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Counsel for Plaintiff and Proposed Class

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

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

Plaintiff,

vs.

FRONTWAVE CREDIT UNION,

Defendant.

Case No.

CLASS ACTION COMPLAINT

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

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Frontwave Credit Union ("FCU" or the "Credit Union"), arising from the unfair and 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.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

A. FCU CHARGES OD FEES ON APPSN TRANSACTIONS

12. Plaintiff has a checking account with FCU.

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

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

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

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

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

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

19. FCU maintains a running account balance in real time, tracking funds accountholders have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instance they are made. When a customer makes a purchase with a debit card, FCU sequesters the funds needed to pay the transaction. subtracting the dollar amount of 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.”

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

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

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

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

1. Mechanics of a Debit Card Transaction

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

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

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

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

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

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

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

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

2. FCU's Account Agreement

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

34. The Account Agreement states in pertinent part:

PAYMENT ORDER OF ITEMS – Knowing your "available balance" is 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*

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

Ex. A at 3 (bold in original).

35. FCU's Fee Schedule states:

Overdraft Courtesy Pay	\$20.00
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36. Consistent with its Account Agreement, an overdraft occurs when you do not have enough money in your account to cover a transaction, but FCU pays it anyway.

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

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

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

40. In fact, FCU actually authorizes transactions on positive funds, sets those funds aside on hold, then fails to use those same funds to settle those same transactions. Instead, it uses a secret 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

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

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

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

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

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

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

68. The parties are numerous such that joinder is impracticable. Upon information and belief, and subject to class discovery, the Class consist of thousands of members or more, the identity of whom are within the exclusive knowledge of and can be ascertained only by resort to the FCU's 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.

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

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

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

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

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

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

CAUSES OF ACTION

FIRST CAUSE OF ACTION

BREACH OF CONTRACT INCLUDING THE COVENANT

OF GOOD FAITH AND FAIR DEALING

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

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

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

PRAYER FOR RELIEF

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

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

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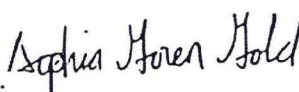
DEMAND FOR JURY TRIAL

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. Kaliei

Counsel for Plaintiff and Proposed Class