney Monica L. Freeman on behalf of Defendant Mutual First Federal Credit Union(Freeman, Monica) (Entered: 02/01/2012)
02/02/2012	7	SCHEDULING LETTER setting Rule 26 Meeting Report Deadline set for 3/5/2012. Please use the revised "Form 35 (Rule 26(f)) Report" posted on the court's website, www.ned.uscourts.gov/forms. Ordered by Magistrate Judge F.A. Gossett. (ARL,) (Entered: 02/02/2012)
02/02/2012	8	TEXT NOTICE REGARDING CORPORATE DISCLOSURE STATEMENT by Deputy Clerk as to Defendant Mutual First Federal Credit Union. Pursuant to Fed. R. Civ. P. 7.1, non-governmental corporate parties are required to file Corporate Disclosure Statements (Statements). The parties shall use the form Corporate Disclosure Statement, available on the Web site of the court at http://www.ned.uscourts.gov/forms/ . If you have not filed your Statement, you must do

		so within 15 days of the date of this notice. If you have already filed your Statement in this case, you are reminded to file a Supplemental Statement within a reasonable time of any change in the information that the statement requires.(GJG) (Entered: 02/02/2012)
02/15/2012	9	CORPORATE DISCLOSURE STATEMENT pursuant to Fed. R. Civ. P. 7.1 by Attorney Monica L. Freeman on behalf of Defendant Mutual First Federal Credit Union.(Freeman, Monica) (Entered: 02/15/2012)
03/05/2012	10	REPORT of Rule 26(f) Planning Meeting by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat.(Hightower-Henne, Tracy) (Entered: 03/05/2012)
03/06/2012	11	ORDER SETTING SCHEDULE FOR INITIAL PROGRESSION OF A CIVIL CASE - Counsel shall notify the undersigned magistrate judge by joint or separate letters by 5/4/2012 addressing mediation requirements. Planning Conference set for 6/4/2012 at 09:30 AM by telephone before Magistrate Judge F.A. Gossett. Counsel for plaintiff shall initiate the planning conference call to the court at 402-661-7340 on 6/4/2012. Ordered by Magistrate Judge F.A. Gossett. (ARL,) (Entered: 03/06/2012)
03/09/2012	12	REASSIGNMENT ORDER - It has come to this Court's attention that the above cases are related as defined under NEGenR 1.4(a)(4). Accordingly, Case No. 8:12CV12, Jarek Charvat, individually and on behalf of all others similarly situated, v. IDI ATM, LLC, is reassigned to Chief District Judge Laurie Smith Camp for disposition and to Magistrate Judge F. A. Gossett for judicial supervision and processing of all pretrial matters. Ordered by Chief Judge Laurie Smith Camp. (TCL) (Entered: 03/09/2012)
03/19/2012	13	MOTION to Amend Complaint 1 by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat. (Attachments: # 1 Exhibit First Amended Complaint) (Hightower-Henne, Tracy) (Entered: 03/19/2012)
03/21/2012	14	TEXT ORDER granting 13 Unopposed Motion for Leave to Amend. Plaintiff shall file his First Amended Complaint by or before 3/22/2012. Per counsels' request, an order will be entered extending the deadlines established in the initial progression order 11 .Ordered by Magistrate Judge F.A. Gossett. (LRH) (Entered: 03/21/2012)
03/21/2012	15	AMENDED COMPLAINT against Defendant Mutual First Federal Credit Union, by Attorney Tracy L. Hightower-Henne on behalf of Jarek Charvat(Hightower-Henne, Tracy) (Entered: 03/21/2012)
03/23/2012	16	AMENDED ORDER SETTING SCHEDULE FOR INITIAL PROGRESSION OF A CIVIL CASE - Counsel shall notify the undersigned magistrate judge by joint or separate letters by 5/25/2012 addressing mediation requirements. Planning Conference set for 6/18/2012 at 09:30 AM by telephone before Magistrate Judge F.A. Gossett. Counsel for plaintiff shall initiate the planning conference call to the court at 402-661-7340 on 6/18/2012. Ordered by Magistrate Judge F.A. Gossett. (ARL,) (Entered: 03/23/2012)
04/04/2012	17	ANSWER to Amended Complaint 15 by Attorney Monica L. Freeman on behalf of Defendant Mutual First Federal Credit Union(Freeman, Monica) (Entered: 04/04/2012)
04/18/2012	18	Certificate of Service of Plaintiff's Initial Disclosures by Attorney Tracy L. Hightower-

		Henne on behalf of Plaintiff Jarek Charvat.(Hightower-Henne, Tracy) (Entered: 04/18/2012)
04/23/2012	19	Certificate of Service of Initial Disclosures by Attorney Monica L. Freeman on behalf of Defendant Mutual First Federal Credit Union.(Freeman, Monica) (Entered: 04/23/2012)
06/18/2012	20	ORDER SETTING FINAL SCHEDULE FOR PROGRESSION OF A CIVIL CASE - Depositions due 2/1/2013. Pretrial Conference set for 2/11/2013 at 10:00 AM in Chambers before Magistrate Judge F.A. Gossett. Jury Trial set for 3/19/2013 at 08:30 AM in Courtroom 2, Roman L. Hruska Federal Courthouse, 111 South 18th Plaza, Omaha, NE before Chief Judge Laurie Smith Camp. Ordered by Magistrate Judge F.A. Gossett. (ARL,) (Entered: 06/18/2012)
06/18/2012	21	NOTIFICATION of Request for Video Recording by Clerk.(MLF,) (Entered: 06/18/2012)
07/02/2012	22	ORDER TO SHOW CAUSE - IT IS ORDERED that on or before July 9, 2012, the parties may file a response to this Order, showing cause, if any, as to why this action should not be dismissed for lack of standing. Ordered by Chief Judge Laurie Smith Camp. (TCL) (Entered: 07/02/2012)
07/09/2012	23	RESPONSE regarding Order to Show Cause, 22 by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat. (Attachments: # 1 Exhibit Response to Motion to Dismiss)(Hightower-Henne, Tracy) (Entered: 07/09/2012)
07/12/2012	24	ORDER - The Court lacks subject matter jurisdiction over the Plaintiff's action. The Plaintiff's Complaint is dismissed, with prejudice. Ordered by Chief Judge Laurie Smith Camp. (GJG) (Entered: 07/12/2012)
07/26/2012	25	NOTICE OF APPEAL regarding Order, Terminated Case 24 by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat. Filing fee \$ 455, receipt number 0867-2315860. (Hightower-Henne, Tracy) (Entered: 07/26/2012)
07/27/2012	26	NOTIFICATION OF APPEAL AND NOA SUPPLEMENT by Clerk to USCA regarding Notice of Appeal to USCA 25 of Order 24 . Notice of Appeal filed on 7/26/2012 by Plaintiff Jarek Charvat. (JAB) (Entered: 07/27/2012)
07/31/2012	27	MOTION for Refund of Filing Fees Paid Electronically by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat.(Hightower-Henne, Tracy) (Entered: 07/31/2012)
07/31/2012	28	SCHEDULING LETTER from USCA - 8th Circuit(12-2790) as to Notice of Appeal to USCA 25 . (Attachments: # 1 Transmittal Letter)(TCL) (Entered: 07/31/2012)
08/03/2012	29	TEXT ORDER granting Motion for Refund of Fees Paid Electronically 27 . Filing Fee in the amount of \$455.00 is refunded to the payor, receipt number 2315858. Ordered by Deputy Clerk. (DKM,) (Entered: 08/03/2012)

PACER Service Center

Transaction Receipt			
10/24/2012 03:07:44			
PACER Login:	gb3039	Client Code:	
Description:	Docket Report	Search Criteria:	8:12-cv-00011-LSC-FG3
Billable Pages:	4	Cost:	0.40

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT,)	
)	Civil Case No. 8:12-cv-11
)	
Individually and on behalf of)	
all others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	CLASS ACTION COMPLAINT
)	
MUTUAL FIRST FEDERAL,)	
CREDIT UNION,)	
)	
Defendant.)	
)	

I. JURISDICTION AND VENUE

1. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1693 *et. seq.*

2. Plaintiff’s claims asserted herein arose in this judicial district and Defendant is the operator of Automated Teller Machines (“ATM”) in this judicial district.

3. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and (c) in that this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred.

II. PARTIES

4. Plaintiff, Jarek Charvat, was and at all times relevant hereto is a citizen of the United States and a resident of Douglas County, Nebraska.

5. Defendant, Mutual First Federal Credit Union. (“Mutual First”), is a Nebraska corporation with its principle place of business in Omaha, Nebraska. Defendant regularly conducts banking business, including the operation of several ATMs, in the District of Nebraska.

6. Defendant is an ATM operator, as that term is defined by 12 C.F.R. § 205.16(a) which states: “Automated teller machine operator means any person that operates an automated teller machine at which a consumer initiates an electronic fund transfer or a balance inquiry and that does not hold the account to or from which the transfer is made, or about which the inquiry is made.”

III. STATEMENT OF FACTS

7. Plaintiff made a cash withdrawal from Defendant’s ATMs at the following location:

- (a) On or about January 3, 2012, Plaintiff made an electronic fund transfer (“EFT”) at Defendant’s ATM at 14510 F Street, Omaha, Nebraska 68144. Defendant charged Plaintiff a fee of \$2.00 in connection with the transaction.

8. At the time of the electronic transactions, Plaintiff did not maintain any accounts with Defendant.

9. At the time of the transactions, there was no notice posted “on or at” the ATM operated by Defendant apprising consumers that a fee would be charged for use of the ATM.

10. Plaintiff brings this action individually and on behalf of all others similarly situated against Defendant alleging violations of the Electronic Fund Transfer Act (“EFTA”) 15 U.S.C. § 1693 *et seq.* and its implementing regulations 12 C.F.R. § 205 *et seq.*

11. The Congressional findings and declaration of purpose regarding the EFTA are as follows:

- (a) Rights and liabilities undefined

The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions and intermediaries in electronic fund transfers undefined.

(b) Purposes

It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

15 U.S.C. § 1693.

12. Among other things, the EFTA imposes certain disclosure requirements upon operators of automated teller machines (“ATMs”).

13. 15 U.S.C. § 1693b(d)(3)(A) requires any ATM operator who imposes fees on consumers in connection with EFTs to provide notice of the fact that the fee is being imposed and the amount of the fee.¹

14. 15 U.S.C. § 1693b(d)(3)(B) identifies the location where the required notice must be posted as follows:

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such paragraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

(ii) On the screen

The notice required under clauses (i) and (ii) subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the automated teller machine, or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction....

¹ “Electronic fund transfer” is defined as “any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone....” 15 U.S.C. § 1693a(6).

15. The relevant implementing regulation, 12 C.F.R. § 205.16(c) reinforces EFTA's statutory posting requirement, mandating that the mandatory fee notice: 1) be posted in a "prominent and conspicuous location" on or at the ATM machine; and 2) "on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying the fee." 12 C.F.R. § 205.16(c)(1) and (2).

16. 15 U.S.C. § 1693b(d)(3)(C), and its implementing regulation, 12 C.F.R. 205.16(e), prohibit ATM operators from imposing a fee on a consumer unless EFTA's notice and posting requirements are followed by the ATM operator.

17. Specifically, 15 U.S.C. § 1693b(d)(3)(C) states, in relevant part:

(C) Prohibition on fees not properly disclosed and explicitly assumed by the consumer

No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless—

(i) The consumer receives such notice in accordance with subparagraph (B)...

IV. CLASS ACTION ALLEGATIONS

18. Plaintiff brings this class action on behalf of himself and all others similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

19. Plaintiff seeks to represent a class of persons to be defined as follows:

All persons who, in the twelve (12) months prior to the filing of Plaintiff's complaint, made an EFT at one of Defendant's ATM at 14510 F Street, Omaha, Nebraska 68144, and were charged a "terminal owner fee" in connection with the transaction.

20. Numerosity: The class described above is so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective class members through this class action will benefit both the parties and this Court.

21. Plaintiff is informed and believes, and thereon alleges, that there are at minimum, thousands of members of the class described above.

22. The exact size of the class and the identities of the individual members thereof are ascertainable through Defendant's records.

23. Members of the class may be notified of the pendency of this action by techniques and forms commonly used in class actions, such as by published notice, e-mail notice, website notices, first class mail, or combinations thereof, or by other methods suitable to this class and deemed necessary and/or appropriate by this Court.

24. Typicality: Plaintiff's claims are typical of the claims of the members of the class. The claims of the Plaintiff and members of the class are based on the same legal theories and arise from the same unlawful and willful conduct.

25. Plaintiff and members of the class were each consumers who used an ATM machine operated by Defendant to make an EFT or balance inquiry and were charged a terminal owner fee, notwithstanding that the posting providing notice of the fee required by EFTA "on or at" Defendant's terminals was not present.

26. Common Questions of Fact and Law: There is a well-defined community of interest and common questions of fact and law affecting members of the class.

27. The questions of fact and law common to the class predominate over questions which may affect individual members and include the following:

- a. Whether, under 15 U.S.C. § 1693b(d)(3)(A) and 12 C.F.R. 205.16, Defendant was, at all relevant times, an automated teller machine operator that imposed a fee on consumers for providing host electronic fund transfer services to those consumers;
- b. Whether Defendant complied with the notice requirements of 15 U.S.C. § 1693(d)(3)(B) and 12 C.F.R. 205.16; and,
- c. Whether Plaintiff and members of the class are entitled to statutory damages, costs and/or attorneys' fees for Defendant's acts and conduct.

28. Adequacy of Representation: Plaintiff is an adequate representative of the class because her interests do not conflict with the interests of the members of the class.

Plaintiff will fairly, adequately, and vigorously represent and protect the interests of the members of the class and has no interests antagonistic to the members of the class. Plaintiff has retained counsel who is competent and experienced in the prosecution of class action litigation.

29. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the claims of the class. While the aggregate damages which may be awarded to the members of the class are likely to be substantial, the damages suffered by the individual members of the class are relatively small. As a result, the expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each member of the class to individually seek redress for the wrongs done to them. Plaintiff does not know of any other litigation concerning this controversy already commenced by or against any member of the class. The likelihood of the individual members of the class prosecuting separate claims is remote. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each member of the class. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

V. SUBSTANTIVE VIOLATION

30. 15 U.S.C. § 1693b(d)(3)(A) provides that as a prerequisite to imposition of a usage fee upon a consumer for host transfer services, an automated teller machine operator must provide notice to the consumer consistent with subparagraph (B) of that statutory section.

31. Subparagraph (B) of 15 U.S.C. § 1693(d)(3) provides in relevant part:

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

32. In turn, subparagraph (c) of 15 U.S.C. § 1693b(d)(3) states, in relevant part: (C) Prohibition on fees not properly disclosed and explicitly assumed by the consumer

No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless—

(i) The consumer receives such notice in accordance with subparagraph (B)...

33. EFTA's statutory notice requirements are reinforced by the implementing regulations set forth at 12 C.F.R. § 205.16.

34. Defendant violated the notice requirements of EFTA in connection with providing host transfer services to Plaintiff and the Class.

35. On information and belief, the notice required by 15 U.S.C. § 1693(d)(3) and 12 C.F.R. § 205.16 was not posted at Defendant's ATM at 14510 F Street, Omaha, Nebraska, 68144 during the entire year preceding the filing of Plaintiff's complaint.

36. Defendant was prohibited from imposing any usage fee or similar fee for providing host transfer services because it failed to comply with EFTA's notice requirements.

37. 15 U.S.C. § 1693m provides that Defendant shall be liable to Plaintiff and Class for violations of 15 U.S.C. § 1693 *et seq.* in the amount of, *inter alia*, statutory damages to be determined by the Court, the costs of this action and reasonable attorneys' fees.

38. Plaintiff seeks the imposition of statutory damages, costs of suit and attorneys' fees.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the members of the class, prays for:

- a. An order certifying the class and appointing Plaintiff as the representative of the class, and appointing counsel for Plaintiff as counsel for the class;
- b. An award to Plaintiff and the members of the class of statutory damages;
- c. Payment of costs of suit;
- d. Payment of reasonable attorneys' fees; and,
- e. Such equitable and other relief as the Court may deem just and proper;
- f. Plaintiff designates Omaha, Nebraska as place of trial; and
- g. Plaintiff requests a jury trial.

DATED this 8th day of January, 2012.

Jarek Charvat, Plaintiff,

BY: /s/ Tracy Hightower-Henne
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**JAREK CHARVAT, Individually and on
behalf of all others similarly situated,**)

Plaintiff,)

v.)

**MUTUAL FIRST FEDERAL
CREDIT UNION,**)

Defendant.)

CASE NO. 8:12CV11

**ORDER TO
SHOW CAUSE**

It has come to the attention of the Court, through a related action, that the Court may lack subject-matter jurisdiction in this case. Plaintiff Jarek Charvat (“Charvat”) has not alleged an injury in fact caused by Mutual First Federal Credit Union (“Mutual First”), and the Court will direct the parties to show cause, if any, why this action should not be dismissed for lack of standing.

SUMMARY OF RELATED ACTIONS

Charvat filed four related actions alleging violations of the Electronic Fund Transfer Act (“EFTA”) 15 U.S.C. § 1693-1693r (Case Nos. 8:12CV11, 8:12CV12, 8:12CV13, 8:12CV97). In case number 8:12CV97, the defendant filed a motion to dismiss (Filing No. 7) for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1), because Charvat had not alleged an injury in fact. The Court agreed that Charvat had not alleged an injury. The facts of this action are similar and the Court finds Charvat has not alleged an injury in fact here.

STANDARD OF REVIEW

The Court is obligated to raise subject matter jurisdiction *sua sponte*. *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987). Under Federal Rule of Civil Procedure 12(b)(1), the Court has “wide discretion” to decide the process with which its jurisdiction can best be determined. *Johnson v. United States*, 534 F.3d 958, 964 (8th Cir. 2008) (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)). It “has the authority to dismiss an action for lack of subject matter jurisdiction on any one of three separate bases: ‘(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.’” *Id.* at 962 (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)); *see also Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008) (stating that “[m]otions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts”). According to Federal Rule of Civil Procedure 12(h)(3), a federal court must dismiss an action if it determines at any time it lacks subject matter jurisdiction. *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637 n.4 (8th Cir. 2003).

DISCUSSION

Three requirements constitute the “irreducible constitutional minimum” of standing, the first of which is “an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The requirement of injury in

fact is a “hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). This injury “may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing’ Of course, Art. III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.” *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). “It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). It is undisputed that Congress can create a legal right sufficient for standing under the EFTA, but Plaintiff must still allege a “distinct and palpable injury to himself.” *Warth*, 422 U.S. at 501. The issue then is whether Mutual First’s failure to give a notice to which Charvat was statutorily entitled in itself constitutes an injury in fact to Charvat. This Court concludes it does not.

Three district courts have held that when an ATM operator fails to provide a fee notice on the exterior of the ATM as required by the EFTA, the statutory violation is in itself an injury—regardless of whether the plaintiff had actual knowledge of the fee through the on-screen notice and affirmatively accepted it. *Campbell v. Hope Cmty. Credit Union*, No. 10-2649-STA, 2012 WL 423432, at *2 (W.D. Tenn. Feb. 8, 2012); *Kinder v. Dearborn Fed. Sav. Bank*, No. 10-12570, 2011 WL 6371184, at **4-5 (E.D. Mich. Dec. 20, 2011); *In re Regions Bank ATM Fee Notice Litig.*, Nos. 2:11-MD-1000, 1001, 1002, & 2202-KS-MTP, 2011 WL 4036691, at *3 (S.D. Miss. Sept. 12, 2011). The *Campbell* and *In re Regions Bank* courts both noted that the EFTA is a remedial consumer statute which should be construed broadly in favor of the consumer. *Campbell*, 2012 WL 423432, at *2; *In re*

Regions Bank, 2011 WL 4036691, at *3. These two courts then stated that the EFTA provides for the recovery of actual and statutory damages, indicating Congress's intent for private causes of action despite minimal or no actual damage. *Campbell*, 2012 WL 423432, at *2; *In re Regions Bank*, 2011 WL 4036691, at *3. In *Kinder*, the court considered the argument that the plaintiff did not suffer an injury because he had actual knowledge. *Kinder*, 2011 WL 6371184, at *2. The *Kinder* court noted that "[a]lthough this argument has some appeal, it has been rejected by at least one court." *Id.* The court then relied on the reasoning of *In re Regions Bank* and granted standing. *Id.*

These three district court opinions did not address the "hard floor" constitutional requirement of injury in *fact*. The Constitution requires more than mere injury in *law*. A plaintiff must allege an injury in *fact* that was caused by the lack of an exterior fee notice on the ATM. This Court agrees that the EFTA should be construed broadly in favor of the consumer, but the provision for actual and statutory damages in the EFTA does not automatically mean that a litigant is entitled to damages when he has alleged no injury in fact. The authorization of statutory damages is unrelated to *injury*. "An interest unrelated to injury in fact is insufficient to give a plaintiff standing." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). Here, Charvat alleges only a statutory violation of the EFTA because First Mutual failed to provide an exterior fee notice on its ATM. Charvat has not alleged an injury in fact caused by Mutual First's violation of the notice requirements, and he lacks standing to bring this action.

Accordingly,

IT IS ORDERED that on or before July 9, 2012, the parties may file a response to this Order, showing cause, if any, as to why this action should not be dismissed for lack of standing.

DATED this 2nd day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**JAREK CHARVAT, Individually and on
behalf of all others similarly situated,**)
)
)
Plaintiff,)
)
v.)
)
MUTUAL FIRST FEDERAL)
CREDIT UNION,)
)
Defendant.)

CASE NO. 8:12CV11

ORDER

For the reasons stated in this Court's Memorandum and Order of July 2, 2012 (Filing No. 15):

IT IS ORDERED:

1. The Court lacks subject matter jurisdiction over the Plaintiff's action, and
2. The Plaintiff's Complaint is dismissed, with prejudice.

DATED this 12th day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
 United States District Judge

APPEAL,CLOSED,TRIAL-OMAHA

**U.S. District Court
District of Nebraska (8 Omaha)
CIVIL DOCKET FOR CASE #: 8:12-cv-00097-LSC-FG3**

Charvat v. First National Bank of Wahoo
Assigned to: Chief Judge Laurie Smith Camp
Referred to: Magistrate Judge F.A. Gossett
Case in other court: USCA-8th Circuit, 12-02797
USDC-NE, 8:12cv11
USDC-NE, 8:12cv12
USDC-NE, 8:12cv13
Cause: 15:1692 Fair Debt Collection Act

Date Filed: 03/08/2012
Date Terminated: 07/12/2012
Jury Demand: Plaintiff
Nature of Suit: 430 Banks and Banking
Jurisdiction: Federal Question

Plaintiff

Jarek Charvat

*Individually and on behalf of all others
similarly situated*

represented by **Michael P. Lewis**
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V.

Defendant

First National Bank of Wahoo

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 Email: khartman@bairdholm.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/08/2012	1	COMPLAINT with jury demand against First National Bank of Wahoo (Filing fee \$ 350, receipt number 0867-2230210), by Attorney Tracy L. Hightower-Henne on behalf of Jarek Charvat(Hightower-Henne, Tracy) (Entered: 03/08/2012)
03/08/2012	2	Summons Requested as to First National Bank of Wahoo regarding Complaint 1 . (Hightower-Henne, Tracy) (Entered: 03/08/2012)
03/08/2012	3	TEXT NOTICE OF JUDGES ASSIGNED: Judge John M. Gerrard and Magistrate Judge Cheryl R. Zwart assigned. (TEL) (Entered: 03/08/2012)
03/08/2012	4	Summons Issued as to defendant First National Bank of Wahoo. YOU MUST PRINT YOUR ISSUED SUMMONS, WHICH ARE ATTACHED TO THIS DOCUMENT. PAPER COPIES WILL NOT BE MAILED. (TEL) (Entered: 03/08/2012)
03/13/2012	5	SUMMONS Returned Executed upon defendant First National Bank of Wahoo on 3/9/2012. (Hightower-Henne, Tracy) (Entered: 03/13/2012)
03/29/2012	6	REASSIGNMENT ORDER - It has come to this Court's attention that the above case is related to: 8:12cv11, 8:12cv12 and 8:12cv13. In the interest of judicial economy, this case is reassigned from District Judge John M. Gerrard to Chief District Judge Laurie Smith Camp for disposition and from Magistrate Judge Cheryl R. Zwart to Magistrate Judge F. A. Gossett for judicial supervision and processing of all pretrial matters. Ordered by Chief Judge Laurie Smith Camp. (MKR) (Entered: 03/29/2012)
03/30/2012	7	MOTION to Dismiss <i>For Lack of Subject Matter Jurisdiction</i> by Attorney Kenneth W. Hartman on behalf of Defendant First National Bank of Wahoo.(Hartman, Kenneth) (Entered: 03/30/2012)
03/30/2012	8	BRIEF in support of MOTION to Dismiss <i>For Lack of Subject Matter Jurisdiction</i> 7 by Attorney Kenneth W. Hartman on behalf of Defendant First National Bank of Wahoo. (Hartman, Kenneth) (Entered: 03/30/2012)
03/30/2012	9	INDEX in support of MOTION to Dismiss <i>For Lack of Subject Matter Jurisdiction</i> 7 by Attorney Kenneth W. Hartman on behalf of Defendant First National Bank of Wahoo. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Hartman, Kenneth) (Entered: 03/30/2012)
03/30/2012	10	CORPORATE DISCLOSURE STATEMENT pursuant to Fed. R. Civ. P. 7.1 identifying Corporate Parent Bank Management, Inc. for First National Bank of Wahoo. by Attorney Kenneth W. Hartman on behalf of Defendants First National Bank of Wahoo, Bank Management, Inc..(Hartman, Kenneth) (Entered: 03/30/2012)
04/20/2012	11	RESPONSE regarding MOTION to Dismiss <i>For Lack of Subject Matter Jurisdiction</i> 7 by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat.

		(Attachments: # 1 Exhibit Brief for Petitioners)(Hightower-Henne, Tracy) (Entered: 04/20/2012)
04/27/2012	12	REPLY BRIEF in support of MOTION to Dismiss <i>For Lack of Subject Matter Jurisdiction</i> 7 by Attorney Kenneth W. Hartman on behalf of Defendant First National Bank of Wahoo.(Hartman, Kenneth) (Entered: 04/27/2012)
06/04/2012	13	MEMORANDUM AND ORDER - All further proceedings in this matter are stayed pending the Supreme Court's decision in First American Financial Corp. v. Edwards, No. 10-708(cert. granted, June 20, 2011). When the Supreme Court's decision is filed, the Defendant must notify the Court of the decision by filing a notice with the Court within seven days of the date of the decision. Ordered by Chief Judge Laurie Smith Camp. (AOA) (Entered: 06/05/2012)
06/29/2012	14	NOTICE regarding Memorandum and Order, Case Stayed,, 13 <i>Notice of Supreme Court Decision</i> by Attorney Kenneth W. Hartman on behalf of Defendant First National Bank of Wahoo (Attachments: # 1 Exhibit A)(Hartman, Kenneth) (Entered: 06/29/2012)
07/02/2012	15	ORDER TO SHOW CAUSE - On or before July 9, 2012, the parties may file a response to this Order, showing cause, if any, as to why the Motion to Dismiss (Filing No. 7), filed by Defendant First National Bank of Wahoo, should not be granted. Show Cause Deadline set for 7/9/2012. Ordered by Chief Judge Laurie Smith Camp. (AOA) (Entered: 07/02/2012)
07/09/2012	16	RESPONSE regarding Order to Show Cause, 15 by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat.(Hightower-Henne, Tracy) (Entered: 07/09/2012)
07/12/2012	17	ORDER - The Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, (Filing No. 7) is granted. The Plaintiff's Complaint is dismissed, with prejudice. Ordered by Chief Judge Laurie Smith Camp. (AOA) (Entered: 07/12/2012)
07/26/2012	18	NOTICE OF APPEAL regarding Order on Motion to Dismiss 17 by Attorney Tracy L. Hightower-Henne on behalf of Plaintiff Jarek Charvat. Filing fee \$ 455, receipt number 0867-2315862. (Hightower-Henne, Tracy) (Entered: 07/26/2012)
07/27/2012	19	NOTIFICATION OF APPEAL AND NOA SUPPLEMENT by Clerk to USCA regarding Order on Motion to Dismiss 17 . Notice of Appeal filed on 7/26/2012 by Plaintiff Jarek Charvat. (MKR) (Entered: 07/27/2012)
08/01/2012	20	SCHEDULING LETTER from USCA - 8th Circuit (12-2797) as to Notice of Appeal to USCA 18 . (Attachments: # 1 Transmittal Letter) (AOA) (Entered: 08/01/2012)

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Billable Pages:	3	Cost:	0.30

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAREK CHARVAT,)	
)	Civil Case No. 8:12-cv-97
)	
Individually and on behalf of)	
all others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	CLASS ACTION COMPLAINT
)	
FIRST NATIONAL BANK,)	
OF WAHOO,)	
)	
Defendant.)	
)	

I. JURISDICTION AND VENUE

1. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1693 *et. seq.*

2. Plaintiff’s claims asserted herein arose in this judicial district and Defendant is the operator of Automated Teller Machines (“ATM”) in this judicial district.

3. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and (c) in that this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred.

II. PARTIES

4. Plaintiff, Jarek Charvat, was and at all times relevant hereto is a citizen of the United States and a resident of Douglas County, Nebraska.

5. Defendant, First National Bank of Wahoo (“First National”), is a Nebraska corporation with its principle place of business in Wahoo, Nebraska. Defendant regularly conducts banking business, including the operation of several ATMs, in the District of Nebraska.

6. Defendant is an ATM operator, as that term is defined by 12 C.F.R. § 205.16(a) which states: “Automated teller machine operator means any person that operates an automated teller machine at which a consumer initiates an electronic fund transfer or a balance inquiry and that does not hold the account to or from which the transfer is made, or about which the inquiry is made.”

III. STATEMENT OF FACTS

7. Plaintiff made a cash withdrawal from Defendant’s ATMs at the following location:

- (a) On or about January 22, 2012, Plaintiff made an electronic fund transfer (“EFT”) at Defendant’s ATM at 354 North Chestnut Street, Wahoo, Nebraska. Defendant charged Plaintiff a fee of \$2.00 in connection with the transaction.
- (b) On or about March 4, 2012, Plaintiff made an EFT at Defendant’s ATM at 354 North Chestnut Street, Wahoo, Nebraska. Defendant charged Plaintiff a fee of \$2.00 in connection with the transaction.

8. At the time of the electronic transactions, Plaintiff did not maintain any accounts with Defendant.

9. At the time of the transactions, there was no notice posted “on or at” the ATM operated by Defendant apprising consumers that a fee would be charged for use of the ATM.

10. Plaintiff brings this action individually and on behalf of all others similarly situated against Defendant alleging violations of the Electronic Fund Transfer Act (“EFTA”) 15 U.S.C. § 1693 *et seq.* and its implementing regulations 12 C.F.R. § 205 *et seq.*

11. The Congressional findings and declaration of purpose regarding the EFTA are as follows:

- (a) Rights and liabilities undefined

The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions and intermediaries in electronic fund transfers undefined.

(b) Purposes

It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

15 U.S.C. § 1693.

12. Among other things, the EFTA imposes certain disclosure requirements upon operators of automated teller machines (“ATMs”).

13. 15 U.S.C. § 1693b(d)(3)(A) requires any ATM operator who imposes fees on consumers in connection with EFTs to provide notice of the fact that the fee is being imposed and the amount of the fee.¹

14. 15 U.S.C. § 1693b(d)(3)(B) identifies the location where the required notice must be posted as follows:

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such paragraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

(ii) On the screen

¹ “Electronic fund transfer” is defined as “any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone....” 15 U.S.C. § 1693a(6).

The notice required under clauses (i) and (ii) subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the automated teller machine, or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction....

15. The relevant implementing regulation, 12 C.F.R. § 205.16(c) reinforces EFTA's statutory posting requirement, mandating that the mandatory fee notice: 1) be posted in a "prominent and conspicuous location" on or at the ATM machine; and 2) "on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying the fee." 12 C.F.R. § 205.16(c)(1) and (2).

16. 15 U.S.C. § 1693b(d)(3)(C), and its implementing regulation, 12 C.F.R. 205.16(e), prohibit ATM operators from imposing a fee on a consumer unless EFTA's notice and posting requirements are followed by the ATM operator.

17. Specifically, 15 U.S.C. § 1693b(d)(3)(C) states, in relevant part:

(C) Prohibition on fees not properly disclosed and explicitly assumed by the consumer

No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless—

(i) The consumer receives such notice in accordance with subparagraph (B)...

IV. CLASS ACTION ALLEGATIONS

18. Plaintiff brings this class action on behalf of himself and all others similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

19. Plaintiff seeks to represent a class of persons to be defined as follows:

All persons who, in the twelve (12) months prior to the filing of Plaintiff's complaint, made an EFT at Defendant's ATM at 354 North Chestnut Street, Wahoo, Nebraska and were charged a "terminal owner fee" in connection with the transaction.

20. Numerosity: The class described above is so numerous that joinder of all individual members in one action would be impracticable. The disposition of the

individual claims of the respective class members through this class action will benefit both the parties and this Court.

21. Plaintiff is informed and believes, and thereon alleges, that there are at minimum, thousands of members of the class described above.

22. The exact size of the class and the identities of the individual members thereof are ascertainable through Defendant's records.

23. Members of the class may be notified of the pendency of this action by techniques and forms commonly used in class actions, such as by published notice, e-mail notice, website notices, first class mail, or combinations thereof, or by other methods suitable to this class and deemed necessary and/or appropriate by this Court.

24. Typicality: Plaintiff's claims are typical of the claims of the members of the class. The claims of the Plaintiff and members of the class are based on the same legal theories and arise from the same unlawful and willful conduct.

25. Plaintiff and members of the class were each consumers who used an ATM machine operated by Defendant to make an EFT or balance inquiry and were charged a terminal owner fee, notwithstanding that the posting providing notice of the fee required by EFTA "on or at" Defendant's terminals was not present.

26. Common Questions of Fact and Law: There is a well-defined community of interest and common questions of fact and law affecting members of the class.

27. The questions of fact and law common to the class predominate over questions which may affect individual members and include the following:

- a. Whether, under 15 U.S.C. § 1693b(d)(3)(A) and 12 C.F.R. 205.16, Defendant was, at all relevant times, an automated teller machine operator that imposed a fee on consumers for providing host electronic fund transfer services to those consumers;
- b. Whether Defendant complied with the notice requirements of 15 U.S.C. § 1693(d)(3)(B) and 12 C.F.R. 205.16; and,

- c. Whether Plaintiff and members of the class are entitled to statutory damages, costs and/or attorneys' fees for Defendant's acts and conduct.

28. Adequacy of Representation: Plaintiff is an adequate representative of the class because her interests do not conflict with the interests of the members of the class. Plaintiff will fairly, adequately, and vigorously represent and protect the interests of the members of the class and has no interests antagonistic to the members of the class. Plaintiff has retained counsel who is competent and experienced in the prosecution of class action litigation.

29. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the claims of the class. While the aggregate damages which may be awarded to the members of the class are likely to be substantial, the damages suffered by the individual members of the class are relatively small. As a result, the expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each member of the class to individually seek redress for the wrongs done to them. Plaintiff does not know of any other litigation concerning this controversy already commenced by or against any member of the class. The likelihood of the individual members of the class prosecuting separate claims is remote. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each member of the class. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

V. SUBSTANTIVE VIOLATION

30. 15 U.S.C. § 1693b(d)(3)(A) provides that as a prerequisite to imposition of a usage fee upon a consumer for host transfer services, an automated teller machine

operator must provide notice to the consumer consistent with subparagraph (B) of that statutory section.

31. Subparagraph (B) of 15 U.S.C. § 1693(d)(3) provides in relevant part:

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

32. In turn, subparagraph (c) of 15 U.S.C. § 1693b(d)(3) states, in relevant part:

(C) Prohibition on fees not properly disclosed and explicitly assumed by the consumer

No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless—

(i) The consumer receives such notice in accordance with subparagraph (B)...

33. EFTA's statutory notice requirements are reinforced by the implementing regulations set forth at 12 C.F.R. § 205.16.

34. Defendant violated the notice requirements of EFTA in connection with providing host transfer services to Plaintiff and the Class.

35. On information and belief, the notice required by 15 U.S.C. § 1693(d)(3) and 12 C.F.R. § 205.16 was not posted at Defendant's ATM at 354 North Chestnut Street, Wahoo, Nebraska during the entire year preceding the filing of Plaintiff's complaint.

36. Defendant was prohibited from imposing any usage fee or similar fee for providing host transfer services because it failed to comply with EFTA's notice requirements.

37. 15 U.S.C. § 1693m provides that Defendant shall be liable to Plaintiff and Class for violations of 15 U.S.C. § 1693 *et seq.* in the amount of, *inter alia*, statutory damages to be determined by the Court, the costs of this action and reasonable attorneys' fees.

38. Plaintiff seeks the imposition of statutory damages, costs of suit and attorneys' fees.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the members of the class, prays for:

- a. An order certifying the class and appointing Plaintiff as the representative of the class, and appointing counsel for Plaintiff as counsel for the class;
- b. An award to Plaintiff and the members of the class of statutory damages;
- c. Payment of costs of suit;
- d. Payment of reasonable attorneys' fees; and,
- e. Such equitable and other relief as the Court may deem just and proper;
- f. Plaintiff designates Omaha, Nebraska as place of trial; and
- g. Plaintiff requests a jury trial.

DATED this 8th day of March, 2012.

Jarek Charvat, Plaintiff,

BY: /s/ Tracy Hightower-Henne
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Attorneys for Plaintiff Jarek Charvat

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**JAREK CHARVAT, Individually and on)
behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
FIRST NATIONAL BANK OF WAHOO,)
)
Defendant.)**

CASE NO. 8:12CV97

**MEMORANDUM
AND ORDER**

This matter is before the Court on Defendant’s Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) (Filing No. 7). Defendant First National Bank of Wahoo (“FNBW”) asserts that this Court has no subject matter jurisdiction over Plaintiff Jarek Charvat (“Charvat”) because Charvat has suffered no injury in fact and therefore does not have standing to bring this claim. Alternatively, FNBW requests that all further proceedings in this matter be stayed pending the United States Supreme Court’s decision in *First American Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. June 21, 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. June 20, 2011) (No. 10-708) (hereinafter referred to as “*First American*”). For the reasons discussed below, all further proceedings in this matter will be stayed pending the Supreme Court’s decision in *First American*.

FACTUAL BACKGROUND

For purposes of the pending Motion, the Court accepts as true all well-pled factual allegations in the Class Action Complaint (“Complaint”) (Filing No. 1), although the Court need not accept Charvat’s legal conclusions. The following is a summary of the allegations in the Complaint.

Charvat made two separate electronic fund transfers (“EFTs”) from FNBW’s automated teller machine (“ATM”) located at 354 North Chestnut Street, Wahoo, Nebraska, on or about January 22, 2012, and March 4, 2012. FNBW charged Charvat a fee of \$2.00 in connection with each transaction. At the time of the EFTs, there was no notice posted “on or at” the ATM apprising consumers that a fee would be charged for the use of the ATM. Charvat does not allege that he received no on-screen notice that a fee would be charged. On March 8, 2012, Charvat brought this class action against FNBW alleging violations of the Electronic Fund Transfer Act (“EFTA”) 15 U.S.C. § 1693-1693r and its implementing regulations 12 C.F.R. § 205.1-205.20. Charvat seeks statutory damages for himself and the members of the class and an award of costs and attorney fees.

The purpose of the EFTA is to define individual consumer rights. 15 U.S.C. § 1693(b). The EFTA requires any ATM operator who imposes fees on consumers in connection with EFTs to provide notice of the fact that a fee is being imposed and the amount of the fee. 15 U.S.C. § 1693b(d)(3)(A). The required notice must be posted in two places, both “on or at” the ATM, and on the screen of the ATM or, alternatively, on a paper notice issued before the transaction is completed. 15 U.S.C. § 1693b(d)(3)(B). An ATM operator is prohibited from imposing a fee on a consumer unless the EFTA’s notice requirements are followed. 15 U.S.C. § 1693b(d)(3)(C). FNBW violated the notice requirements of the EFTA, and was thus prohibited from imposing any fee on Charvat or the Class.

STANDARD OF REVIEW

A motion under Federal Rule of Civil Procedure 12(b)(1) challenges whether the Court has subject matter jurisdiction to hear the case. The party asserting jurisdiction

bears the burden of proving that jurisdiction is proper. *Great Rivers Habitat Alliance v. FEMA*, 615 F.3d 985, 988 (8th Cir. 2010). The Court, however, has “wide discretion” to decide the process with which its jurisdiction can best be determined. *Johnson v. United States*, 534 F.3d 958, 964 (8th Cir. 2008) (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)). It “has the authority to dismiss an action for lack of subject matter jurisdiction on any one of three separate bases: ‘(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.’” *Id.* at 962 (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)); see also *Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008) (stating that “[m]otions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts”). According to Federal Rule of Civil Procedure 12(h)(3), a federal court must dismiss an action if it determines at any time it lacks subject matter jurisdiction. *Harris v. P.A.M. Transp., Inc.*, 339 F.3d 635, 637 n.4 (8th Cir. 2003).

DISCUSSION

I. **Charvat did not allege an injury in fact to satisfy the constitutional minimum requirement of standing.**

Three requirements constitute the “irreducible constitutional minimum” of standing, the first of which is “an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The requirement of injury in fact is a “hard floor of Article III jurisdiction that cannot be removed by statute.” *Summers*

v. Earth Island Inst., 555 U.S. 488, 497 (2009). This injury “may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing’ Of course, Art. III’s requirement remains: the plaintiff still must allege a distinct and palpable injury to himself.” *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). “It is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). It is undisputed that Congress can create a legal right sufficient for standing under the EFTA, but Plaintiff must still allege a “distinct and palpable injury to himself.” *Warth*, 422 U.S. at 501. The issue then is whether FNBW’s failure to give a notice to which Charvat was statutorily entitled in itself constitutes an injury in fact to Charvat. This Court concludes it does not.

Three district courts have held that when an ATM operator fails to provide a fee notice on the exterior of the ATM as required by the EFTA, the statutory violation is in itself an injury—regardless of whether the plaintiff had actual knowledge of the fee through the on-screen notice and affirmatively accepted it. *Campbell v. Hope Cmty. Credit Union*, No. 10-2649-STA, 2012 WL 423432, at *2 (W.D. Tenn. Feb. 8, 2012); *Kinder v. Dearborn Fed. Sav. Bank*, No. 10-12570, 2011 WL 6371184, at **4-5 (E.D. Mich. Dec. 20, 2011); *In re Regions Bank ATM Fee Notice Litig.*, Nos. 2:11-MD-1000, 1001, 1002, & 2202-KS-MTP, 2011 WL 4036691, at *3 (S.D. Miss. Sept. 12, 2011). The *Campbell* and *In re Regions Bank* courts both noted that the EFTA is a remedial consumer statute which should be construed broadly in favor of the consumer. *Campbell*, 2012 WL 423432, at *2; *In re Regions Bank*, 2011 WL 4036691, at *3. These two courts then stated that the EFTA

provides for the recovery of actual and statutory damages, indicating Congress's intent for private causes of action despite minimal or no actual damage. *Campbell*, 2012 WL 423432, at *2; *In re Regions Bank*, 2011 WL 4036691, at *3. In *Kinder*, the court considered the argument that the plaintiff did not suffer an injury because he had actual knowledge. *Kinder*, 2011 WL 6371184, at *2. The *Kinder* court noted that “[a]lthough this argument has some appeal, it has been rejected by at least one court.” *Id.* The court then relied on the reasoning of *In re Regions Bank* and granted standing. *Id.*

These three district court opinions did not address the “hard floor” constitutional requirement of injury in *fact*. The Constitution requires more than mere injury in *law*. A plaintiff must allege an injury in *fact* that was caused by the lack of an exterior fee notice on the ATM. This Court agrees that the EFTA should be construed broadly in favor of the consumer, but the provision for actual and statutory damages in the EFTA does not automatically mean that a litigant is entitled to damages when he has alleged no injury in fact. The authorization of statutory damages is unrelated to *injury*. “An interest unrelated to injury in fact is insufficient to give a plaintiff standing.” *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). Here, Charvat alleges only a statutory violation of the EFTA because FNBW failed to provide an exterior fee notice on its ATM. Charvat has not alleged an injury in fact caused by FNBW's violation of the notice requirements, and he will not be accorded standing.

Charvat cites *White v. Arlen Realty & Dev. Corp.*, 540 F.2d 645 (4th Cir. 1975), in support of his position that a statutory violation of the EFTA is in itself an injury creating standing. In *White*, a credit provider violated the disclosure requirements of the Truth in

Lending Act (“TILA”), 15 U.S.C. §1637(b)(2), by failing to give a brief identification of the charges on the plaintiff’s charge card statement. *Id.* at 647-48. The court held that even though the plaintiff had actual knowledge of the purchases he had made on his card, he had a “right to specific information”– a description of his purchases on the charge card statement. *Id.* at 649-50. Charvat cites this case as rejecting the proposition that “a consumer who already knows of the information not provided by the defendant cannot claim to be injured.” (Filing No. 11, at 5.) In *White*, however, it was not the plaintiff’s actual knowledge of his purchases that was at issue. The plaintiff suffered injury in fact, although he had actual knowledge of the purchases he had made on his charge card, because he did not know what the creditor *claimed* to be his purchases. The *White* case demonstrates the constitutional requirement that an injury in fact, which may be caused by a statutory violation, must be *alleged*. Here, Charvat has not alleged an injury in fact caused by FNBW’s failure to provide notice of the fee on the exterior of its ATM.

Charvat also cites cases where “testers” have been granted standing to bring suit under statutorily created rights to certain information, despite not relying on the information or being misled by false information. Charvat first cites *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), wherein the court held that “testers” paid to determine housing discrimination had standing even though they had no actual intent to purchase property and were not misled by the false information provided by realty companies, as Congress had created a statutory right for purchasers to be free from such misrepresentations. *Id.* at 1526-27 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982)). Charvat then points to “testers” who have been held to have standing to sue for non-compliant

transportation facilities under the American with Disabilities Act, even though they have no intention of using public transportation themselves. *Tandy v. City of Wichita*, 380 F.3d 1277, 1285-88 (10th Cir. 2004). Finally, Charvat points to employment “testers” that have been held to have standing to enforce non-discrimination statutes, because Congress has mandated that every individual receive equal employment *opportunity*, even though the “testers” had no intention of taking the jobs for which they applied. *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 298-300 (7th Cir. 2000). It is true that like Charvat, the “tester” plaintiffs did not rely on the information they received and did not personally allege an injury that operated to their detriment. The information presented to the “testers,” however, was deficient in that it was false, misleading, or delayed. Charvat does not allege that FNBW’s failure to provide a fee notice “on or at” the ATM was in any way false or misleading. The fee information was available to him through the on-screen notice. The cases that Charvat cites do not change the fact that he must allege an *injury in fact* caused by FNBW’s failure to comply with the EFTA notice requirements.

Charvat suggests that if this Court determines that a statutory violation of the notice requirements of the EFTA is not in itself an injury, the Court would be stripping the statute of a requirement purposefully imposed by Congress. He notes that Congress may have discerned that one notification was not enough, or that unscrupulous ATM operators should be prevented from luring consumers under the false presumption that no transaction fee would be incurred. This Court does not question Congress’s purpose for imposing the notice requirements. Instead, this Court is respectful of the constitutional minimum requirement of standing that a plaintiff must have to proceed in an action before the Court. This limitation on judicial power “is no mere formality: it ‘defines with respect to

the Judicial Branch the idea of separation of powers on which the federal government is founded.” *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1361 (D.C. Cir. 2012) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1983)).

II. The federal government did not assign its “federal interests” to private actors to enforce the notice requirements of the EFTA.

In an attempt to circumvent Article III’s standing requirement, Charvat alleges that the federal government assigned its “federal interests” to private actors to enforce the notice requirements of the EFTA. This argument is rejected for two reasons. First, the EFTA is not a *qui tam* statute that clearly assigns the federal government’s standing to private actors; and second, the purpose of the EFTA is to protect consumer interests and not federal interests, thus there are no “federal interests” to assign.

Charvat develops his “assigned standing” argument by relying on *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), wherein the court held that a *qui tam* plaintiff who had suffered no injury had standing to bring suit on behalf of the United States because he was a partial assignee of the United States’ interests under the False Claims Act (“FCA”). *Id.* at 773. The FCA is a *qui tam* statute, meaning that it allows an injury to the federal government—in this case fraud committed against the federal government—to confer standing upon a private actor so that he may enforce the federal government’s interests. *Id.* at 768-69. Unlike the FCA, the EFTA is not a *qui tam* statute. The few *qui tam* statutes still in effect today make it clear within the statute that an individual may sue on the federal government’s behalf. *Id.* at 802 n.1. There is no language in the EFTA suggesting that a private actor may sue on the federal government’s behalf. Although Charvat cites the provision for damages in the EFTA statute as evidence

of Congress's intent to encourage private actors to bring suit to enforce the statute, the authorization of damages does not make the EFTA a *qui tam* statute. *Vermont Agency* takes care to note that an interest unrelated to injury in fact, like the bounty a *qui tam* plaintiff would recover by statute after a successful suit (or the statutory damages Charvat would receive), is not enough to create standing. *Id.* at 772. Instead, a *qui tam* plaintiff has standing because the federal government assigned its claims to private actors. *Id.* at 773. Moreover, the purpose of the EFTA is not to protect "federal interests" but rather to protect consumer interests. 15 U.S.C. § 1693(b). The EFTA provides that a person is liable under 15 U.S.C. § 1693m(a) for failing to comply with any provision of the Act "with respect to any consumer." Because the federal government has no federal interests in the EFTA to assign to private actors, the federal government could not have assigned its standing.

Charvat's allegations suggest his interest appears to be solely in the enforcement of the EFTA statute. Unless Charvat alleges an injury in fact, he does not have *standing* to enforce the statute. Where the government has not assigned its claims to private citizens, only the United States Attorney General may sue to redress the injury to the Government. *City of Kansas City v. Yarco Co., Inc.*, 625 F.3d 1038, 1041 (8th Cir. 2010). Therefore, FNBW is entitled to dismissal of this action because Charvat has not alleged an injury in fact.

III. The standing issue before the Supreme Court in *First American* has bearing on the standing issue presented here.

The issue before the Supreme Court in *First Am. Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. June 21, 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. June 20, 2011) (No. 10-

708) is similar to the standing issue presented here, and the Supreme Court's decision will be relevant to this motion. It is possible that the pending decision of the Supreme Court in *First American* may alter this Court's understanding of the constitutional minimum requirement of standing. Therefore, it is in the best interest of Charvat that all further proceedings in this matter to be stayed pending the Supreme Court's decision.

In *First American*, plaintiff/respondent Edwards sued defendant/petitioner First American Financial Corporation, a title insurance underwriter, for failing to disclose a "kickback" to a title agency in which First American had an ownership interest. Edwards's claim is that she was injured because First American's ownership interest violated the mandatory disclosure requirements of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(a). *First Am. Fin. Corp.*, 610 F.3d at 515, 517. Edwards had no complaint about the price or quality of the title insurance she received and alleged no other harm than a statutory violation of RESPA. Petition for Writ of Certiorari, *First Am. Fin. Corp. V. Edwards*, 2010 WL 4876485, at *1 (No. 10-708).

First American argues that Edwards did not suffer an injury in fact because Edwards would have been charged the same fee for title insurance by any provider and she made no claim that any alleged violation of RESPA operated to her detriment. *Id.* at *8. The fees for title insurance in Ohio are set by state law, so disclosing the affiliation to the title agency would not have changed the fee Edwards was charged. *Id.* at **5-6. First American raised the question of "whether a plaintiff can establish standing to sue under RESPA merely by alleging a statutory violation, without any claim that the violation affected the settlement

services rendered.” *Id.* at *11. The Supreme Court granted certiorari to hear the following question presented:

Does such a purchaser have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to “Cases” and “Controversies” and which this Court has interpreted to require the plaintiff to “have suffered an ‘injury in fact,’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

Id. at *i; *First Am. Fin. Corp.*, 131 S. Ct. at 3022 (granting petition for writ of certiorari to the above question).

Charvat contends *First American* has no bearing on the standing issue here because there is not a competitive market in Ohio for title insurance fees and the disclosure of the ownership interest in the title agency would not have affected the fee. In this case, unlike *First American*, a competitive market exists for ATM fees. Charvat believes the presence of a competitive market distinguishes the standing question here because the EFTA mandates the fee notice requirements so that consumers can make an informed choice of whether to make an EFT.

The presence of a competitive market does not change the relevance of the question presented in *First American* and its applicability to the standing issue here. In both *First American* and here, the question remains whether a violation of a statute, without an alleged injury in fact, is in itself sufficient to create standing under Article III. For this reason, and because it is in Charvat’s interest that his action not be dismissed by this Court for lack of subject matter jurisdiction pending the Supreme Court’s decision in *First American*, this Court will grant FNBW’s request to stay the proceedings in this matter pending the Supreme Court’s decision.

IT IS ORDERED:

1. All further proceedings in this matter are stayed pending the Supreme Court's decision in *First American Financial Corp. v. Edwards*, No. 10-708 (cert. granted, June 20, 2011); and
2. When the Supreme Court's decision is filed, the Defendant must notify the Court of the decision by filing a notice with the Court within seven days of the date of the decision.

DATED this 4th day of June, 2012.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**JAREK CHARVAT, Individually and on)
behalf of all others similarly situated,)
)
Plaintiff,)
)
v.)
)
FIRST NATIONAL BANK OF WAHOO,)
)
Defendant.)**

CASE NO. 8:12CV97

**ORDER TO
SHOW CAUSE**

This matter is before the Court on Defendant’s Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) (Filing No. 7). The Motion was stayed (Filing No. 13) pending the Supreme Court’s decision in *First American Fin. Corp. v. Edwards*, 610 F.3d (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (U.S. June 20, 2011) (No. 10-708). On June 28, 2012, the Supreme Court dismissed the writ of certiorari as improvidently granted. *First Am. Fin. Corp. v. Edwards*, 2012 WL 2427807 (U.S. June 28, 2012 (No. 10-708)). Because the Supreme Court did not address the issue of standing related to this case, the Court’s analysis in the June 4, 2012, Order is not altered. In the absence of good cause shown, the Motion will be granted for the reasons set forth in the Court’s June 4, 2012, Order (Filing No. 13). The Court directs the parties to show cause, if any, on or before July 9, 2012, why the Motion to Dismiss should not be granted.

Accordingly,

IT IS ORDERED that on or before July 9, 2012, the parties may file a response to this Order, showing cause, if any, as to why the Motion to Dismiss (Filing No. 7), filed by Defendant First National Bank of Wahoo, should not be granted.

DATED this 2nd day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

**JAREK CHARVAT, Individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

FIRST NATIONAL BANK OF WAHOO,

Defendant.

CASE NO. 8:12CV97

ORDER

For the reasons stated in this Court’s Memorandum and Order of June 4, 2012
(Filing No. 13):

IT IS ORDERED:

1. The Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction,
(Filing No. 7) is granted; and
2. The Plaintiff’s Complaint is dismissed, with prejudice.

DATED this 12th day of July, 2012.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, I caused the foregoing to be sent by U.S. Mail to the Office of the Clerk and to the following counsel:

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