No. 101288-8

SUPREME COURT
OF THE STATE OF WASHINGTON

KARISSA FEYEN, on behalf of herself and all others similarly situated,

Respondent,

v.

SPOKANE TEACHERS CREDIT UNION,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

Respondent Karissa Feyen's complaint plainly alleged petitioner Spokane Teacher's Credit Union's practice of imposing overdraft fees, after approving a credit union member's debit card transaction and reducing the funds in the member's account to pay for it, was unsupported by its account documents and an unfair or deceptive practice. Applying the settled standard of review under CR 12(b)(6), the Court of Appeals reinstated her claims based on the specific language of STCU's contract of adhesion, which misleads members as to the circumstances under which STCU charges members overdraft fees after authorizing debit card purchases based on a positive account balance.

The Court of Appeals never addressed the preemption arguments raised in the petition because STCU never argued them on appeal. The decision does not conflict with any other decisions of this Court or of the

Court of Appeals, published or unpublished, and presents no issue of constitutional magnitude or substantial public concern. RAP 13.4(b). The Court should deny review.

B. Restatement of Issues Presented for Review.

1. Did the Court of Appeals correctly determine under the liberal pleading standard of CR 12(b)(6) that a jury could find STCU's overdraft practices are not supported by the confusing, deceptive, and ambiguous language in its Account Documents?

2. Should this Court consider STCU's federal preemption arguments that were not addressed by the Court of Appeals because STCU failed to raise them?

3. Does federal law preempt a member's claim that their credit union's assessment of overdraft fees constitutes a breach of contract, or an unfair and deceptive practice under the Consumer Protection Act?

C. Restatement of the Case.

This case does not present the morality tale of reckless depositors spending more money than they have saved that STCU spins in its petition, but whether STCU's adhesion contracts put its members on notice that STCU charges overdraft fees when members have sufficient money in their account to pay a debit card transaction. Feyen's complaint alleged that STCU deviated from the specific representations and promises made to its members to maximize STCU's overdraft fee revenue, charging members overdraft fees on transactions that it had authorized based on a positive balance in the member's account at the time of purchase.

STCU selectively quotes from the Account Documents, ignoring the language that misleads credit union members, and asserts (as it did in the Court of Appeals) hypothetical facts that are not contained in the complaint or plain from the incorporated contract. The

Court of Appeals accurately summarized the allegations in the complaint, the incorporated Account Documents, and the procedural history:

1. STCU promised it would charge overdraft fees only if a member's balance was insufficient to pay a transaction authorized by STCU at the time of purchase.

Respondent Karissa Feyen uses a debit card that is issued by and linked to her account with petitioner Spokane Teacher's Credit Union. (CP 5, 8) STCU defines its relationship with its members using three separate form documents—a Membership and Account Agreement, a Privilege Pay Agreement, and an Overdraft Disclosure (the "Account Documents"). (CP 37-48) STCU does not dispute that it both "drafted the documents and retains the right to change the language in the documents whenever convenient for it." (Op. 2)

STCU's contention, that the "contract provides that STCU will determine whether a debit card transaction is

subject to an overdraft fee," not when a member swipes their debit card and STCU authorizes the transaction, but "only when the item is 'presented for payment' and paid by STCU" (Pet. 17), is not supported by a fair reading of the Account Documents or the allegations in the complaint. Read together, the Account Documents lead a member to believe, as respondent alleged, that STCU determines the sufficiency of their account balance to cover a transaction—and thus whether an overdraft has occurred—when STCU authorizes the transaction at the time of purchase.

Indeed, as the Court of Appeals noted, Section 12 of the Account Agreement, primarily relied upon by STCU, contains contradictory and undefined language. Section 12 initially states that an overdraft occurs only when a customer does not have sufficient "available funds" "to cover" a particular purchase:

> If on any day the *available funds* in your checking account are not sufficient *to cover* checks and other items posted to your account, those checks and items will be handled in

> accordance with our overdraft procedures and the terms of this Agreement.

(CP 44, Membership and Account Agreement, § 12, "Overdrafts," emphasis added)

The referenced Overdraft Disclosure and Privilege Pay Agreement tells members that a their "available balance" will fluctuate throughout any given day to account for purchases, even if they are still "pending":

> Your available balance is the money in your account after deducting all outstanding debits, ATM withdrawals, and other pending electronic charges. It does not include outstanding checks, online bill payments, or pre-authorized debits such as health club dues or auto insurance premiums.
>
> Available balance is a gauge of how much money is in your account at any moment in time. It can fluctuate throughout the day as debit card purchases, direct deposits, transfers, and so on are posted to your account.

(CP 38)

Because a customer's available balance will fluctuate to account for ongoing purchases, the Account Documents

warn that "[o]verdrafts may occur at any time," but that the determination is made at the time of a transaction:

> Most overdrafts are accidental, but with the use of debit and other electronic transactions, an overdraft can happen at any time. It's not like the old days when all the deposits and charges were added up at the end of the day to determine if there was an overdraft. Today, an overdraft can occur at any hour that your "available balance" drops below zero.

(CP 37) In the same vein, STCU tells its members that an overdraft occurs "when you spend more than you have in your account." (CP 37)

Consistent with this language, the Privilege Pay Agreement repeats that "[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway" (CP 40), and confirms that STCU assesses whether a member has sufficient available funds at the time of purchase, authorizing overdraft transactions at its discretion and warning that unauthorized transactions will be "declined":

> STCU pays overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction. If we do not authorize and pay an overdraft, *your transaction will be declined*.
>
> We will not authorize and pay overdrafts for the following types of transactions unless you request to "Opt-in" in writing:
>
> - Debit Card Transactions

(CP 40, emphasis added)

Thus, STCU tells its members that an overdraft occurs when "the *available* funds in your checking account are not sufficient to cover checks and other items posted to your account" (CP 44) (emphasis added), that overdrafts will not be determined "at the end of the day" (CP 37), that "available balance is the money in [the] account after deducting *all outstanding debits*" including "*pending electronic charges*," and thus operates as "a gauge of how much money is in your account *at any moment in time*" (CP 38, emphasis added), that authorized transactions will

be paid, and that that unauthorized transactions will be "declined." (CP 40)

Ignoring these terms, STCU relies on a single sentence of its Account Agreement that inconsistently tells members that STCU determines the sufficiency of a customer's funds to pay a transaction not when authorized, but "at the time a check or item is presented":

> The Credit Union's determination of an insufficient account balance is made at the time the check or item is presented to us, which may be later than the time you conduct the transaction.

(CP 44, ¶ 12) However, the next sentence tells members that STCU pays debit card transactions, "in the chronological order they are received." (CP 44-45)

The Court of Appeals noted the confusion engendered by the STCU's Account Documents, which do not differentiate between the term "available balance," which can "fluctuate throughout the day" (CP 38), and the term "available funds" which must be "sufficient to cover

checks and other items posted to your account" to avoid overdraft charges. (CP 44, Op. 5) STCU also does not distinguish between "the timing of when debits are settled," the time "an item is presented to us," and the "chronological order they are received," or explain whether these terms are synonymous. (CP 44-45, Op. 5)

2. STCU charges its members overdraft fee for debit card purchases even when a customer's checking account contains adequate funds to cover an authorized transaction.

Respondent Karissa Feyen has a personal checking account with STCU. (CP 5) Like many other STCU members, Ms. Feyen uses a debit card issued by STCU to pay for goods and services directly from her checking account. (CP 21, 30)

Feyen alleged STCU members' debit card transactions occur in two steps: first, STCU authorizes the payment at the time it occurs, adjusting a member's available balance in real time to reflect purchases the

instant they are made. Once a member swipes her debit card to make a purchase, STCU confirms there are sufficient funds in the member's account and authorizes the payment, instantly subtracting the amount of the purchase from the member's available balance. (CP 8, 11)

STCU disputes that it sets aside or places a "hold" on sufficient funds to cover the transaction, as alleged in respondent's complaint. But this fact necessarily follows from its contractual representation that STCU immediately reduces a member's "available balance" by deducting all "outstanding debits, ATM withdrawals, and other pending electronic charges" at the time of the purchase (CP 8-9, 38); *see also* CP 37 ("overdrafts can occur at any time"), and that an overdraft occurs only when the "available funds in your checking account are not sufficient to cover checks and other items posted to your account." (CP 44)

The second phase occurs after the initial purchase, when the transaction "settle[s]." STCU then transfers the

funds from the member's account to the merchant. (CP 9, 11) What STCU does not disclose is that even though it has at the time of purchase deducted from its member's account sufficient funds to pay a transaction, STCU nonetheless charges its members an overdraft fee at the time of settlement if subsequent intervening transactions further reduce the account's available balance. These transactions are referred to as "Authorize Positive, Purportedly Settle Negative" transactions (APPSN transactions). (CP 8)

The Court of Appeals posited a hypothetical in which a member who as sufficient available funds to pay a transaction nevertheless may incur an overdraft fee. STCU authorizes a transaction, based on a positive balance, with Merchant A, deducting the funds necessary to cover that transaction. But if that transaction "settles"—i.e., when STCU transfers the funds to Merchant A—after a subsequent transaction with Merchant B causes a negative

available balance, STCU charges an overdraft fee for *both* transactions, even though the customer had sufficient funds to cover the transaction with Merchant A and STCU authorized the payment at the time of purchase. (CP 8-11) In other words, while the purchase from Merchant A did not "overdraw" the member's account, STCU will still charge an overdraft fee if that purchase "settles" after a subsequent purchase and the accompanying overdraft fee results in a negative balance. (Op. 12-13; CP 25)

3. The Court of Appeals reversed the trial court's dismissal under CR 12(b)(6) of Feyen's claims for breach of contract, breach of the duty of good faith and violation of the CPA.

Feyen brought this action alleging that STCU's "authorize positive/settle negative" practice contravenes the parties' contract, violates the duty of good faith and constitutes an unfair or deceptive practice under the Consumer Protection Act, RCW ch. 19.86. (CP 20-45) The

trial court dismissed her claims on STCU's motion under CR 12(b)(6).

The Court of Appeals reversed, holding that the complaint adequately alleged that "language in the account documents misleads members about the true nature of STCU's practices" (Op. 8), that "Karissa Feyen sufficiently pleads causes of action for breach of contract and violation of the implied duty of good faith" (Op. 14), and that her allegation that "STCU imposes its deceptive contract language on hundreds, if not thousands of consumers" supported a CPA claim. (Op. 14)

D. Argument for Denial of Review.

1. The Court of Appeals properly applied CR 12(b)(6)'s standard in holding that the complaint properly alleged practices that are inconsistent with STCU's confusing, ambiguous and deceptive Account Documents.

STCU's petition is premised on the erroneous contention that the allegations in Feyen's complaint are inconsistent with, and refuted by, STCU's Account

Documents. To the contrary, the Court of Appeals relied on the confusing and (at a minimum) ambiguous language in STCU's contract of adhesion that STCU foisted upon its members to hold that the complaint adequately alleged claims challenging STCU's practice of charging an overdraft fee after authorizing a transaction based on a member's positive account balance and immediately reducing a member's balance to account for it. Its decision fully comports with this Court's precedent interpreting ambiguous language in an adhesion contract against the drafter and requiring the court to accept as true all allegations in a complaint that is challenged under CR 12(b)(6).

STCU does not contend that the Court of Appeals incorrectly enunciated the liberal standard for assessing a complaint's allegations under CR 12(b)(6). The Court's recitation of those standards (Op. 10-11) comports with established law: "The superior court and this court grant

such motions sparingly, with care, and only in the unusual case in which the plaintiff's allegations show on the face of the complaint and insuperable bar to relief." (Op. 10, citing *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998) (dismissal under CR 12(b)(6) appropriate "only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery"), *cert. denied*, 525 U.S. 1171 (1999); *see* Pet. 18). *Accord, P.E. Sys., LLC v. CPI Corp.*, 176 Wn. 2d 198, 211-12, ¶31, 289 P.3d 638 (2012) (reiterating liberal standard and holding Court of Appeals erred in determining enforceability and breach of contract under CR 12(c)) (Pet. 18-19) The Court of Appeals expressly held, as STCU argues in its petition, that the court "need not deem the complaint's legal conclusions as true." (Op. 11; Pet. 19)

Similarly, STCU does not take issue with the Court of Appeals' reliance on hypotheticals (including one posited by STCU during argument) to conclude that STCU fails to

disclose its practice of charging overdraft fees on transactions it has authorized based on a member's positive account balance. In particular, STCU does not dispute its practice of charging overdraft fees on an authorized transaction that later settles negative based on a subsequent reduction in the member's balance for an overdraft fee on a subsequent transaction, or Feyen's contention that STCU reaps millions of dollars in fees from

such APPSN transactions.[1] While intending to demonstrate the reasonableness of its practice, STCU instead posits competing far-fetched hypotheticals that lack any basis in the real world.[2]

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[1] STCU does take issue with the Court of Appeals' reliance on the Consumer Finance Protection Bureau's warning to credit unions to refrain from misleading disclosures, but incorrectly claims CFPB was concerned only with "***changes*** to how a credit union assesses fees." (Pet. 31, emphasis in original) Not so. The CFPB warns that overdraft disclosures can "create[] the misimpression that the institutions would not charge an overdraft fee" when "authorization of the transaction did not push the customer's available balance into overdraft status," and that assessing overdraft charges "in a manner inconsistent with the overall net impression created by the disclosures" in those contracts amounted to a "deceptive" and "unfair" business practice. CFPB, *Supervisory Highlights,* 9 (Winter 2015), available at: https://bit.ly/31bZOra. The CFPB continues to take action against banks charging "surprise" overdraft fees. *CFPB Orders Regions Bank to Pay $191 Million for Illegal Surprise Overdraft Fees* (Sept. 28, 2022), available at https://bit.ly/3VFALny.

[2] For instance, STCU posits the absurd scenario of an STCU member with a $100 balance who pays for a $99 dinner using a debit card, and then "leaves a $1,000 tip—knowingly overdrawing her account—without consequence." (Pet. 16)

As the Court of Appeals correctly observed, the adequacy of a plaintiff's allegations for purposes of CR 12(b)(6) does not turn on the reasonableness of a *defendant's* hypotheticals in seeking dismissal. "[A]ny hypothetical situation conceivably raised by the complaint defeats a 12(b)(6) motion if it is legally sufficient to support plaintiff's claim. . . . [T]here is no reason why 'the 'hypothetical' situation should not be that which the *complaining party* contends actually exists.'" *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978), quoting *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 298, n.2, 545 P.2d 13 (1975).

STCU's assertion that the Court of Appeals nonetheless "misinterpreted" the CR 12(b)(6) standard is grounded in snippets of the panel's questions during oral argument rather than the decision itself. (Pet. 18) When STCU does cite the Opinion, it quotes from the court's "Facts" section summarizing the allegations in Feyen's

complaint, rather than the dispositive portion of the decision, arguing that STCU's Account Documents refute Feyen's contention that when STCU "authorize[s] a debit card transaction, it would then supposedly 'sequester' and 'segregate funds from the account.'" (Pet. 20, quoting Op. 6, 12)

But STCU conceded below that upon authorizing a member's transaction, it places a "hold" on the account that immediately "impacts the member's available balance." (Resp. Br. 7) And, notwithstanding STCU's hyperbole, the Court of Appeals did not hold that STCU was obligated to set aside "sequestered funds . . . in a lockbox" so that they remain "untouchable." (Pet. 23) It held that Feyen's complaint adequately alleged that STCU's Account Documents do not fairly disclose its profitable practice of charging multiple overdraft fees, including an overdraft fee on the very transaction it has authorized,

which resulted in a reduction of a customer's positive balance. (Op. 12-14)

STCU's recitation of other portions of its Account Documents do not negate the allegations in the complaint or the contractual language that would lead a reasonable credit union member to believe that STCU's promises to reduce a member's positive balance by the amount of an authorized transaction do not support its practice of assessing an overdraft fee on that transaction. At best those conflicting provisions raise an ambiguity that must be resolved against STCU, the drafter of its members' adhesion contracts. *See Adler v. Fred Lind Manor,* 153 Wn.2d 331, 355, 103 P.3d 773 (2004) ("[A]ny ambiguity between these arguably conflicting provisions is resolved against the drafter"); *McKasson v. Johnson*, 178 Wn. App. 422, 429-30, ¶ 15, 315 P.3d 1138 (2013) (construing adhesion contract against drafting party that had stronger bargaining position).

As the Court of Appeals noted, STCU does not "inform the member whether the act and timing of an item being presented is the same as the act and timing of the credit union first receiving notice of the debit transaction." (Op. 3) STCU's members could reasonably conclude that an overdraft is determined when a transaction is "presented" for authorization because STCU never explains to its members how "a check or item is presented" or when it occurs.

The Court of Appeals correctly held that Feyen's complaint stated a valid cause of action for breach of STCU's contract and, by using discretionary authority to assess overdraft fees, for breach of the implied duty of good faith and fair dealing. Similarly, STCU's practice of assessing overdraft fees on APSN transactions in the face of its contrary disclosures stated a valid claim under the CPA. *See Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 78, ¶ 42, 170 P.3d 10 (2007)

(telecom company's billing practices were deceptive because invoices failed to properly label surcharges). The Court of Appeals' reversal of the dismissal of this action presents no issue for review.

2. The Court of Appeals decision turns on idiosyncratic language in STCU's own Account Documents that is not present in any of the other non-binding decisions it cites.

STCU cannot satisfy any of the criteria of RAP 13.4(b). The decision below is not contrary to an unpublished Division Three decision. RAP 13.4(b)(2). And the inapposite non-Washington authority cited in its petition raises no issue of substantial public interest under RAP 13.4(b)(4).

STCU's contention that this decision conflicts with *Silvey v. Numerica Credit Union*, No. 38047-5-III, 2022 WL 3209419 (Aug. 9, 2022) (unpublished) for purposes of RAP 13.4(b)(2) is particularly misplaced. At issue in *Silvey* was the adequacy of a different credit union's disclosure,

using different language, that it would "assess overdraft and NSDF fees on the basis of a member's ledger balance, not their available balance." *Silvey*, 2022 WL 3209419, at *9. The *Silvey* court held that the specific account documents did not support the plaintiff's distinct (and different) claims in that case.

Here, by contrast, the court cited ambiguous and deceptive contractual language (Op. 3-5) to hold that Feyen's complaint adequately alleged that STCU does not inform its members that a member's "two charges create two overdrafts and two overdraft fees even though the credit union member possessed sufficient funds in the account to cover one of the two charges." (Op. 13)

The only common element that this case shares with *Silvey* is that they are both consumer class actions against credit unions. STCU cannot create a "conflict with a *published* decision of the Court of Appeals" under RAP 13.4(b)(2) (emphasis added) by citing an *unpublished*

decision, addressing a different issue under different contract language.[3]

Neither does STCU's moralistic plea to stem the work of "interest groups" allegedly responsible for a tide of class action lawsuits on behalf of consumers who recklessly "spent more money than they had" raise any issue of substantial public interest under RAP 13.4(b)(4). (Pet. 1, 6, 26) STCU's string cites of "overdraft cases pending in state courts," without discussing what, if anything, they may have in common with this decision, does not raise any issue of concern to Washington citizens, its financial institutions or anyone else. (Pet. 6)

What STCU does not disclose is that many courts (as well as the CFPB) have found deceptive the very "authorize

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[3] STCU does not cite to any portion of the Court of Appeals decision but instead quotes from the appellant's motion to reconsider in *Silvey*, and argues that the Court should grant review under RAP 13.4(b)(2) based on the respondent's pending motion to publish this unpublished decision.

positive/settle negative" practices allegedly undertaken by STCU here, denying motions to dismiss similar claims based on ambiguous contract language that, like STCU's Account Documents, fail to disclose that the credit union will impose overdraft fees after authorizing the transaction based on a member's positive balance at the time it

occurred.[4] And the fact that some courts in other jurisdictions may have also granted motions to dismiss similar claims under Rule 12(b)(6), shows only that

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[4] *See, e.g., Roberts v. Capital One, N.A.,* 719 F. Appx. 33 (2nd Cir. 2017); *Hash v. First Fin. Bancorp*, No. 1:20-CV-1321 RLM-MJD, 2021 WL 859736 (S.D. Ind. Mar. 8, 2021); *Gardner v. Flagstar Bank, FSB*, No. 20-CV-12061, 2021 WL 3772866 (E.D. Mich. Aug. 23, 2021); *Varga v. Am. Airlines Fed. Credit Union,* No. CV 20-4380 DSF (KSX), 2020 WL 8881747 (C.D. Cal. Dec. 1, 2020); *Lloyd v. Navy Fed. Credit Union*, No. 17-CV-1280-BAS-RBB, 2018 WL 1757609 (S.D. Cal. April 12, 2018); *Kelly v. Cmty. Bank, N.A.*, No. 819CV919MADCFH, 2020 WL 777463 (N.D.N.Y. Feb. 18, 2020); *Lussaro v. Ocean Fin. Fed. Credit Union,* 456 F.Supp.3d 474 (E.D.N.Y 2020); *Precision Roofing of N. Fla. Inc. v. Centerstate Bank*, No. 3:20-CV-352-J-39JRK, 2021 WL 3036354 (M.D. Fla. Feb. 22, 2021); *Hinton v. Atlantic Union Bank*, No. 3:20CV651, 2020 WL 9348205 (E.D. Va. Nov. 2, 2020); *see also, Davidson v. First Fin. Bank*, No. 2019 CV 2633 (Ohio Sup. Ct. June 5, 2020) (CP 155-57); *Darty v. Scott Credit Union*, No. 19L0793 (Ill. Cir. Ct. June 24, 2020) (CP 131-47); *Vocaty v. Great Lakes Credit Union,* No. 19L727 (Ill. Cir. Ct. June 3, 2020) (CP 149-53); *Glass v. Delta Cmty. Credit Union*, No. 2019 CV 317322 (Ga. Sup. Ct., Dec. 8, 2020) (CP 160-77); *Dominique v. Desert Fin. Credit Union*, No. CV 2020-053959 (Ariz. Sup. Ct. Jan. 27, 2021) (CP 180-91); *Moose v. Allegacy Fed. Credit Union*, No. 20 CVS 4279, 2021 WL 1790713 (N.C. Sup. Ct. May 5, 2021) (all unpublished authorities cited per GR 14.1).

different courts may apply the principles of contract interpretation to determine the meaning of idiosyncratic contract terms differently in different cases.

3. STCU's federal preemption argument, raised for the first time in its petition, presents no grounds for review.

STCU's federal preemption argument similarly presents no grounds for review because it was never raised below and because it is, in any event, without merit.

The Court of Appeals did not address the federal preemption issue raised in STCU's petition for the simple reason that STCU failed to raise the issue in the Court of Appeals. "This court will not consider issues that were not raised in the Court of Appeals." *In re Tobin,* 165 Wn.2d 172, 175, n.1, 196 P.3d 670 (2008); *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188 n. 5, 94 P.3d 952 (2004). Even were STCU's single mention of the term "preemption" in a

footnote adequate to preserve the issue,[5] the Court of Appeals decision presents no issue of federal preemption for this Court to review.

In any event, federal laws governing financial institutions do not preempt claims under state consumer protection statutes of general application, state contract or quasi-contractual law. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 533, 129 S. Ct. 2710, 174 L. Ed. 2d 464 (2009). Consumer protection claims based on affirmative and misleading statements in account contracts do no more than incidentally impact an institution's banking activities and are not preempted. *See McCurry v. Chevy*

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[5] In a footnote to its Brief of Respondent, STCU attempted to incorporate by reference a preemption argument made, but not addressed, in the trial court. (Resp. Br. 4) This Court will not allow parties to incorporate by reference arguments raised only in their trial court briefing and will deem such issues abandoned on appeal. *U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n,* 134 Wn.2d 74, 111-12, 949 P.2d 1337 (1997).

Chase Bank, FSB, 169 Wn.2d 96, 105, ¶ 17, 233 P.3d 861 (2010) (rejecting argument that unfair and deceptive practice claim brought against bank under the CPA was barred by preemption to the extent it is a misrepresentation stemming from the contract).[6]

The Court of Appeals properly applied CR 12(b)(6) in holding that Feyen presented a meritorious claim for breach of contract, breach of the duty of good faith and violation of the CPA based on the language of STCU's Account Documents and the allegations of the complaint. *See Tenore,* 136 Wn.2d at 330 (reversing 12(b)(6) dismissal on preemption grounds of claim alleging telephone

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[6] *Accord, Roy v. ESL Fed. Credit Union,* 19-CV-6122-FPG, 2020 WL 5849297, at *11 (W.D.N.Y. Sept. 30, 2020); *Gutierrez v. Wells Fargo Bank, NA*, 704 F.3d 712, 726-28 (9th Cir. 2012); *Smallwood v. Sovereign Bank, F.S.B.*, No. 11-cv-87, 2012 WL 243744 (N.D. W.Va. Jan. 25, 2012); *In re HSBC Bank, USA, N.A.*, 1 F. Supp. 3d 34, 48 (E.D.N.Y. 2014); *New Mexico v. Capital One Bank (USA) N.A.*, 980 F. Supp. 2d 1314, 1333 (D.N.M. 2013) (all unpublished authorities cited per GR 14.1).

carrier's misleading disclosures). Even were a preemption issue presented by the decision below, it does not merit this Court's review.

E. Conclusion.

This Court should deny review.

I certify that this brief is in 14-point Georgia font and contains 4,616 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 27th day of October, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 27, 2022, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 27th day of October, 2022.

/s/ Eliana C. Belenky
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SMITH GOODFRIEND, PS

October 27, 2022 - 3:14 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,288-8
Appellate Court Case Title:	Karissa Feyen v. Spokane Teachers Credit Union
Superior Court Case Number:	20-2-03072-9

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