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6 Attorneys for Defendant
FRONTWAVE CREDIT UNION
7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 ELAINE WARD-HOWIE, on behalf
11 of herself and all others similarly
12 situated,

13 Plaintiff,

14 v.

15 FRONTWAVE CREDIT UNION,
16 Defendant.
17

Case No. '22CV0890 BTM JLB

**DEFENDANT FRONTWAVE CREDIT
UNION'S NOTICE OF REMOVAL**

[From the Superior Court of California,
County of San Diego, Case No. 37-
2022-00016328-CU-BC-CTL]

*[Filed concurrently with Declaration of
Stuart M. Richter]*

Complaint filed: April 29, 2022
Action Removed: June 17, 2022

1 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that pursuant to 28 U.S.C §§ 1332(d)(2), 1441, 1446,
3 and 1453, defendant Frontwave Credit Union (“Frontwave”) removes to the United
4 States District Court for the Southern District of California, the state court action
5 described below. Removal is based on the grounds discussed below.

6 **PROCEDURAL BACKGROUND**

7 1. On April 29, 2022, plaintiff Elaine Ward-Howie (“Plaintiff”) filed a
8 Class Action Complaint against Frontwave in the Superior Court for the State of
9 California, County of San Diego (the “State Court Action”). The Complaint was
10 captioned *Elaine Ward-Howie v. Frontwave Credit Union*, Case No. 37-2022-
11 00016328-CU-BC-CTL, and was assigned to the Honorable Katherine Bacal.

12 2. Plaintiff asserts two claims for relief on her own behalf and on behalf
13 of the putative class: (1) breach of contract, including breach of the implied
14 covenant of good faith and fair dealing; and (2) violation of California’s Unfair
15 Competition Law (“UCL”).

16 3. Plaintiff served Frontwave with the Summons, Complaint, and other
17 case-opening documents on May 27, 2022.

18 4. At the time of this removal, Frontwave has not answered or otherwise
19 responded to the Complaint. No further proceedings have occurred in the state court
20 action.

21 **THE CASE IS REMOVABLE**

22 5. This Court has original jurisdiction pursuant to the Class Action
23 Fairness Act of 2005 (“CAFA”). *See* 28 U.S.C. § 1332(d).

24 6. CAFA grants federal courts discretion to exercise diversity jurisdiction
25 over class actions if: (a) the putative class exceeds more than 100 class members
26 (*id.* § 1332(d)(5)(B)); (b) any member of the proposed class is a citizen of a state
27 different from any defendant (*i.e.*, minimal diversity exists) (*id.* § 1332(d)(2)(A));
28 and (c) the amount in controversy exceeds \$5 million in aggregate (*id.* §

1 1332(d)(2),(6)). As set forth below, this action satisfies each of the three
2 requirements.

3 **A. The Purported Class Exceeds More Than 100 Class Members**

4 7. Plaintiff purports to bring a class action under California state law.
5 Compl. ¶ 64 (“Plaintiff brings this action on his [*sic*] own behalf and on behalf of
6 all others similarly situated.”). This case qualifies as a “class action.” 28 U.S.C. §
7 1453(a); *id.* § 1332(d)(1)(B) (a class action is “any civil action filed under Rule 23
8 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial
9 procedure authorizing an action to be brought by 1 or more representative persons
10 as a class action”).

11 8. As required by 28 U.S.C. § 1332(d)(5)(B), it is more likely than not
12 that there are more than 100 class members in Plaintiff’s proposed class. Plaintiff’s
13 putative class consists of “[a]ll Frontwave Credit Union checking account holders
14 who, during the applicable statute of limitations, were charged OD Fees on APPSN
15 Transactions on a Frontwave checking account.” Compl. ¶ 64. Plaintiff admits that
16 “the Class consist[s] of thousands of members or more.” *Id.* ¶ 68. Moreover, a 4-
17 year statute of limitations applies to both Plaintiff’s contract and UCL claims. *See*
18 Cal. Civ. Proc. Code § 337(a) (four-year statute of limitations for “[a]n action upon
19 any contract, obligation or liability founded upon an instrument in writing”); *Harris*
20 *v. Home Depot U.S.A., Inc.*, No. 15-01058, 2016 WL 8114188, at *1 (N.D. Cal.
21 Jan. 20, 2016) (“UCL claims are always subject to a four-year statute of
22 limitations”). Thus, based on the proposed class definition and the allegations made
23 in the Complaint, the putative class is comprised of more than 100 class members.

24 **B. Minimal Diversity Exists**

25 9. The citizenship of putative class members, named and unnamed, is
26 considered when determining minimal diversity under CAFA. 28 U.S.C. §
27 1332(d)(1)(D). If any class member is diverse from any defendant, minimal
28 diversity is met. 28 U.S.C. § 1332(d)(2). The requisite diversity exists here.

1 10. Frontwave is a California state-chartered credit union with its principal
2 place of business in Oceanside, California. Compl. ¶ 8. Therefore, for purposes of
3 determining jurisdiction, Frontwave is a California citizen. *See Wells Fargo Bank,*
4 *N.A. v. Comments Sols., LLC*, No. 19-77, 2019 WL 6873257, at *2 (D.N.J. Dec. 17,
5 2019) (“First Legacy is a state-chartered credit union, chartered in the state of North
6 Carolina, with its principal place of business within that state, rendering it a citizen
7 of North Carolina.”); 28 U.S.C. § 1332(c)(1) (stating that a corporation is a citizen
8 of every state where it is incorporated and where it has its principal place of
9 business).

10 11. Plaintiff alleges that she is a “citizen [] of Schertz, Texas.” Compl. ¶ 7.

11 12. Plaintiff seeks to represent a proposed class comprised of “[a]ll
12 Frontwave Credit Union checking accountholders,” not just those in California.
13 Compl. ¶ 64. Frontwave’s members are predominantly Marines or Marine families
14 and they reside throughout the United States, including in Arizona, Illinois, Indiana,
15 Nevada, Oregon, Texas, and Washington. Thus, it is more likely than not, that some
16 putative class members are of a different citizenship than Frontwave and their
17 inclusion also creates the minimal diversity needed under CAFA.

18 **C. The Amount in Controversy Exceeds \$5,000,000**

19 13. To establish jurisdiction under CAFA, the amount in controversy must
20 exceed \$5,000,000, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2). “When
21 the plaintiff’s complaint does not state the amount in controversy, the defendant’s
22 notice of removal may do so.” *Dart Cherokee Basin Operating Co., LLC v. Owens*,
23 574 U.S. 81, 84 (2014). “[A] defendant’s notice of removal need include only a
24 plausible allegation that the amount in controversy exceeds the jurisdictional
25 threshold.” *Id.* at 89; *see also id.* at 84 (“A statement ‘short and plain’ need not
26 contain evidentiary submissions.”).

27 14. The Complaint seeks relief of an unspecified monetary value,
28 including:

- 1 a. Awarding Plaintiff and the Class actual damages, statutory damages,
- 2 punitive and exemplary damages, and restitution;
- 3 b. Attorneys' fees;
- 4 c. Enjoining Frontwave from engaging in the overdraft practices outlined
- 5 in the Complaint;
- 6 d. Compelling disgorgement of the alleged ill-gotten gains derived from
- 7 Frontwave's misconduct; and
- 8 e. Awarding such other relief as the Court deems just and proper.

9 Compl. ¶¶ 82, 93; *id.*, Prayer for Relief (c)-(j).

10 15. Plaintiff's request for actual damages and restitution is equivalent to
11 the allegedly unlawful overdraft fees assessed to Plaintiff and the Class by
12 Frontwave over the past four years. *Id.* ¶¶ 82, 92-93. Based on Frontwave's overall
13 overdraft fee revenue for the alleged class period and based on damages
14 calculations from other cases by data analytics consultants, the APPSN fee damages
15 could be could be as much as \$2.77 million. *See* Declaration of Stuart M. Richter
16 ("Richter Decl.") ¶ 3.

17 16. Plaintiff's request for injunctive/declaratory relief, if granted, will
18 prevent Frontwave from charging the allegedly improper fees in the future. Thus, if
19 APPSN damages for the past four years could be \$2.77 million, Frontwave will lose
20 an equivalent amount of revenue for the next four years should an injunction as
21 requested by Plaintiff be issued by this Court. The "value" of this injunctive relief
22 must also be considered as part of the amount in controversy. *See In re Ford Motor*
23 *Co./Citibank (S. Dakota), N.A.*, 264 F.3d 952, 958 (9th Cir. 2001) (noting "where
24 the value of a plaintiff's potential recovery (in this case, a maximum of \$3,500) is
25 below the jurisdictional amount, but the potential cost to the defendant of
26 complying with the injunction exceeds that amount, it is the latter that represents
27 the amount in controversy for jurisdictional purposes"); *Bayol v. Zipcar, Inc.*, No.
28 14- 02483, 2015 WL 4931756, at *10 (N.D. Cal. Aug. 18, 2015) ("a defendant's

1 aggregate cost of compliance with an injunction is appropriately counted toward the
2 amount in controversy” for CAFA jurisdiction).

3 17. Plaintiff’s request for reasonable attorneys’ fees is also considered in
4 determining the amount in controversy. *See Guglielmino v. McKee Foods Corp.*,
5 506 F.3d 696, 700 (9th Cir. 2007) (noting that “Section 1332(a)’s amount-in-
6 controversy required excludes only ‘interest and costs’ and therefore includes
7 attorneys’ fees”). If this case is prosecuted through trial, Plaintiff’s counsel’s fees
8 will be at least \$1 million. *See Richter Decl.* ¶ 5.

9 18. Thus, although Plaintiff does request a specific amount of damages,
10 given Plaintiff’s claims, the alleged nationwide class, and the broad request for
11 relief, the amount in controversy exceeds \$5,000,000, exclusive of interest and
12 costs. Accordingly, the amount in controversy is satisfied in this case. *Lewis v.*
13 *Verizon Communs., Inc.*, 627 F.3d 395, 397 (9th Cir. 2010) (noting removing
14 defendant need only show “that the potential damages could exceed the
15 jurisdictional amount”).

16 **THE REQUIREMENTS FOR REMOVAL HAVE BEEN MET**

17 **A. Removal Is Timely**

18 19. This Notice is timely under 28 U.S.C. § 1446(b). Frontwave was
19 served with the Complaint on May 27, 2022. “Receipt” of the complaint means
20 proper service as required by state law, not mere possession. *See Murphy Bros, Inc.*
21 *v. Michettis Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999). This Notice is filed
22 on June 17, 2022, well within the 30-day deadline provided by 28 U.S.C. § 1446(b).

23 **B. Venue Is Proper**

24 20. Venue is proper in the United States District Court for the Southern
25 District of California, as this is the District and division embracing the place where
26 the State Court Action is pending (*i.e.*, San Diego County).

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C. Supporting Documents and Notice

21. Frontwave has complied with 28 U.S.C. § 1446(a) by attaching hereto as **Exhibits A-G**, all process, pleadings, and orders received in the State Court Action.

22. Concurrently with the filing of this Notice, Frontwave will give written notice to all adverse parties and will file a copy of this Notice with the clerk of the Superior Court of the State of California in and for the County of San Diego. *See* 28 U.S.C. § 1446(d).

D. Non-Waiver of Defenses

23. By removing this action Frontwave does not admit any of the allegations in Plaintiff’s Complaint.

24. Frontwave does not waive, and expressly preserves, all objections, defenses, and exceptions authorized by law, including without limitation, those permitted pursuant to Rules 4 and 12 of the Federal Rules of Civil Procedure.

WHEREFORE, Frontwave prays that the above action, formerly pending against it in the Superior Court for the State of California, County of San Diego, be removed to this Court.

Respectfully submitted,

Dated: June 17, 2022

KATTEN MUCHIN ROSENMAN LLP
Stuart M. Richter
Camille A. Brooks

By: /s/ Stuart M. Richter

Attorneys for Defendant FRONTWAVE
CREDIT UNION

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Elaine Ward-Howie
(b) County of Residence of First Listed Plaintiff
(c) Attorneys (Firm Name, Address, and Telephone Number)
Sophia Goren Gold; Kaliel Gold PLLC; 950 Gilman St., Ste. 200, Berkeley, CA 94710; (202) 350-4783

DEFENDANTS
Frontwave Credit Union
County of Residence of First Listed Defendant
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys (If Known)
Stuart Richter, Katten Muchin Rosenman LLP, 2029 Century Park East, Ste. 2600, Los Angeles, CA 90067; (310) 788-4400

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)
1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
PTF DEF
Citizen of This State 1 X 1
Citizen of Another State X 2 2
Citizen or Subject of a Foreign Country 3 3
Incorporated or Principal Place of Business In This State 4 X 4
Incorporated and Principal Place of Business In Another State 5 5
Foreign Nation 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes codes like 110 Insurance, 210 Land Condemnation, 422 Appeal, etc.

V. ORIGIN (Place an "X" in One Box Only)
1 Original Proceeding
X 2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC 1332(d)(2); 28 USC 1441; 28 USC 1446; 28 USC 1453
Brief description of cause:
Putative class action removed under CAFA; claims for breach of contract and violation of California's Unfair Competition Law

VII. REQUESTED IN COMPLAINT:
CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND \$ Damages & Declaratory
CHECK YES only if demanded in complaint:
JURY DEMAND: X Yes No

VIII. RELATED CASE(S) IF ANY
(See instructions):
JUDGE
DOCKET NUMBER

DATE June 17, 2022
SIGNATURE OF ATTORNEY OF RECORD /s/ Stuart M. Richter

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

EXHIBIT A

1 Sophia Goren Gold (SBN 307971)
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4 Berkeley, California 94710
5 Telephone: (202) 350-4783
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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
04/29/2022 at 04:32:18 PM
Clerk of the Superior Court
By Carolina Miranda, Deputy Clerk

37-2022-00016328-CU-BC-CTL

13 *Counsel for Plaintiff and Proposed Class*

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF SAN DIEGO, HALL OF JUSTICE**

16 ELAINE WARD-HOWIE, on behalf of herself
17 and all others similarly situated,

18 Plaintiff,

19 vs.

20 FRONTWAVE CREDIT UNION,

21 Defendant.

Case No.

CLASS ACTION COMPLAINT

22 Plaintiff Elaine Ward-Howie (“Plaintiff”), on behalf of herself and all persons similarly
23 situated, alleges the following based on personal knowledge as to allegations regarding Plaintiff and
24 on information and belief as to other allegations:

25 **INTRODUCTION**

26 1. This is a civil action seeking monetary damages, restitution and declaratory relief from
27 Defendant, Frontwave Credit Union (“FCU” or the “Credit Union”), arising from the unfair and
28 unconscionable assessment and collection of overdraft fees (“OD Fees”) on APPSN Transactions
(described below).

2. These practices breach contractual promises made in FCU’s adhesion contracts.

1 3. In plain, clear, and simple language, the checking account contract documents
2 discussing OD Fees promise that FCU will only charge OD Fees on transactions where there are
3 insufficient funds to cover them.

4 4. As happened to Plaintiff, however, FCU charges OD Fees even when there are
5 sufficient funds to cover a debit card transaction.

6 5. FCU's customers have been injured by FCU's improper practices to the tune of
7 millions of dollars bilked from their accounts in violation of their agreements with FCU.

8 6. On behalf of herself and the "Class" as defined below, Plaintiff seeks damages and
9 restitution for Defendant's violations as set forth more fully below.

10 **PARTIES**

11 7. Plaintiff is a citizen and resident of Schertz, Texas and an FCU checking account
12 holder.

13 8. FCU is a state-chartered credit union with its headquarters and principal place of
14 business located in Oceanside, California. Among other things, FCU is engaged in the business of
15 providing retail banking services to consumers, including Plaintiff and members of the putative
16 classes, which includes the issuance of debit cards for use by its customers in conjunction with their
17 checking accounts. FCU operates banking centers, and thus conducts business, throughout California,
18 including in this district.

19 **JURISDICTION AND VENUE**

20 9. This Court has jurisdiction over this matter because the amount in controversy exceeds
21 \$25,000

22 10. Venue is proper in this District pursuant to CCP § 395(a).

23 11. Defendant regularly and systematically provides retail banking services throughout
24 the State of California, including in this county, and provides retail banking services to its customers,
25 including members of the putative Class. As such, it is subject to the personal jurisdiction of this
26 Court.

27 ///

28 ///

1 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

2 **A. FCU CHARGES OD FEES ON APPSN TRANSACTIONS**

3 12. Plaintiff has a checking account with FCU.

4 13. FCU issues debit cards to its checking account customers, including Plaintiff, which
5 allows its customers to have electronic access to their checking accounts for purchases, payments,
6 withdrawals, and other electronic debit transactions.

7 14. Pursuant to its Account Agreement, FCU charges fees for debit card transactions that
8 purportedly result in an overdraft.

9 15. Plaintiff FCU brings this cause of action challenging FCU’s practice of charging OD
10 Fees on what are referred to in this complaint as “Authorize Positive, Purportedly Settle Negative
11 Transactions” (“APPSN Transactions”).

12 16. Here’s how it works: at the moment debit card transactions are authorized on an
13 account with positive funds to cover the transaction, FCU immediately reduces accountholders’
14 checking accounts for the amount of the purchase, sets aside funds in a checking account to cover
15 that transaction, and as a result, the accountholder’s “available balance” reflects that subtracted
16 amount. Therefore, customers’ accounts will always have sufficient available funds to cover these
17 transactions because FCU has already sequestered these funds for payment.

18 17. However, FCU still assesses crippling OD Fees on many of these transactions and
19 misrepresents its practices in its Account Agreement (defined below).

20 18. Despite putting aside sufficient available funds for debit card transactions at the time
21 those transactions are authorized, FCU later assesses OD Fees on those same transactions when they
22 purportedly settle days later into a negative balance. These types of transactions are APPSN
23 Transactions.

24 19. FCU maintains a running account balance in real time, tracking funds accountholders
25 have for immediate use. This running account balance is adjusted, in real-time, to account for debit
26 card transactions at the precise instance they are made. When a customer makes a purchase with a
27 debit card, FCU sequesters the funds needed to pay the transaction, subtracting the dollar amount of
28 the transaction from the customer’s available balance. Such funds are not available for any other use

1 by the accountholder, and such funds are specifically associated with a given debit card transaction.

2 20. That means when any subsequent, intervening transactions are initiated on a checking
3 account, they are compared against an account balance that has already been reduced to account for
4 any earlier debit card transactions. This means that many subsequent transactions incur OD Fees due
5 to the unavailability of the funds sequestered for those debit card transactions.

6 21. 21. Still, despite keeping those held funds off-limits for other transactions, FCU
7 improperly charges OD Fees on those APPSN Transactions, even though the APPSN Transactions
8 always have sufficient available funds to be covered.

9 22. Indeed, the Consumer Financial Protection Bureau (“CFPB”) has expressed concern
10 with this very issue, flatly calling the practice “unfair” and/or “deceptive” when:

11 A financial institution authorized an electronic transaction, which reduced a
12 customer’s available balance but did not result in an overdraft at the time of
13 authorization; settlement of a subsequent unrelated transaction that further lowered
14 the customer’s available balance and pushed the account into overdraft status; and
15 when the original electronic transaction was later presented for settlement, because
16 of the intervening transaction and overdraft fee, the electronic transaction also
17 posted as an overdraft and an additional overdraft fee was charged. Because such
18 fees caused harm to consumers, one or more supervised entities were found to have
19 acted unfairly when they charged fees in the manner described above. Consumers
20 likely had no reason to anticipate this practice, which was not appropriately
21 disclosed. They therefore could not reasonably avoid incurring the overdraft fees
22 charged. Consistent with the deception findings summarized above, examiners
23 found that the failure to properly disclose the practice of charging overdraft fees in
24 these circumstances was deceptive. At one or more institutions, examiners found
25 deceptive practices relating to the disclosure of overdraft processing logic for
26 electronic transactions. Examiners noted that these disclosures created a
misimpression that the institutions would not charge an overdraft fee with respect
to an electronic transaction if the authorization of the transaction did not push the
customer’s available balance into overdraft status. But the institutions assessed
overdraft fees for electronic transactions in a manner inconsistent with the overall
net impression created by the disclosures. Examiners therefore concluded that the
disclosures were misleading or likely to mislead, and because such misimpressions
could be material to a reasonable consumer’s decision-making and actions,
examiners found the practice to be deceptive. Furthermore, because consumers
were substantially injured or likely to be so injured by overdraft fees assessed
contrary to the overall net impression created by the disclosures (in a manner not
outweighed by countervailing benefits to consumers or competition), and because
consumers could not reasonably avoid the fees (given the misimpressions created
by the disclosures), the practice of assessing fees under these circumstances was
found to be unfair.

27 Consumer Financial Protection Bureau. Winter 2015 “Supervisory Highlights.”

28 ///

1 23. There is no justification for these practices, other than to maximize FCU's OD Fee
2 revenue. APPSN Transactions only exist because intervening checking account transactions
3 supposedly reduce an account balance. But FCU is free to protect its interests and either reject those
4 intervening transactions or charge OD Fees on those intervening transactions—and it does the latter
5 to the tune of millions of dollars each year. But FCU was not content with these millions in OD Fees.
6 Instead, it sought millions more in OD Fees on these APPSN Transactions.

7 24. Besides being unfair and unjust, these practices breach contract promises made in
8 FCU's adhesion contracts—contracts which fail to inform accountholders about the true nature of
9 FCU's processes and practices.

10 25. In plain, clear, and simple language, the checking account contract documents
11 covering OD Fees promise that FCU will only charge OD Fees on transactions that have insufficient
12 funds to cover that debit card transaction.

13 26. In short, FCU is not authorized by contract to charge OD Fees on transactions that
14 have not overdrawn an account, but it has done so and continues to do so

15 **1. Mechanics of a Debit Card Transaction**

16 27. A debit card transaction occurs in two parts. First, authorization for the purchase
17 amount is instantaneously obtained by the merchant from FCU. When a merchant physically or
18 virtually “swipes” a customer's debit card, the credit card terminal connects, via an intermediary, to
19 FCU, which verifies that the customer's account is valid and that sufficient available funds exist to
20 cover the transaction amount.

21 28. At this step, if the transaction is approved, FCU immediately decrements the funds in
22 an accountholder's account and sequesters funds in the amount of the transaction but does not yet
23 transfer the funds to the merchant.

24 29. Indeed, the entire purpose of the immediate debit and hold of positive funds is to
25 ensure that there are enough funds in the account to pay the transaction when it settles, as discussed
26 in the Federal Register notice announcing revisions to certain provisions of the Truth in Lending Act
27 regulations:

28 ///

1 When a consumer uses a debit card to make a purchase, a hold may be placed on
2 funds in the consumer's account to ensure that the consumer has sufficient funds in
3 the account when the transaction is presented for settlement. This is commonly
4 referred to as a "debit hold." During the time the debit hold remains in place, which
5 may be up to three days after authorization, those funds may be unavailable for the
6 consumer's use for other transactions.

7 Federal Reserve Board, Office of Thrift Supervision, and National Credit Union Administration,
8 Unfair or Deceptive Acts or Practices, 74 FR 5498-01 (Jan. 29, 2009).

9 30. Sometime thereafter, the funds are actually transferred from the customer's account to
10 the merchant's account.

11 31. FCU (like all banks and credit unions) decides whether to "pay" debit card transactions
12 at authorization. After that, FCU is obligated to pay the transaction no matter what. For debit card
13 transactions, that moment of decision can only occur at the point of sale, at the instant the transaction
14 is authorized or declined. It is at that point—and only that point—when FCU may choose to either
15 pay the transaction or decline it. When the time comes to actually settle the transaction, it is too late—
16 the financial institution has no discretion and must pay the charge. This "must pay" rule applies
17 industry wide and requires that, once a financial institution authorizes a debit card transaction, it
18 "must pay" it when the merchant later makes a demand, regardless of other account activity. See
19 Electronic Fund Transfers, 74 Fed. Reg. 59033-01, 59046 (Nov. 17, 2009).

20 32. There is no change—no impact whatsoever—to the available funds in an account when
21 this step occurs.

22 **2. FCU's Account Agreement**

23 33. Plaintiff has a FCU checking account, which is governed by FCU's Important Account
24 Information for Our Members ("Account Agreement") and FCU's Fees & Charges ("Fee Schedule")
25 attached hereto as Exhibits A & B. respectively.

26 34. The Account Agreement states in pertinent part:

27 **PAYMENT ORDER OF ITEMS** – Knowing your "available balance" is
28 important to managing your deposit/checking account. *Available balance refers to the actual amount available in your account that is without any restrictions, holds or uncollected/processed items.* When processing items drawn on your account, our policy is to pay them in the order in which they are received. The order in which items are paid is important if the available balance in your account is not enough to pay all of the items that are presented. . . . *If an item is presented without available*

1 *funds in your account to pay it*, we may, at our discretion, pay the item (creating an
2 overdraft) or return the item NSF. Current Overdraft and NSF fees are disclosed in
3 our Schedule of Fees and Charges, which is available on our website or upon
4 request. By paying items in the order that we receive them, our policy maintains a
5 reasonable balance between minimizing additional cost to you and paying your
6 more important Items. *A hold on your funds or an unprocessed item, can affect the*
7 *ability for all items that are presented, to be paid. You must be cognizant of such*
8 *holds and items that have yet to be received and/or processed in order to determine*
9 *the available balance in your account.* We encourage you to keep careful records
10 and practice good account management. This will help you to avoid writing checks
11 against your account when the available balance is not enough to pay all of your
12 items, which can result in NSF/Overdraft fees.

13 Ex. A at 3 (bold in original).

14 35. FCU's Fee Schedule states:

15 Overdraft Courtesy Pay \$20.00

16 36. Consistent with its Account Agreement, an overdraft occurs when you do not have
17 enough money in your account to cover a transaction, but FCU pays it anyway.

18 37. For debit card transactions, FCU decides whether to pay a debit card transaction at the
19 moment of authorization. FCU represents to its customers that it is one step, just like consumers using
20 debit cards believe.

21 38. For APPSN Transactions, which are immediately deducted from a positive available
22 account balance and held aside for payment of that same transaction, there are always funds to cover
23 those transactions—yet FCU assesses OD Fees on them anyway.

24 39. APPSN transactions are always initiated at the time the customer uses the debit card
25 when there are sufficient available funds in the account.

26 40. In fact, FCU actually authorizes transactions on positive funds, sets those funds aside
27 on hold, then fails to use those same funds to settle those same transactions. Instead, it uses a secret
28 posting process described below.

41. All the above representations and contractual promises are untrue. In fact, FCU
charges OD Fees even when sufficient funds exist to cover transactions that are authorized into a
positive balance. No express language in any document states that FCU may impose OD Fees on any
APPSN Transactions.

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1 42. The above-quoted Account Agreement language confirms that overdrafts occur “[i]f
2 any item is presented without available funds in your account to pay it,” and that “[a] hold on your
3 funds . . . can affect the ability for all items that are presented, to be paid.” Ex. A at 3. That contract
4 language dictates that an APPSN Transaction would not be subject to an OD Fee, but that other
5 transactions could be because of the held funds set aside to pay the APPSN Transaction.

6 43. The Account Agreement misconstrues FCU’s true debit card processing and overdraft
7 practices.

8 44. First, and most fundamentally, FCU charges OD Fees on debit card transactions for
9 which there are sufficient funds available to cover the transactions. That is despite contractual
10 representations that FCU will only charge OD Fees on transactions with insufficient available funds
11 to cover a given transaction.

12 45. FCU assesses OD Fees on APPSN Transactions that do have sufficient funds available
13 to cover them throughout their lifecycle.

14 46. FCU’s practice of charging OD Fees even when sufficient available funds exist to
15 cover a transaction violates a contractual promise not to do so. This discrepancy between FCU’s
16 actual practice and the contract causes accountholders like the Plaintiff to incur more OD Fees than
17 they should.

18 47. Next, sufficient funds for APPSN Transactions are actually debited from the account
19 immediately, consistent with standard industry practice and the Account Agreement’s language.

20 48. Because these withdrawals take place upon initiation, they cannot be re-debited later.
21 But that is what FCU does when it re-debits the account during a secret posting process.

22 49. In reality, FCU’s actual practice is to assay the same debit card transaction twice to
23 determine if the transaction overdraws an account—both at the time a transaction is authorized and
24 later at the time of settlement.

25 50. At the time of settlement, however, an available balance *does not change at all* for
26 these transactions previously authorized into good funds. As such, FCU cannot then charge an OD
27 Fee on such transaction because the available balance has not been rendered insufficient due to the
28 pseudo-event of settlement.

1 51. Upon information and belief, something more is going on: at the moment a debit card
2 transaction is getting ready to settle, FCU does something new and unexpected, during the middle of
3 the night as part of its nightly batch posting process. Specifically, FCU releases the hold placed on
4 funds for the transaction for a split second, putting money back into the account, then re-debits the
5 same transaction a second time.

6 52. This secret step allows FCU to charge OD Fees on transactions that never should have
7 caused an overdraft—transactions that were authorized into sufficient funds, and for which FCU
8 specifically set aside money to pay.

9 53. This discrepancy between FCU’s actual practices and the contract causes
10 accountholders to incur more OD Fees than they should.

11 54. In sum, there is a huge gap between FCU’s practices as described in the Account
12 Agreement and FCU’s practices in reality

13 **3. Reasonable Accountholders Understand Debit Card Transactions are Debited**
14 **Immediately**

15 55. The assessment of OD Fees on APPSN Transactions is fundamentally inconsistent
16 with the immediate withdrawal of funds for debit card transactions. That is because if funds are
17 immediately debited, they cannot be depleted by intervening transactions (and it is that subsequent
18 depletion that is the necessary condition of APPSN Transactions). If funds are immediately debited,
19 then they are necessarily applied to the debit card transactions for which they are debited.

20 56. FCU was and is aware that this is precisely how accountholders reasonably understand
21 debit card transactions to work.

22 57. FCU knows that many accountholders prefer debit cards for these very reasons.
23 Research indicates that accountholders prefer debit cards as a budgeting device because they do not
24 allow debt like credit cards do, and because the money comes directly out of a checking account.

25 58. Consumer Action, a national nonprofit consumer education and advocacy
26 organization, advises consumers determining whether they should use a debit card that “[t]here is no
27 grace period on debit card purchases the way there is on credit card purchases; the money is
28 immediately deducted from your checking account. Also, when you use a debit card you lose the one

1 or two days of 'float' time that a check usually takes to clear.” What Do I Need to Know About Using
2 a Debit Card?, ConsumerAction (Jan. 14, 2019),
3 [https://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit](https://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card)
4 [_card](https://www.consumeraction.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card).

5 59. Further, Consumer Action informs consumers that “Debit cards offer the convenience
6 of paying with plastic without the risk of overspending. When you use a debit card, you do not get a
7 monthly bill. You also avoid the finance charges and debt that can come with a credit card if not paid
8 off in full.” Understanding Debit Cards, ConsumerAction, [http://www.consumer-](http://www.consumer-action.org/english/articles/understanding_debit_cards)
9 [action.org/english/articles/understanding_debit_cards](http://www.consumer-action.org/english/articles/understanding_debit_cards).

10 60. This understanding is a large part of the reason that debit cards have risen in popularity.
11 The number of terminals that accept debit cards in the United States has increased by approximately
12 1.4 million from 2011 to 2016, and with that increasing ubiquity, consumers have (along with credit
13 cards) viewed debit cards "as a more convenient option than refilling their wallets with cash from an
14 ATM." Maria LaMagna, Debit Cards Gaining on Case for Smallest Purchases, MarketWatch, Mar.
15 23, 2016, [http://www.marketwatch.com/story/morepeople-are-using-debit-cards-to-buy-a-pack-of-](http://www.marketwatch.com/story/morepeople-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23)
16 [gum-2016-03-23](http://www.marketwatch.com/story/morepeople-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23).

17 61. Not only have accountholders increasingly transitioned from cash to debit cards, but
18 they believe that a debit card purchase is the fundamental equivalent of a cash purchase, with the
19 swipe of a card equating to handing over cash, permanently and irreversibly.

20 62. FCU was aware of accountholder perception that debit transactions reduce an available
21 balance in a specified order-namely, the moment they are actually initiated-and its account agreement
22 only supports this perception.

23 4. **Plaintiff’s Debit Transactions**

24 63. As an example, Plaintiff was assessed at least one OD Fee for a transaction that settled
25 on October 2, 2020, despite the fact it was authorized on positive funds prior to that date. Further, at
26 that time of authorization, positive funds were deducted immediately for the debit card transactions
27 on which she was later assessed an OD Fee.

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CLASS ALLEGATIONS

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2 64. Plaintiff brings this action on his own behalf and on behalf of all others similarly
3 situated. The Class includes:

4 All Frontwave Credit Union checking accountholders who, during the applicable
5 statute of limitations, were charged OD Fees on APPSN Transactions on a
6 Frontwave checking account.

7 65. Excluded from the Class is Defendant, its subsidiaries and affiliates, their officers,
8 directors and members of their immediate families and any entity in which defendants have a
9 controlling interest, the legal representatives, heirs, successors or assigns of any such excluded party,
10 the judicial officer(s) to whom this action is assigned, and the members of their immediate families.

11 66. Plaintiff reserves the right to modify or amend the definition of the proposed Class
12 and/or to add a Subclass(es), if necessary, before this Court determines whether certification is
13 appropriate.

14 67. The questions here are ones of common or general interest such that there is a well-
15 defined community of interest among the class members. These questions predominate over questions
16 that may affect only individual class members because the Credit Union has acted on grounds
17 generally applicable to the class. Such common legal or factual questions include, but are not limited
18 to:

- 19 a. Whether FCU improperly charged OD Fees on APPSN Transactions;
- 20 b. Whether the conduct enumerated above breaches the contract;
- 21 c. Whether the conduct enumerated above breaches the implied covenant of good faith and
22 fair dealing;
- 23 d. Whether the conduct enumerated above violates applicable consumer protection laws; and
- 24 e. The appropriate measure of damages.

25 68. The parties are numerous such that joinder is impracticable. Upon information and
26 belief, and subject to class discovery, the Class consist of thousands of members or more, the identity
27 of whom are within the exclusive knowledge of and can be ascertained only by resort to the FCU's
28 records. FCU has the administrative capability through its computer systems and other records to
identify all members of the Class, and such specific information is not otherwise available to Plaintiff.

1 69. It is impracticable to bring Class members' individual claims before the Court. Class
2 treatment permits a large number of similarly situated persons or entities to prosecute their common
3 claims in a single forum simultaneously, efficiently and without the unnecessary duplication of
4 evidence, effort, expense, or the possibility of inconsistent or contradictory judgments that numerous
5 individual actions would engender. The benefits of the class mechanism, including providing injured
6 persons or entities with a method for obtaining redress on claims that might not be practicable to
7 pursue individually, substantially outweigh any difficulties that may arise in the management of this
8 class action.

9 70. Plaintiff's claims are typical of the claims of the other Class members in that they arise
10 out of the same wrongful business practice by FCU, as described herein.

11 71. Plaintiff is more than an adequate representative of the Class in that he has suffered
12 damages as a result of the Credit Union's improper business practices. In addition:

- 13 a. Plaintiff is committed to the vigorous prosecution of this action on behalf of herself
14 and all others similarly situated and has retained competent counsel experienced in the
15 prosecution of class actions and, in particular, class actions on behalf of consumers
16 against financial institutions;
- 17 b. There is no conflict of interest between Plaintiff and the unnamed Class members;
- 18 c. He anticipates no difficulty in the management of this litigation as a class action; and
- 19 d. Plaintiff's legal counsel has the financial and legal resources to meet the substantial
20 costs and legal issues associated with this type of litigation.

21 72. Plaintiff knows of no difficulty to be encountered in the maintenance of this action
22 that would preclude its maintenance as a class action.

23 73. All conditions precedent to bringing this action have been satisfied and/or waived.

24 **CAUSES OF ACTION**

25 **FIRST CAUSE OF ACTION**

26 **BREACH OF CONTRACT INCLUDING THE COVENANT**

27 **OF GOOD FAITH AND FAIR DEALING**

28 74. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

1 75. Plaintiff and FCU contracted for checking account and debit card services, as
2 embodied in the Account Documents.

3 76. The Account Documents do not permit FCU to charge OD Fees on APPSN
4 Transactions.

5 77. FCU therefore breached promises included in the Account Documents as described
6 herein when it charged OD Fees on APPSN Transactions.

7 78. Further, parties to a contract are required not only to adhere to the express conditions
8 in the contract, but also to act in good faith when they are invested with a discretionary power over
9 the other party. In such circumstances, the party with discretion is required to exercise that power and
10 discretion in good faith. This creates an implied promise to act in accordance with the parties'
11 reasonable expectations. That means that FCU is prohibited from exercising its discretion to enrich
12 itself and gouge its customers. Indeed, FCU has a duty to honor payment requests in a manner that is
13 fair to Plaintiff and other accountholders and is prohibited from exercising its discretion to pile on
14 ever greater penalties. Here—in the form agreements FCU foisted on Plaintiff and other
15 accountholders—FCU has provided itself numerous discretionary powers affecting Plaintiff's and
16 other accountholders' accounts.

17 79. Instead of exercising that discretion in good faith and consistent with Plaintiff's and
18 other accountholders reasonable expectations, FCU abuses that discretion to take money out of their
19 accounts without their permission and contrary to their reasonable expectations that they will not be
20 charged OD Fees on APPSN Transactions.

21 80. FCU breaches the covenant of good faith and fair dealing by charging OD Fees on
22 APPSN Transactions.

23 81. Plaintiff and members of the Class have performed all, or substantially all, of the
24 obligations imposed on them under the contract.

25 82. Plaintiff and members of the Class have sustained damages as a result of the Credit
26 Union's breach of the contract.

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SECOND CAUSE OF ACTION

VIOLATION OF THE UNFAIR COMPETITION LAW

Cal. Bus. & Prof. Code § 17200, et seq.

(On behalf of the Class)

83. Plaintiff incorporates the preceding allegations by reference as if fully set forth herein.

84. FCU’s conduct described herein violates the Unfair Competition Law (the “UCL”), codified at California Business and Professions Code section 17200, *et seq.*

85. The UCL prohibits, and provides civil remedies for, unfair competition. Its purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. In service of that purpose, the Legislature framed the UCL’s substantive provisions in broad, sweeping language.

86. By defining unfair competition to include any “any unlawful, unfair or fraudulent business act or practice,” the UCL permits violations of other laws to be treated as unfair competition that is independently actionable, and sweeps within its scope acts and practices not specifically proscribed by any other law.

87. FCU’s conduct violates the UCL by charging OD Fees on APPSN Transactions.

88. Defendant committed fraudulent business acts and practices in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*, in the following respect, among others:

FCU’s practices of falsely indicating in Account Documents that OD Fees will not be charged on APPSN Transactions.

89. Specifically, Defendant’s conduct was not motivated by any business or economic need or rationale. The harm and adverse impact of FCU’s imposition of OD Fees on APPSN Transactions was neither outweighed nor justified by any legitimate reasons, justifications, or motives.

90. The harm to Plaintiff and members of the Class arising from FCU’s unfair practices relating to the imposition of OD Fees on APPSN Transactions outweighs the utility, if any, of those practices.

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1 91. FCU's unfair business practice relating to OD Fees as alleged herein are immoral,
2 unethical, oppressive, unscrupulous, unconscionable, and/or substantially injurious to Plaintiff and
3 members of the Class.

4 92. FCU's conduct was substantially injurious to consumers in that they have been forced
5 to pay OD Fees on APPSN Transactions, which is not disclosed in the contract with FCU.

6 93. As a result of FCU's violations of the UCL, Plaintiff and members of the Class have
7 paid, and/or will continue to pay OD Fees and thereby have suffered and will continue to suffer actual
8 damages

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff demands judgment against Defendant for herself and the Class
11 members as follows:

- 12 (a) Certifying this matter as a class action;
- 13 (b) Designating Plaintiff as appropriate Class representative and his counsel
14 as Class Counsel;
- 15 (c) Declaring the Credit Union's assessment of OD Fees on APPSN Transactions to be a
16 breach of contract, as well as unfair, fraudulent, and unlawful;
- 17 (d) Restitution of all relevant OD Fees paid to FCU by Plaintiff and the Class, as a result
18 of the wrongs alleged herein an amount to be determined at trial;
- 19 (e) Disgorgement of the ill-gotten gains derived by the Credit Union from its misconduct;
- 20 (f) Actual damages in an amount according to proof;
- 21 (g) Statutory, punitive, and exemplary damages, as permitted by law;
- 22 (h) Pre-judgment interest at the maximum rate permitted by applicable law;
- 23 (i) Costs and disbursements assessed by Plaintiff in connection with this action, including
24 reasonable attorneys' fees pursuant to applicable law; and
- 25 (j) Such other relief as this Court deems just and proper.

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DEMAND FOR JURY TRIAL

Plaintiff and all others similarly situated hereby demand trial by jury on all issues in this complaint that are so triable as a matter of right.

Dated: April 27, 2022

Respectfully submitted,

KALIEL GOLD PLLC

By: 

Sophia G. Gold
Jeffrey D. Kalief

Counsel for Plaintiff and Proposed Class

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Frontwave Credit Union Hit with Class Action Over Allegedly Unauthorized Overdraft Fees](#)
