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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

ELEVATE FEDERAL CREDIT UNION Plaintiff, v. ELEVATIONS CREDIT UNION Defendant.	Case No. 1:20-cv-00028-DAK **COMPLAINT** Honorable Dale A. Kimball

Plaintiff Elevate Federal Credit Union ("Plaintiff" or "Elevate"), by and through counsel, for its complaint against Elevations Credit Union ("Defendant"), alleges as follows:

NATURE OF ACTION AND RELIEF SOUGHT

1. This is an action under the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*, for a declaratory judgment of non-infringement of Defendant's alleged trademarks. Plaintiff seeks a declaration that its use of its marks ELEVATE FEDERAL CREDIT UNION, ELEVATE

CREDIT UNION, and ELEVATE ("Plaintiff's Marks") does not infringe on Defendant's claimed rights in its trademarks.

2. This action arises out of Defendant's claims that Plaintiffs' Marks infringe on its claimed marks.

3. Plaintiff is the owner of trademark registrations for Plaintiffs' Marks, copies of which are attached as Exhibit A.

PARTIES

4. Plaintiff is a Utah-based credit union with its principal place of business at 1023 Medical Drive, Brigham City, Utah 84302.

5. Upon information and belief, Defendant is a Colorado nonprofit corporation with its principal place of business at 2960 Diagonal Highway, Boulder, Colorado 80301.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1338. The claims alleged in this Complaint arise under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Lanham Act, 15 U.S.C. §§ 1052 and 1125, *et seq*.

7. This Court has personal jurisdiction over Defendant because Defendant has established minimum contacts with this forum.

8. Venue is proper in this District under 28 U.S.C. § 1391(b) and (c) because a substantial part of the events giving rise to Plaintiff's claims occurred in this District or because the Defendant is subject to personal jurisdiction in this District.

9. An actual case or controversy exists between the parties. Defendant has repeatedly threatened to take action against Plaintiff, has asserted that Plaintiff is engaging in

acts of trademark infringement and unfair competition, and has demanded that Plaintiff immediately cease and desist from using Plaintiff's Marks.

GENERAL ALLEGATIONS

10. Plaintiff is a small, local, Utah-based credit union that has been in operation in since 1954.

11. Plaintiff began its operations in Box Elder County, Utah, under the name Intermountain Indian School Credit Union. In 1978, the name was changed to Box Elder County Federal Credit Union.

12. Since 2015, its business has expanded to include operations in three counties in Northern Utah with branches in Brigham City, Utah and Garland, Utah.

13. Plaintiff only has three branches: two in Box Elder County and one in Cache County, Utah.

14. To better reflect its growth, beginning in or around 2018, Plaintiff began a rebranding campaign, which, among other things, included changing its name to "Elevate Credit Union" (the "Rebranding").

15. In conjunction with the Rebranding, Plaintiff acted in good faith in selecting and adopting the tradename "Elevate Credit Union."

16. Plaintiff sought prior permission on January 30, 2018, from the National Credit Union Association ("NCUA"), the entity that approves and regulates all credit unions, to change its name to Elevate Federal Credit Union.

17. Following the NCUA approval process, on February 28, 2018, Plaintiff received a certificate of resolution from the NCUA granting Plaintiff permission to use the name Elevate Federal Credit Union and reserving the name for Plaintiff.

18. On December 17, 2019, the NCUA officially changed Plaintiff's name to Elevate Federal Credit Union, without objection, despite NCUA's full knowledge of the existence of Elevations Credit Union.

19. NCUA does not approve a name for a credit union that it believes is too similar in name or membership to another credit union.

20. Based on NCUA's approval, Plaintiff understood that there would be no legal issues with its Rebranding.

21. In addition, over the last year, Plaintiff has publicly announced its Rebranding on numerous occasions, including via published notification of its Rebranding in the preeminent, nationwide trade journal for credit unions, "Credit Unions Today", on at least five occasions since April 2019.

22. Elevate received no objection from Defendant and no notice of any confusion or concern with its name change.

23. In the last two years, Plaintiff has invested and incurred substantial costs and effort in Rebranding to "Elevate Credit Union." It has rebranded and replaced all of its signage, advertising, marketing materials, financial products and credit cards, applications, company information, mailings, website, social media, mobile apps, blog, office materials such as business cards, envelopes, and letterhead, as well as updates with its core processor and other vendors. Plaintiff has also expended a tremendous amount of time and effort informing its members and

the community of the rebranding and building consumer recognition and good will in the Plaintiff's Marks.

24. Although Plaintiff believes that Defendant has known of the Rebranding for nearly a year, given the prominent public announcements in the principal credit union trade journal, Defendant waited until December 11, 2019 to object to Plaintiff's Rebranding and demand that it cease all such efforts.

25. By then, Plaintiff's Rebranding was already irreversible. It no longer was authorized to do business as Box Elder County Federal Credit Union and can only do business as Elevate Credit Union, per the rules and regulations of NCUA.

Defendant's Demands

26. Upon information and belief, Defendant began operating as the University of Colorado Federal Credit Union in 1953.

27. Upon information and belief, Defendant subsequently changed its name to Elevations Credit Union.

28. Upon information and belief, Defendant only has credit union branches in northern Colorado, with thirteen branches clustered in suburbs and towns north of Denver.

29. Upon information and belief, Defendant has no branches in Utah and does not specifically advertise in Utah or target new members in Utah.

30. Defendant is not authorized to operate as a credit union in Utah

31. Defendant is not registered to do business in Utah, and Plaintiff is not registered to do business in Colorado.

32. Defendant claims trademark rights in the marks ELEVATIONS and ELEVATIONS CREDIT UNION for use with credit union services ("Defendant's Marks").

33. On December 11, 2019, two years after Plaintiff first announced its Rebranding and name change, Defendant sent a letter to Plaintiff, claiming that Plaintiff's Marks infringed Defendants' Marks.

34. Plaintiff, through legal counsel, responded to Defendant's letter, explaining in detail why the marks were not confusingly similar and there would be no likelihood of confusion between the marks.

35. The marks do not sound alike, do not have the same appearance, and do not have the same meaning.

36. The only common element between the marks is the phrase "credit union," which merely describes the credit union services offered under the marks.

37. Plaintiff's Marks contain the distinctive term "elevate," and Defendant's Marks contain the distinctive term "elevations."

38. The term "elevate" and the term "elevations" do not have the same meaning, appearance, sound, or commercial impression.

39. Indeed, the U.S. Patent & Trademark Office ("USPTO") has repeatedly approved marks for registration that are used in connection with identical or related goods and services despite the fact that the only nondescriptive term in each mark is "elevate" or "elevations" and found no likelihood of confusion between such marks. For example:

a. The USPTO found no likelihood of confusion between Defendant's Marks and the mark NOTRE DAME FCU ELEVATE (Reg. No. 5020137), despite the fact

that both marks were used in connection with credit union services. The only distinctive feature of the marks was the term "elevate" in the '137 registration and the term "elevations" in Defendant's marks. *See* attached Exhibit B.

b. The USPTO found no likelihood of confusion between the mark ELEVATE REAL ESTATE GROUP (Reg. No. 3940897) and the mark ELEVATION REAL ESTATE GROUP (Ser. No. 88176991), despite the fact that both marks were to be used in connection with identical real estate development services. *See* attached Exhibit C.

c. There are coexisting federal trademark registrations for the mark ELEVATION PARTNERS (Reg. No. 3093993) and the mark ELEVATE (Ser. No. 87209388), despite both marks being used for related investment services and the term "partners" being merely descriptive. *See* attached Exhibit D.

d. There are coexisting registrations for the mark ELEVATE PAYMENTS (Reg. No. 5898554) on the one hand and for the marks ELEVATION PAYMENTS (Reg. No. 5495268) and ELEVATION (Reg. No. 5495267) on the other hand, despite all being used in connection with electronic credit card payments. *See* attached Exhibit E.

e. There is a current registration for the mark ELEVATE MORTGAGE GROUP (Reg. No. 5549866) that coexists with registrations for Defendant's Marks despite the fact that all are registered for use with mortgage lending services. *See* attached Exhibit F.

40. In short, the USPTO has repeatedly concluded that a mark containing the word "elevate" as the only distinctive element would not create a likelihood of confusion with a mark containing the term "elevations" or "elevation" as the only distinctive element, even when the marks are used in connection with identical or closely related goods or services.

41. Plaintiff's Marks similarly would not create a likelihood of confusion with Defendant's Marks.

42. Plaintiff is unaware of any actual confusion by consumers with Defendant as a result of its use of Plaintiff's Marks.

43. Defendant has not asserted any actual confusion between the marks and, upon information and belief, there has been no actual confusion.

44. Defendant only operates in several counties in northern Colorado, and Plaintiff only operates in three small rural counties in northern Utah.

45. Plaintiff and Defendant's respective channels of trade, geographical markets, membership, and consumer base are not the same and their target markets and members are not the same.

46. Potential members of credit unions exercise great care in selecting their financial institutions.

47. There are literally dozens of companies using marks that contain the terms "elevation," "elevations," "elevate," "elevated," and "elevating" as the dominant or often only nondescriptive element of their respective marks.

48. Those marks identify goods and services identical to, overlapping, or related to those offered under Defendant's Marks and Plaintiff's Marks.

49. Defendant's continue to assert that Plaintiff's Marks infringe Defendant's Marks.

50. To resolve this ongoing dispute, Plaintiff's therefore seek a judicial declaration that Plaintiff's Marks do not infringe Defendant's Marks.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment of No Trademark Infringement and No Unfair Competition)

51. Plaintiff repeats and realleges the allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

52. Defendant claims that Plaintiff's use of Plaintiff's Marks constitutes trademark infringement and unfair competition and has demanded that Plaintiff cease using Plaintiff's Marks.

53. An actual, present, and justiciable controversy exists between Plaintiff and Defendant concerning Plaintiff's use of Plaintiff's Marks.

54. Plaintiff use of Plaintiff's Marks to identify its credit union services would not create a likelihood of confusion with Defendants' Marks.

55. Plaintiff therefore seeks a declaratory judgment from this Court that Plaintiff's use of Plaintiff's Marks to identify its credit union services does not infringe or unfairly compete with Defendant's Marks under federal, state, or common law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment in its favor as follows:

a. declaring that Plaintiff's use of Plaintiff's Marks to identify its credit union services does not infringe Defendants' Marks under federal, state, or common law;

b. awarding Plaintiff its costs, expenses and attorneys' fees in this action; and

c. awarding such other further relief to which Plaintiff may be entitled as a matter of law or equity, or which the Court deems to be just and proper.

DATED this 4th day of March, 2020.

FABIAN VANCOTT

/s/ Nicole M. Deforge
Nicole M. Deforge
Matthew S. Brahana
Kirsten R. Allen

Attorneys for Plaintiff