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21 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

22 **FOR THE COUNTY OF SAN DIEGO, HALL OF JUSTICE**

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

25 Plaintiff,

26 vs.

27 FRONTWAVE CREDIT UNION,

28 Defendant.

Case No. 37-2022-00016328-CU-BC-CTL  
Assigned to: Hon. Katherine A. Bacal  
Dept. C-69

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S UNOPPOSED MOTION  
FOR PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT**

**[Notice of Motion and Unopposed Motion  
for Preliminary Approval, Joint Declaration  
of Proposed Class Counsel, and [Proposed]  
Order filed concurrently herewith]**

**Date: February 9, 2024**

**Time: 1:30 p.m.**

**Dept: C-69**

Amended Complaint Filed: January 4, 2023

Complaint Filed: April 29, 2022

Trial Date: None Set

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Elaine Ward-Howie respectfully moves for Preliminary Approval<sup>1</sup> of a proposed  
4 class action Settlement with Defendant Frontwave Credit Union, the terms of which are set forth in  
5 the Settlement Agreement and Releases attached as *Exhibit A*.

6 Plaintiff sued on behalf of herself and other Accountholders who Defendant assessed (a)  
7 APPSN Fees, which are Overdraft Fees on signature Point of Sale Debit Card transactions where  
8 there was a sufficient available balance at the time the transaction was authorized, but an insufficient  
9 available balance at the time the transaction was presented to Defendant for payment and posted to  
10 the Account; and (b) Retry Fees, which are Returned Item Fees and Overdraft Fees that were charged  
11 for Automated Clearing House (ACH) and check transactions that were re-submitted by a merchant  
12 after being returned by Defendant for insufficient funds. Agreement ¶¶ 13, 49. Plaintiff alleges these  
13 two practices breached her Account agreement and the implied covenant of good faith and fair  
14 dealing and violated California's Unfair Competition Law ("UCL").

15 On June 27, 2023, the Parties mediated with the Honorable Edward A. Infante, Ret., and  
16 with his direction and assistance, ultimately agreed to this common fund Settlement. Defendant will  
17 pay a Settlement Fund of **\$1,872,814.00** for Relevant Fees and forgive another **\$127,186.00** for  
18 Uncollected Relevant Fees. See Joint Declaration of Class Counsel ("Decl."), filed concurrently  
19 herewith, at ¶¶ 9, 25. The Settlement Fund shall pay Settlement Class Member Payments, Settlement  
20 Administration Costs, an Incentive Award to the Class Representative, and Class Counsel's  
21 attorneys' fees and costs. Agreement ¶ 63.

22 All Settlement Class Members will *automatically* receive their *pro rata* share of the Net  
23 Settlement Fund. Agreement ¶ 84.d.iii. The Settlement Class Members need not submit claim forms  
24 or prove they were damaged. *Id.* Instead, using an expert's analysis of Defendant's available  
25 transaction data, Settlement Class members with Relevant Fees will be identified. A formula

26  
27 \_\_\_\_\_  
28 <sup>1</sup> Unless otherwise noted, all capitalized terms used herein have the same definitions as set forth in  
the Agreement.

(detailed in paragraph 84.d.i.-ii. of the Agreement) will calculate each Settlement Class Member Payment. Automatically paying the Settlement Class is the gold standard for class action settlements and will maximize the benefits to Settlement Class Members. Decl. ¶ 27.

Accordingly, the Agreement provides an excellent result. It is fair, adequate, reasonable, and confers a substantial benefit to the Settlement Class. In accordance with California Rules of Court, rule 3.769, Plaintiff requests Preliminary Approval of the Settlement; provisional certification of the Settlement Class (including the APPSN Fee Class and Retry Fee Class); approval of the proposed Notices and Notice Program; appointment of Plaintiff as Class Representative and her counsel as Class Counsel; and the setting of the Final Approval Hearing.

## **II. BACKGROUND**

On April 29, 2022, Plaintiff filed her initial Class Action Complaint, alleging breaches of contract and the implied covenant of good faith and fair dealing and UCL violation for APPSN Fees. *See* Compl. ¶¶ 33-54; 78-79; 84-93.

On June 17, 2022, Defendant removed the Action, Case No. 3:22-cv-00890 (S.D. Cal.), under the Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1332(d). On June 24 and 27, 2022, respectively, Defendant filed a motion to dismiss and amended motion to dismiss. Decl. ¶ 4. On July 7, 2022, Plaintiff moved to remand the case to this Court arguing Defendant did not plausibly allege CAFA’s \$5,000,000 jurisdictional threshold was met. The Parties fully briefed that motion, and, on July 26, 2022, Judge Bencivengo ordered the Parties to show cause why the case should not be remanded because Defendant is a state-chartered credit union and CAFA’s exceptions mandating or allowing the Court to decline jurisdiction where more than two-thirds or one-third of class members are citizens of the state in which the action was originally filed (see 28 U.S.C. §§ 1332(d)(4)(B), (d)(3)). On August 5, 2022, the Parties separately responded, with Plaintiff requesting the court exercise its discretion to decline jurisdiction under CAFA’s discretionary home state exception. On August 11, 2022, the federal court remanded the Action. *Id.* ¶ 5.

On September 16, 2022, Defendant filed a demurrer, arguing its Account agreement permitted it to charge APPSN Fees and that the contract and UCL claims are preempted. *Id.* ¶ 6.

On January 4, 2023, Plaintiff filed her First Amended Class Action Complaint, again

1 alleging APPSN Fee claims and adding the Retry Fee claims. First Am. Compl. ¶ 99; *see also id.*  
2 ¶¶ 30-51; 71-94. On February 21, 2023, Defendant filed a demurrer scheduled to be heard on July  
3 21, 2023, challenging the contract and UCL claims. Decl. ¶ 7.

4 The Parties agreed to mediate, before which Defendant retained an experienced expert to  
5 evaluate Defendants' account level transaction data to assess its damages exposure for APPSN Fees  
6 and Retry Fees. *Id.* ¶ 8. Defendant shared the results of that detailed analysis before mediation.  
7 Defendant also responded to Plaintiff's document requests and interrogatories, producing over 500  
8 pages, allowing Class Counsel to be sufficiently educated regarding Defendant's fee practices and  
9 damages exposure if Plaintiff prevailed at trial. *Id.* On June 27, 2023, the Parties attended an all-day  
10 mediation with Judge Infante (Ret.) of JAMS, reaching an agreement to the material settlement  
11 terms. *Id.* ¶ 9. They then negotiated the Agreement, executing it effective September 18, 2023. *Id.*

### 12 **III. TERMS OF THE PROPOSED SETTLEMENT**

13 The proposed Settlement resolves the APPSN Fee and Retry Fee class claims. The  
14 Agreement includes the following material terms:

#### 15 **A. Class Definition**

16 For settlement purposes, the Parties agree to certify the Settlement Class, consisting of the:

17 "APPSN Fee Class" means those current or former members of Defendant who were  
18 assessed APPSN Fees from April 29, 2018 through June 30, 2022.

19 "Retry Fee Class" shall mean those current or former members of Defendant who  
20 were assessed Retry Fees from January 4, 2019 through June 30, 2022.

21 Agreement ¶¶ 14, 50.<sup>2</sup> Excluded from the Settlement Class are Defendant, its parents, subsidiaries,  
22 affiliates, officers and directors; all Settlement Class members who make a timely election to be  
23 excluded; and all judges assigned to this litigation and their immediate family members. *Id.* ¶ 55.

#### 24 **B. Class Benefits**

25 Within 10 days of the Effective Date, Defendant shall transfer to the Settlement

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26 <sup>2</sup> The Class Periods' start dates are tied to the dates APPSN Fee claim and Retry Fee claim were  
27 filed, and the end dates are the same because Defendant updated its account agreement and fee  
28 schedule as of that date to more clearly describe when APPSN Fees and Retry Fees are assessed.  
Decl. ¶ 41.

1 Administrator the Settlement Fund, less the total amount that will be credited to Settlement Class  
2 Members by Defendant, and it shall forgive, waive, and agree not to collect from Settlement Class  
3 Members all Uncollected Relevant Fees. *Id.* ¶¶ 63-64. The Settlement Fund represents  
4 approximately 46% of the Settlement Class’s alleged damages. Decl. ¶ 35. Defendant shall have no  
5 reversionary interest in any portion of the Settlement benefits. Agreement ¶ 84.d.iv.

6 The Net Settlement Fund is the Settlement Fund minus Court-approved attorneys’ fees and  
7 costs, any Court-approved Incentive Award, and Settlement Administration Costs. *Id.* ¶ 32. The Net  
8 Settlement Fund shall be paid *pro rata* to Settlement Class Members using the equitable formulas  
9 outlined in the Agreement, allocating 78.5% for the APPSN Fee Class and 21.5% for the Retry Fee  
10 Class, simply because Defendant’s damages exposure was proportionally far bigger for the one  
11 class. *Id.* ¶ 84.d. Applying the Agreement’s formulas, the Settlement Administrator shall identify  
12 for Defendant the full amount of Settlement Class Member Payments. *Id.*

13 No later than 30 days after the Effective Date, Defendant and the Settlement Administrator  
14 shall distribute the Net Settlement Fund to Settlement Class Members. *Id.* ¶ 84.d.iii. Defendant will  
15 make Account credits to Current Accountholders. *Id.* ¶ 84.d.iii.(1). If by the deadline for Defendant  
16 to apply credits, it is unable to complete certain credits, Defendant shall deliver the total amount of  
17 such unsuccessful Settlement Class Member Payments to the Settlement Administrator to issue  
18 checks. *Id.* The Settlement Administrator will mail Past Accountholders a check. *Id.* ¶ 84.d.iii.(2).  
19 The Agreement includes a one-time check remailing process. *Id.*

### 20 C. Release of Claims

21 Each Settlement Class Member shall fully release Defendant and the other Released Parties  
22 from the Released Claims defined as:

23 any and all liabilities, rights, claims, actions, causes of action, demands, damages,  
24 costs, attorneys’ fees, losses and remedies, whether known or unknown, existing or  
25 potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or  
26 equitable, based on contract, tort or any other theory, that arise from or relate to  
Defendant’s assessment of APPSN Fees or Retry Fees, and claims that were asserted  
or could possibly have been asserted in the Action relating to Defendant’s assessment  
of APPSN Fees or Retry Fees.

27 *Id.* ¶ 45. The Releases also include a waiver of California Civil Code section 1542. *Id.* ¶ 90. The  
28 Releases are appropriate as they are narrowly tailored to the claims in this Action and do not release

1 any claims for which Settlement Class Members are not receiving consideration. Decl. ¶ 28.

2 **D. Notice Program**

3 The Notice Program consists of Email Notice, Postcard Notice, and Long Form Notice.  
4 Agreement ¶¶ 34, 72-81. Settlement Class members identified via Defendant's records as having  
5 been assessed Relevant Fees will be sent an Email Notice or Postcard Notice. *Id.* ¶¶ 77-78.

6 The Settlement Administrator shall send Email Notice to Settlement Class members who  
7 agreed to receive notices from Defendant by email. *Id.* ¶¶ 25, 77. The Postcard Notice shall be  
8 mailed to Settlement Class members who did not agree to receive notices from Defendant by email  
9 and to those for whom the Settlement Administrator is unable to deliver Email Notice using the  
10 email address provided by Defendant. *Id.* ¶¶ 41, 77-78. For Postcard Notices returned as  
11 undeliverable, the Settlement Administrator shall perform reasonable address traces to re-mail a  
12 Postcard Notice once. *Id.* No later than 60 days before the original Final Approval Hearing date, the  
13 Settlement Administrator shall re-mail Postcard Notice and complete the Notice Program. *Id.* ¶ 79.

14 The Email Notice and Postcard Notice summarize the Settlement benefits and provide notice  
15 of Settlement Class member rights, including to opt-out of the Settlement or to object to its fairness,  
16 adequacy, or reasonableness. *Id.*, Ex. 1. They also disclose Class Counsel's intent to seek the  
17 Incentive Award for the Class Representative, the attorneys' fees and estimated litigation costs, and  
18 the estimated Settlement Administration Costs. *Id.* Those Notices also provide instructions to obtain  
19 the Long Form Notice and the Final Approval Hearing date, time, and location. *Id.*

20 The Long Form Notice shall be posted on the Settlement Website and be available on request  
21 made to the Settlement Administrator. *Id.* ¶¶ 73-75. That Notice provides a more detailed summary  
22 of the case; answers to frequently asked questions; Class Counsel's contact information; opt-out and  
23 objection instructions; a description of the Incentive Award, attorney's fees and estimated litigations  
24 costs and Settlement Administration Costs; information about the Final Approval Hearing; and  
25 instructions on how to obtain a copy of the Agreement. *Id.* ¶¶ 73-75 and Ex. 2 thereto. The Long  
26 Form Notice will be translated to Spanish, and a note of its availability in Spanish will appear on  
27 the Postcard Notice and Email Notice. *Id.* ¶ 72; *see id.*, Exs. 1-2.

28 **E. Plaintiff's Application for Attorneys' Fees, Costs, and Incentive Award**

1 The Application for Attorneys' Fees, Costs, and Incentive Award will request the Court to  
2 approve up to a 5,000.00 Incentive Award to Plaintiff for serving as the Class Representative. *Id.* ¶  
3 84.b. In addition, Class Counsel will request 33.33% (or \$666,600.00) of the Value of the Settlement  
4 (\$2,000,000.00), and litigation costs currently estimated to be \$13,932.00. *Id.* ¶ 84.b; Decl. ¶ 49.  
5 The Settlement is not contingent on these awards Agreement ¶ 84.a.-b.

6 **F. Residual Funds**

7 If there are Residual Funds from uncashed checks, the Agreement first provides for a second  
8 distribution to participating Settlement Class Members (who received an Account Credit or cashed  
9 a check), to the extent feasible and practical in light of the costs of administering such subsequent  
10 payments, unless the amounts involved are too small to make individual distributions economically  
11 feasible or other specific reasons exist that would make such further distributions impossible or  
12 unfair. *Id.* ¶ 87.a. Second, if a second distribution does not occur, or if there are Residual Funds after  
13 a second distribution, those funds shall be distributed to a Court-approved *cy pres* recipient. *Id.* ¶  
14 87.b. The Parties propose Frontwave Foundation, a 501(c)(3) nonprofit organization that focuses on  
15 serving veterans, active-duty service members, and their families, which are the majority of  
16 Defendant's membership base. If the Court is not inclined to approve Frontwave Foundation, the  
17 Parties propose Armed Services YMCA (Camp Pendleton, 29 Palms & San Diego) as a secondary  
18 *cy pres* recipient, another 501(c)(3) nonprofit organization that serves the military and their families.

19 **G. Settlement Administration, Opt-Outs, Objections, and Termination**

20 The Parties request the Court's approval of Epiq Class Action & Claims Solutions, Inc.  
21 ("Epiq"), as the Settlement Administrator, to effectuate the Notice Program and distribute the  
22 Settlement Fund, performing the tasks identified in the Agreement to administer the Settlement.  
23 Agreement ¶ 53. Epiq is highly experienced ([https://www.epiqglobal.com/en-us/services/class-](https://www.epiqglobal.com/en-us/services/class-action-mass-tort/class-action-administration)  
24 [action-mass-tort/class-action-administration](https://www.epiqglobal.com/en-us/services/class-action-mass-tort/class-action-administration)), and Class Counsel and Defendant's Counsel have  
25 worked with Epiq on similar account fee cases many times. Decl. ¶ 50.

26 The Agreement has a procedure for Settlement Class members to opt out by submitting an  
27 opt-out notice by the last day of the Opt-Out Period. Agreement ¶ 73. The Settlement Administrator  
28 shall process all opt-out requests. *Id.* ¶ 69.f. Settlement Class Members who object to the Settlement

1 must also do so by the last day of the Objection Period following the stated procedure. *Id.* ¶¶ 74-75.

2 The Settlement may be terminated if notice is given within 15 days after the events identified  
3 in the Agreement, most notably the Court’s denial of Preliminary Approval or Final Approval; an  
4 appellate court vacating or reversing the Final Approval Order; the Effective Date does not occur;  
5 or Defendant’s election to terminate the Agreement because timely opt-outs equal or exceed 5% of  
6 the total members in the Settlement Class. *Id.* ¶¶ 92-93.

#### 7 **IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT**

8 A class action may not be dismissed, compromised, or settled without Court approval. (Cal.  
9 Rules of Court, rule 3.769.) Approval of a class action settlement requires: (1) preliminary approval  
10 of the proposed settlement after submission of a written motion; (2) dissemination of notice to all  
11 settlement class members; and (3) a final settlement approval hearing at which class members may  
12 be heard regarding the settlement, and at which evidence and argument on the settlement’s fairness,  
13 adequacy, and reasonableness is presented. (Cal. Rules of Court, rule 3.769(c).)

14 Plaintiff respectfully requests Preliminary Approval of the Settlement. In approving a class  
15 action settlement, “the court must at least satisfy itself that the class settlement is within the  
16 ‘ballpark’ of reasonableness. [Citation].” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th  
17 116, 133, 85 Cal.Rptr.3d 20) The Court should assess whether the Settlement is fair, adequate, and  
18 reasonable after considering relevant factors such as “the strength of plaintiff’s case, the risk,  
19 expense, complexity and likely duration of further litigation, the risk of maintaining class action  
20 status through trial, the amount offered in settlement, the extent of discovery completed and the  
21 stage of the proceedings, [and] the experience and view of counsel[.]” (*Dunk v. Ford Motor Co.*  
22 (1996) 48 Cal.App.4th 1794, 1801, 56 Cal.Rptr.2d 483.) “[A] presumption of fairness exists where:  
23 (1) the settlement is reached through arm’s-length bargaining; (2) investigation and discovery are  
24 sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar  
25 litigation; and (4) the percentage of objectors is small.” (*Ibid.*) That last element should be evaluated  
26 for Final Approval.

27 Due regard should be given to what is otherwise a private consensual agreement  
28 between the Parties. The inquiry “must be limited to the extent necessary to reach  
a reasoned judgment that the agreement is not the product of fraud or overreaching



1 by, or collusion between, the negotiating parties, and that the settlement, taken as  
2 a whole, is fair, reasonable and adequate to all concerned.” [Citation.]  
3 “Ultimately, the [trial] court’s determination is nothing more than ‘an amalgam  
of delicate balancing, gross approximations and rough justice.’ [Citation].”

4 (*Id.* at p.1801.) “Neither the trial court nor this court [of appeal] is to reach any ultimate conclusions  
5 on the contested issues of fact and law which underlie the merits of the dispute, for it is the very  
6 uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce  
7 consensual settlements. In other words, the settlement or fairness hearing is not to be turned into a  
8 trial or rehearsal for trial on the merits.” (*7-Eleven Owners for Fair Franchising v. Southland Corp.*  
9 (2000) 85 Cal.App.4th 1135, 1145, 102 Cal.Rptr.2d 777.)

10 Here, the Agreement provides fair, reasonable, and adequate monetary relief given the  
11 claims balanced against the risks of continued litigation, and thus warrants Preliminary Approval.  
12 Decl. ¶ 32. The Agreement is the result of arm’s-length bargaining between the Parties with the  
13 assistance of a highly respected mediator. *Id.* ¶ 19. Additionally, each Settlement Class member’s  
14 maximum realistic recovery depends on the number of Relevant Fees and Uncollected Relevant  
15 Fees assessed during the Class Period. *Id.* ¶ 35. For some, only one Relevant Fee or Uncollected  
16 Relevant Fee may be at issue. *Id.* An expert is needed to evaluate complicated account level  
17 transaction data on the days that challenged fees were assessed, something not recognizable to the  
18 average Accountholder from the Account statements. *Id.* The Settlement Fund and forgiveness of  
19 Uncollected Relevant Fees is an excellent result for the Settlement Class, providing 46% of the  
20 expected recovery in the face of the risk Defendant would prevail in defense of its fee practices. *Id.*  
21 Moreover, proposed Class Counsel are very experienced, particularly in consumer class actions  
22 against credit unions and banks for improper account fee practices. Decl. ¶ 11.

23 Therefore, the Agreement should be presumed fair and in all other respects proper.

24 **A. The Settlement is Fair, Reasonable, and Adequate**

25 **1. The Settlement is the Result of Serious, Informed, and Non-Collusive**  
26 **Negotiations Before a Neutral Third Party**

27 “[A] presumption of fairness exists where . . . [a] settlement is reached through arm’s-length  
28 bargaining.” (*Dunk*, 48 Cal.App.4th. at 1802.) A neutral third-party mediator’s involvement is a

1 factor weighing substantially in arm’s-length negotiations. (*Kullar v. Foot Locker Retail, Inc.*, 168  
2 Cal.App.4th at 129.) Here, Hon. Edward A. Infante, Ret., whose experience includes mediating  
3 many similar account fees cases, presided over the Parties’ full-day mediation. Decl. ¶ 9.

4 **2. The Extent of Discovery Completed and the Stage of the Proceedings**

5 The Agreement is the product of effective arm’s-length bargaining that occurred only *after*  
6 the Parties gathered critical data regarding Defendant’s fee practices. The Parties conducted  
7 investigation, including formal and informal discovery and settlement discussions, which revealed  
8 facts “sufficient to allow counsel and the court to act intelligently.” (*Dunk*, 48 Cal.App.4th at 1802.)

9 Defendant engaged a qualified expert to analyze Defendant’s available account-level  
10 transaction data necessary to identify Relevant Fees and Uncollected Relevant Fees for the  
11 Settlement Class members, which reliable analysis was used at mediation and will be used to pay  
12 the Settlement benefits. Decl. ¶ 15. Defendant will apply the names, addresses, and email addresses  
13 to the class list this expert created and deliver it to the Settlement Administrator for the Notice  
14 Program and later distribution of the Net Settlement Fund. *Id.*

15 **3. Class Counsel is Experienced in Similar Litigation**

16 There exists a presumption of fairness where “counsel is experienced in similar litigation.”  
17 (*Dunk*, 48 Cal.App.4th at 1802.) The law firms representing Plaintiff—KalielGold PLLC and  
18 Kopelowitz Ostrow P.A.—collectively have decades of experience in class action litigation and  
19 have successfully handled class actions throughout the United States, in both state and federal  
20 courts. *Id.* ¶ 11. Class Counsel have focused a substantial portion of their class action practices on  
21 cases challenging Overdraft Fees and Return Item Fees assessed by financial institutions. *Id.*  
22 Representative cases are identified in Class Counsel’s firm resumes. *Id.*, Ex. 1-2.

23 **4. The Amount Offered in Settlement is Within the Range of Reasonableness**

24 As noted in *7-Eleven Owners* “the merits of the underlying class claims are not a basis for  
25 upsetting the settlement of a class action; the operative word is ‘settlement.’” (85 Cal.App.4th at  
26 1150.) “‘The fact that a proposed settlement may only amount to a fraction of the potential recovery  
27 does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be  
28 disapproved.’ [Citation.]” (*Ibid.*)

1 The Action settled for approximately 46% of the most likely recoverable damages, which  
2 total approximately \$4,314,333.00 for Relevant Fees and Uncollected Relevant Fees. Decl. ¶ 35.  
3 Plaintiff’s best-case scenario would be full reimbursement of all Relevant Fees. *Id.* ¶ 39. However,  
4 Defendant disputes APPSN Fees and Retry Fees breached the contract or violated the UCL. *Id.*  
5 Defendant also argues the claims are federally preempted. *Id.* Cases pursuing these theories have  
6 yet to be successfully tried to judgment. *Id.* Thus, the Net Settlement Fund distributed *pro rata* to  
7 Settlement Class Members based on the number of Relevant Fees assessed to each of them is an  
8 excellent recovery, far more than a fraction of recovery. *Id.* Forgiveness of Uncollected Relevant  
9 Fees adds additional value. *Id.*

10 **5. The Settlement Is Reasonable Given the Risks of Maintaining the Action**  
11 **Through Trial**

12 “A trial court should *not* evaluate a proposed settlement against a hypothetical or speculative  
13 measure of what might have been achieved had plaintiffs prevailed at trial.” (*In re Sutter Health*  
14 *Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 511, 89 Cal.Rptr.3d 615.) Rather, at  
15 preliminary approval, the question is whether the proposed settlement is “within the range of  
16 possible approval.” (*Manual for Complex Litigation* (3d ed. 1995) § 30.41.)

17 The Court, acting as a fiduciary for the absent class members, is to be presented information  
18 “to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent  
19 merit of the claims being released, discounted by the risks and expenses of attempting to establish  
20 and collect on those claims by pursuing the litigation.” (*Kullar v. Foot Locker Retail, Inc.*, 168  
21 Cal.App.4th at p. 129.) In *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186  
22 Cal.App.4th 399, 112 Cal.Rptr.3d 324, the court noted *Kullar* does not require the parties to submit  
23 an illusory prediction of the outer reaches of exposure without considering the actual risks of  
24 certification, decertification, dispositive motions, and trial. (*Id.* at p. 409.) Nor is an explicit  
25 statement of the maximum amount the class could recover if it prevailed on all its claims, provided  
26 the record which allows “an understanding of the amount that is in controversy and the realistic  
27 range of outcomes of the litigation.” (*Ibid.*) This Motion provides more than this information.

28 While Plaintiff believes in the merits of her case, she also recognizes the inherent risks of

1 litigation and understands the benefits to Settlement Class Members receiving a settlement benefit  
2 immediately, instead of costly formal discovery, briefing and prevailing on the demurrer and then  
3 class certification, incurring costs to notice a litigation class, defeating at least one likely motion for  
4 summary judgment, and prevailing at trial. Decl. ¶ 33. Any recovery could be significantly delayed  
5 by appellate proceedings at multiple stages of the case. *Id.* Thus, Plaintiff faces significant risks at  
6 each litigation stage. All that is certain if the Action continues is that Settlement Class Members  
7 will wait much longer before receiving any recovery. Thus, in Class Counsel’s experience and  
8 informed judgment, the Settlement represents an excellent recovery, and settling under the proposed  
9 terms outweighs the risks and uncertainties of continued litigation. *Id.* ¶ 39.

10 **B. The Class Representative Incentive Award Is Reasonable**

11 The proposed \$5,000.00 Incentive Award to the Class Representative is intended to  
12 recognize her initiative, risks, and efforts on behalf the Settlement Class. “[I]t is established that  
13 named plaintiffs are eligible for reasonable incentive payments to compensate them for the expense  
14 or risk they have incurred in conferring a benefit on other members of the class.” (*In re Munoz*, 186  
15 Cal.App.4th at 412.) This payment is designed to separately compensate Plaintiff for (1) granting a  
16 release of the Released Claims, (2) having incurred substantial risks in undertaking this litigation,  
17 including the potential liability for costs of suit, while exposing her to reputational risk by filing the  
18 Action which identifies her financial difficulties associated with the assessment of Overdraft Fees  
19 and Return Item Fees, and (3) having expended resources in prosecuting this Action by providing  
20 information and documents to Class Counsel to assist in their investigation of her claims, reviewing  
21 and approving her pleadings, considering and accepting the settlement proposal, and supervising  
22 Class Counsel. *See* Decl. ¶ 31.

23 **C. The Requested Attorneys’ Fees and Costs Are Reasonable**

24 Plaintiff, as the prevailing party in the settlement of this class action, is entitled to payment  
25 of attorneys’ fees and costs. (*Earley v. Sup. Ct.* (2000) 79 Cal.App.4th 1420, 1427, 95 Cal.Rptr.2d  
26 57; *Maria P. Riles* (1987) 43 Cal.3d 1281, 1290-91, 240 Cal.Rptr. 872.) Class Counsel have  
27 undertaken representation of at their own expense, with compensation contingent on providing a  
28 benefit to the Plaintiff and Settlement Class. Decl. ¶ 29. Pursuant to the Settlement, Class Counsel

1 will seek attorneys' fees equal to up to 33.33% of the Value of the Settlement (\$666,600.00) and  
2 litigation costs. *Id.* Plaintiff and Class Counsel will file an Application for Attorneys' Fees, Costs,  
3 and Incentive Award explaining the basis for and reasonableness of the requested attorneys' fees  
4 and costs and Incentive Award.

5 **D. The Proposed Form and Method of Notice Is Appropriate**

6 The primary purpose of procedural due process is to provide affected parties with the ability  
7 to be heard at a meaningful time and in a meaningful manner. It does not guarantee any particular  
8 procedure but only requires notice reasonably calculated to apprise the interested parties of the  
9 pendency of the action affecting their interests and an opportunity to present their objections. (*Ryan*  
10 *v. Cal. Interscholastic Fed'n – San Diego Section* (2001) 94 Cal.App.4th 1048, 1072, 114  
11 Cal.Rptr.2d 798.)

12 **1. The Notices Comply with California Rule of Court 3.766(d)**

13 California Rules of Court, rule 3.766(d) requires a proposed notice to include: (1) a brief  
14 explanation of the case, including the basic contentions or denials of the parties; (2) a statement that  
15 the court will exclude the member from the class if the member so requests by a specified date; (3)  
16 a procedure for the member to follow in requesting exclusion from the class; (4) a statement that the  
17 judgment, whether favorable or not, will bind all members who do not request exclusion; and (5) a  
18 statement that any member who does not request exclusion may, if the member so desires, enter an  
19 appearance through counsel. (See also *4 Newberg on Class Actions* (4th ed. 2013) § 11:53, p. 167  
20 “[N]otice is adequate if it may be understood by the average class member.”.) The Notice Program,  
21 described in Section III.D. *supra*, satisfies each of these requirements, providing comprehensive  
22 notice to the Settlement Class through Email Notice, Postcard Notice, and Long Form Notice.

23 **2. The Method of Notice Satisfies California Rule of Court 3.766(e)**

24 Because Settlement Class members are known to Defendant, the Notice Program requiring  
25 direct notice is appropriate, constitutes the best form of notice under the circumstances, and satisfies  
26 due process. (*7-Eleven* at 1145 [notice must be “adequate to fairly apprise the prospective members  
27 of the class of the terms of the proposed settlement and of the options that are open to them in  
28 connection with [the] proceedings.”].)

1 The Parties are confident that direct Email Notice or Postcard Notice, the availability of the  
2 Long Form Notice, the Settlement Website, and the toll-free telephone line offering answers to  
3 frequently asked questions will sufficiently effect notice of the Settlement to the vast majority of  
4 the Settlement Class, meeting the requirements of due process. In addition, the content of the Notices  
5 sets forth substantial detail regarding the nature of the Action and claims, the structure of the  
6 Agreement and Settlement Class benefits, and appries all Settlement Class members of their rights  
7 and obligations, including to opt-out or object, and when the Final Approval Hearing will occur.

8 **V. THE PROPOSED SETTLEMENT CLASS SHOULD BE PROVISIONALLY**  
9 **CERTIFIED FOR SETTLEMENT PURPOSES**

10 California Rules of Court, rule 3.769(d) provides the trial court with the authority to  
11 provisionally certify a settlement class at the preliminary approval stage. In granting provisional  
12 class certification, trial courts should apply a lesser standard of scrutiny in the settlement context.  
13 (See *Dunk v. Ford Motor Co.*, *supra*, 48 Cal.App.4th at 1807 n.19.) Absent a trial, no inquiry need  
14 be made regarding whether the case “would present intractable management problems.” (*Amchem*  
15 *Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620, 117 S.Ct. 2231.)

16 Under California Code of Civil Procedure § 382, certification is proper “when the question  
17 is one of a common or general interest, of many persons, or when the parties are numerous, and it  
18 is impracticable to bring them all before the court, one or more may sue or defend for the benefit of  
19 all.” Courts have interpreted § 382 as imposing two essential requirements for class certification:  
20 (1) “there must be an ascertainable class” and (2) “there must be a well-defined community of  
21 interest in the questions of law and fact involved affecting the parties to be represented.” (*Daar v.*  
22 *Yellow Cab Co.* (1967) 67 Cal.2d 695, 704, 63 Cal.Rptr. 724.) The “community of interest”  
23 consideration includes the following factors: “(1) predominant questions of law or fact; (2) class  
24 representatives with claim or defenses typical of the class; and (3) class representatives who can  
25 adequately represent the class.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470, 174  
26 Cal.Rptr. 515.) Finally, the Court must determine “the class action proceeding superior to alternative  
27 means for a fair and efficient adjudication of the litigation.” (*Sav-On Drug Stores, Inc. v. Super. Ct.*  
28 (2004), 34 Cal.4th 319, 332, 17 Cal.Rptr.3d 906.)

1 The following arguments explain why the Settlement Class should be provisionally certified:

2 **A. The Proposed Class Is Ascertainable and Numerous**

3 To determine whether a settlement class is ascertainable, courts will “examine the class  
4 definition, the size of the class and the means for identifying class members.” (*Reyes v. San Diego*  
5 *County Bd. of Supervisor* (1987) 196 Cal.App.3d 1263, 1274, 242 Cal.Rptr. 339.) Here, the class  
6 definitions are sufficiently particular and limited to a defined group of Accountholders, such that  
7 identification of Settlement Class members is ascertainable and verifiable.

8 Based on Defendant’s records, approximately 30,110 unique Accounts make up the  
9 Settlement Class. Decl. ¶ 42. The number of Settlement Class members will be refined once Account  
10 numbers are matched with Accountholders’ names to see if any have more than one affected  
11 Account. *Id.* Regardless, the Settlement Class is large enough to also satisfy the numerosity  
12 requirement. (See *Chance v. Super. Ct.* (1962) 58 Cal.2d 275, 291, 23 Cal.Rptr. 761.)

13 **B. Common Issues of Law and Fact Predominate**

14 The predominance requirement examines the relationship between the class and the common  
15 issues, and inquiries whether those common issues “would be the principal issues in any individual  
16 action, both in terms of time to be expended in their proof and of their importance, and that if a class  
17 suit were not permitted, a multiplicity of legal actions dealing with identical basis issues would be  
18 required in order to permit recovery by each [individual member of the class.]” (*Vasquez v. Super.*  
19 *Ct.* (1971) 4 Cal.3d 800, 810, 94 Cal.Rptr. 796.) Plaintiff’s and Settlement Class members’ claims  
20 arise from common factual predicates—they were charged APPSN Fees and/or Retry Fees.  
21 Moreover, each Settlement Class member seeks the same breach of contract and UCL remedies,  
22 with the construction of the contract language governing the challenged Overdraft Fees and Return  
23 Item Fees being a common legal issue. These central issues would resolve the Plaintiff’s and class  
24 claims and thus, predominate over any potential individual issues. Decl. ¶ 43.

25 **C. The Claims of the Named Plaintiff Are Typical of the Claims of the Class**

26 Typicality is required “to assure that the interest of the named representative aligns with the  
27 interests of the class.” (*Martinez v. Joe’s Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375,  
28 179 Cal.Rptr.3d 867.) “The test of typicality ‘is whether other members have the same or similar

1 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and  
2 whether other class members have been injured by the same course of conduct.” [Citation.] (*Ibid.*)  
3 As addressed above, Plaintiff’s claims are typical to those in the Settlement Class because they are  
4 based on the same facts and assert identical legal theories. Where, as here, the same underlying  
5 conduct affects Plaintiff, the APPSN Fee Class and Retry Fee Class identically, typicality is satisfied  
6 notwithstanding any differences that might underlie individual claims. (See *Rosack v. Volvo of Am.*  
7 *Corp.* (1982) 131 Cal.App.3d 741, 763, 182 Cal.Rptr. 800.)

8 **D. Plaintiff and Class Counsel Will Adequately Represent the Class**

9 Adequacy of representation examines whether (1) the named representative is represented  
10 by counsel qualified to conduct the litigation, and (2) the named representative’s interests are in  
11 conflict or antagonistic to the interests of the class. (*Richmond v. Dart Indus., Inc., supra*, 29 Cal.3d  
12 at p. 470.) “But only a conflict that goes to the very subject matter of the litigation will defeat a  
13 party’s claim of representative status.” (*Ibid.*)

14 Plaintiff is an adequate class representative because she shares the common goal to pursue  
15 the deterrence of Defendant’s assessment of fees in breach of its Account agreement and to be  
16 refunded the challenged Overdraft Fees and Return Item Fees. Thus, because Plaintiff’s interests  
17 are co-extensive with those of the Settlement Class members, proving Plaintiff’s claim would  
18 necessarily support the class claims. There is no evidence that Plaintiff harbors any antagonistic  
19 interest or conflict with the Settlement Class’s interests. Decl. ¶ 45. She has fully committed to the  
20 responsibility of serving as Class Representative. *Id.* Further, Plaintiff has retained highly  
21 experienced consumer class action attorneys who have litigated numerous cases against banks and  
22 credit unions and have historically achieved excellent results for classes. *Id.* ¶ 46.

23 Accordingly, the Settlement Class satisfies all the criteria for provisional class certification.

24 **VI. CONCLUSION**

25 For the above reasons, the Parties request the Court preliminarily approve the Settlement;  
26 provisionally certify the Settlement Class; approve the form and method of Notice; appoint Plaintiff  
27 as Class Representative and counsel as Class Counsel for settlement purposes; and schedule the  
28 Final Approval Hearing for 150 days after entry of the Preliminary Approval Order.



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Dated: October 5, 2023

Respectfully submitted,

**KALIELGOLD PLLC**



By: \_\_\_\_\_

Sophia Goren Gold  
Jeffrey D. Kaliei

*Counsel for Plaintiff and the Proposed Class*

# **EXHIBIT A**

# **SETTLEMENT AGREEMENT AND RELEASE**

*Elaine Ward-Howie v. Frontwave Credit Union*

**Superior Court of the State of California for the County of San Diego**

**Case No. 37-2022-00016328-CU-BC-CTL**

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (“Settlement” or “Agreement”)<sup>1</sup> is entered into by Plaintiff Elaine Ward-Howie, individually and on behalf of the Settlement Class, on the one hand, and Defendant Frontwave Credit Union, on the other hand, as of the last date executed below. The Parties hereby agree to the following terms in full settlement of the action entitled *Elaine Ward-Howie v. Frontwave Credit Union*, No. 37-2022-00016328-CU-BC-CTL, subject to Final Approval, as defined below, by the San Diego County Superior Court for the State of California.

### **I. Procedural History and Recitals**

1. On April 29, 2022, Plaintiff filed a putative class action Complaint in the San Diego County Superior Court for the State of California, entitled *Elaine Ward-Howie v. Frontwave Credit Union*. Plaintiff asserted two claims for relief: (1) breach of contract, including breach of the covenant of good faith and fair dealing; and (2) violation of California’s Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*).

2. On June 17, 2022, Defendant removed the action to the United States District Court for the Southern District of California. Plaintiff filed a motion to remand on July 7, 2022, which was granted on August 17, 2022.

3. On September 16, 2022, Defendant filed a demurrer to the Complaint.

4. On January 4, 2023, Plaintiff filed an Amended Complaint, in which Plaintiff asserts two claims for relief for: (1) breach of contract, including breach of the covenant of good faith and fair dealing; and (2) violation of California’s Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*). Both claims are based on the theories that Defendant allegedly improperly assesses APPSN Fees and Retry Fees.

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<sup>1</sup> All capitalized terms herein have the meanings ascribed to them in Section II below or various other places in the Agreement.

5. On February 21, 2023, Defendant filed a demurrer to the Amended Complaint. The Court has not ruled on Defendant's demurrer.

6. The Parties participated in a private mediation session before the Honorable Edward A. Infante, Ret. on June 27, 2023. In advance of mediation, the Parties engaged in informal discovery, including obtaining an analysis of Defendant's potential damages exposure for both APPSN Fees and Retry Fees. During the mediation, the Parties were presented with a mediator's proposal. This Settlement is based on the Parties' acceptance of the mediator's proposal.

7. The Parties now agree to settle the Action in its entirety.

**NOW, THEREFORE**, in light of the foregoing, for good and valuable consideration, the receipt and sufficiency of which is hereby mutually acknowledged, the Parties agree, subject to approval by the Court, as follows.

## **II. Definitions**

In addition to the terms defined at various points within this Agreement, the following Defined Terms apply throughout this Agreement:

8. "Account" means any checking account maintained by Defendant.

9. "Accountholder" means any person who has or had any interest, whether legal or equitable, in an Account during the Class Periods.

10. "Action" means *Elaine Ward-Howie v. Frontwave Credit Union*, No. 37-2022-00016328-CU-BC-CTL.

11. "Amended Complaint" means the Amended Class Action Complaint filed in this Action on January 4, 2023.

12. "Application for Attorneys' Fees, Costs, and Incentive Award" means the application to be submitted to the Court by Class Counsel, as part of the Motion for Final Approval,

requesting an award of attorneys' fees for Class Counsel, reimbursement of litigation costs incurred by Class Counsel, and an Incentive Award for the Class Representative.

13. "APPSN Fees" means Overdraft Fees that Defendant charged and did not refund on signature Point of Sale Debit Card transactions during the APPSN Fee Class Period, where there was a sufficient available balance at the time the transaction was authorized, but an insufficient available balance at the time the transaction was presented to Defendant for payment and posted to a member's Account.

14. "APPSN Fee Class" means those current or former members of Defendant who were assessed APPSN Fees.

15. "APPSN Fee Class Period" means the period from April 29, 2018 through June 30, 2022.

16. "Class Counsel" means:

KALIEL GOLD PLLC  
Sophia Goren Gold  
950 Gilman Street, Suite 200  
Berkeley, California 94710

KALIEL GOLD PLLC  
Jeffrey D. Kaliei  
1100 15th Street NW 4th Floor  
Washington, D.C. 20005

KOPELOWITZ OSTROW P.A.  
Jeff Ostrow  
1 West Las Olas Blvd., Suite 500  
Fort Lauderdale, FL 33301

17. "Class Periods" means the APPSN Fee Class Period and the Retry Fee Class Period.

18. "Class Representative" means Elaine Ward-Howie.

19. "Complaint" means the Complaint filed in this action on April 29, 2022.

20. "Court" means the Superior Court in and for San Diego County, California.

21. “Current Accountholder” means a Settlement Class Member who is a member of Defendant as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

22. “Defendant” means Frontwave Credit Union.

23. “Defendant’s Counsel” means Katten Muchin Rosenman LLP.

24. “Effective Date” means the later of: (1) 10 days after the time period has expired to appeal the judgment entered after the entry of the Final Approval Order without any appeal or motion to vacate judgment being filed; or (2) if an appeal of the judgment entered after the entry of Final Approval Order is taken, then the earlier of 10 days after the entry of an order dismissing the appeal or 10 days after the appeal has been finally resolved in the appellate court of last resort without any right to appeal or seek further review from another appellate court.

25. “Email Notice” means a short form of notice that shall be sent by email to Settlement Class members who agreed to receive notices from Defendant by email in the form attached as ***Exhibit 1***.

26. “Final Approval” means the date that the Court enters the Final Approval Order granting final approval to the Settlement and determines the amount of attorneys’ fees and costs awarded to Class Counsel and the amount of any Incentive Award to the Class Representative.

27. “Final Approval Hearing” is the hearing held before the Court wherein the Court will consider granting Final Approval to the Settlement and further determine the amount of attorneys’ fees and costs awarded to Class Counsel and the amount of any Incentive Award to the Class Representative.

28. “Final Approval Order” means the final order that the Court enters granting Final Approval to the Settlement. The proposed Final Approval Order shall be in a form agreed upon by

the Parties and shall be substantially in the form attached as an exhibit to the Motion for Final Approval. Final Approval Order also includes the orders, which may be entered separately, determining the amount of attorneys' fees and costs awarded to Class Counsel and the amount of any Incentive Award to the Class Representative.

29. "Incentive Award" means any Court-ordered payment to Plaintiff for serving as the Class Representative, which is in addition to any payment due to Plaintiff as a Settlement Class Member or forgiveness of Uncollected Relevant Fees.

30. "Long Form Notice" means the form of notice that shall be posted on the Settlement Website created by the Settlement Administrator and shall be available to Settlement Class members by mail on request made to the Settlement Administrator, in the form attached as ***Exhibit 2***.

31. "Motion for Final Approval" means the motion requesting the Court grant Final Approval to the Settlement pursuant to Cal. Ct. R. 3.769.

32. "Net Settlement Fund" means the Settlement Fund, minus Court-approved attorneys' fees and costs awarded to Class Counsel, any Settlement Administration Costs, and any Court-approved Incentive Award to the Class Representative.

33. "Notice" means the Email Notice, Long Form Notice, and Postcard Notice that the Parties will ask the Court to approve in connection with the motion for Preliminary Approval of the Settlement.

34. "Notice Program" means the methods provided for in this Agreement for giving the Notice and consists of Email Notice, Postcard Notice, and Long Form Notice, which shall be substantially in the forms as the exhibits attached to this Agreement.

35. "Objection Period" means the period that begins the day after the earliest date on



which the Notice is first distributed, and that ends no later than 30 days before the original date scheduled for the Final Approval Hearing. The deadline for the Objection Period will be specified in the Notice.

36. “Opt-Out Period” means the period that begins the day after the earliest date on which the Notice is first distributed, and that ends no later than 30 days before the original date scheduled for the Final Approval Hearing. The deadline for the Opt-Out Period shall be specified in the Notice.

37. “Overdraft Fee” means any fee or fees assessed to an Accountholder for items paid when the Account had insufficient funds.

38. “Party” means Plaintiff or Defendant and “Parties” means Plaintiff and Defendant together.

39. “Past Accountholder” means a Settlement Class Member who is not a member of Defendant as of the date that the Net Settlement Fund is distributed to Settlement Class Members pursuant to this Agreement.

40. “Plaintiff” means Elaine Ward-Howie.

41. “Postcard Notice” shall mean the short form of notice that shall be sent by mail to Settlement Class members who did not agree to receive notices from Defendant by email, or for whom the Settlement Administrator is unable to send Email Notice using the email address provided by Defendant, in the form attached as *Exhibit 1*.

42. “Preliminary Approval” means the date that the Court enters, without material change, an order preliminarily approving the Settlement, substantially in the form of the exhibit attached to the motion for Preliminary Approval.

43. “Preliminary Approval Order” means the order granting Preliminary Approval of

this Settlement.

44. “Releases” means all the releases contained in Section XII.

45. “Released Claims” means any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys’ fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that arise from or relate to Defendant’s assessment of APPSN Fees or Retry Fees, and claims that were asserted or could possibly have been asserted in the Action relating to Defendant’s assessment of APPSN Fees or Retry Fees.

46. “Released Parties” means Defendant and each of its present and former parents, subsidiaries, divisions, affiliates, predecessors, successors and assigns, and the present and former directors, officers, employees, agents, insurers, members, attorneys, advisors, consultants, representatives, partners, joint venturers, independent contractors, wholesalers, resellers, distributors, retailers, predecessors, successors.

47. “Releasing Parties” means Plaintiff and all Settlement Class Members, and each of their respective executors, representatives, heirs, predecessors, assigns, beneficiaries, successors, bankruptcy trustees, guardians, joint tenants, tenants in common, tenants by entireties, agents, attorneys, and all those who claim through them or on their behalf.

48. “Relevant Fees” means APPSN Fees and Retry Fees.

49. “Retry Fees” shall mean Returned Item Fees and Overdraft Fees that were charged and not refunded during the Retry Fee Class Period, for Automated Clearing House (ACH) and check transactions that were re-submitted by a merchant after being returned by Defendant for insufficient funds.

50. “Retry Fee Class” shall mean those current or former members of Defendant who were assessed Retry Fees.

51. “Retry Fee Class Period” means the period from January 4, 2019 through June 30, 2022.

52. “Returned Item Fee” means any non-sufficient funds fee or fees assessed to an Accountholder for transactions for check or ACH payment transactions returned when the Account has insufficient funds.

53. “Settlement Administrator” means Epiq Class Action & Claims Solutions, Inc.

54. “Settlement Administration Costs” means all costs and fees of the Settlement Administrator regarding notice and settlement administration.

55. “Settlement Class” means Defendant’s Accountholders with one or more Accounts, who were charged a Relevant Fee during the Class Periods. Excluded from the Settlement Class is Defendant, its parents, subsidiaries, affiliates, officers and directors; all Settlement Class members who make a timely election to be excluded; and all judges assigned to this litigation and their immediate family members.

56. “Settlement Class Member” means any member of the Settlement Class who has not opted-out of the Settlement and who is entitled to the benefits of the Settlement, including a Settlement Class Member Payment and/or forgiveness of Uncollected Relevant Fees.

57. “Settlement Class Member Payment” means the cash distribution that will be made from the Net Settlement Fund to each Settlement Class Member, pursuant to the allocation terms of the Settlement.

58. “Settlement Fund” means the \$1,872,814.00 common cash fund Defendant is obligated to pay under the terms of this Settlement, allocated \$1,470,159.00 for APPSN Fees and

\$402,655.00 for Retry Fees. The Settlement Fund shall be paid into an account established by the Settlement Administrator within 10 days after the Effective Date, less the total amount that will be credited to Settlement Class Members by Defendant, as provided in Paragraph 84.d.iii. below.

59. “Settlement Website” means the website that the Settlement Administrator will establish as a means for Settlement Class members to obtain notice of and information about the Settlement, through and including hyperlinked access to this Agreement, the Long Form Notice, Preliminary Approval Order, and such other documents as the Parties agree to post or that the Court orders posted on the website. These documents shall remain on the Settlement Website for at least six months after Final Approval. The URL of the Settlement Website shall be [www.fcufeesettlement.com](http://www.fcufeesettlement.com), or such other URL as Class Counsel and Defendant agree upon in writing. The Settlement Website shall not include any advertising and shall not bear or include the Defendant’s logo or Defendant’s trademarks.

60. “Uncollected Relevant Fees” means any Relevant Fees that were assessed but were not paid when an Account was closed and the Relevant Fees charged off, which is calculated to be \$127,186.00.

61. “Value of the Settlement” means the Settlement Fund plus the Uncollected Relevant Fees.

### **III. Certification of the Settlement Class**

62. Plaintiff shall propose and recommend to the Court that the Settlement Class be certified under and Cal. R. Ct. 3.769(d). Defendant agrees solely for purposes of the Settlement provided for in this Agreement, and the implementation of such Settlement, that this case shall proceed as a class action; provided, however, that if a Final Approval Order is not issued, then Defendant shall retain all rights to object to maintaining this case as a class action. Plaintiff and

Class Counsel shall not reference this Agreement in support of any subsequent motion relating to certification of a liability class.

**IV. Settlement Consideration**

63. Within 10 days after the Effective Date, Defendant shall transfer to the Settlement Administrator the Settlement Fund, less the total amount that will be credited to Settlement Class Members by Defendant, as provided in Paragraph 84.d.iii., below. The Settlement Fund shall be used to pay Settlement Class Members their respective Settlement Class Member Payments; any and all attorneys' fees and costs awarded to Class Counsel; any Incentive Award to the Class Representative; and all Settlement Administration Costs. Defendant shall not be responsible for any other payments under this Agreement.

64. Within 10 days after the Effective Date, Defendant shall forgive, waive, and agree not to collect from Settlement Class Members all Uncollected Relevant Fees as defined above.

65. For avoidance of doubt, it is agreed by the Parties that a Settlement Class Member may qualify for a Settlement Class Member Payment and forgiveness of Uncollected Relevant Fees by virtue of having paid one or more Relevant Fees and having been assessed at least one other Relevant Fee that became an Uncollected Relevant Fee.

**V. Settlement Approval**

66. Upon execution of this Agreement by all Parties, Class Counsel shall promptly move the Court for a Preliminary Approval Order. The proposed Preliminary Approval Order shall be attached to the motion, or otherwise filed with the Court, and shall be in a form agreed to by Class Counsel and Defendant. The motion for Preliminary Approval shall, among other things, request that the Court: (a) preliminarily approve the terms of the Settlement as being within the range of fair, adequate, and reasonable; (b) provisionally certify the Settlement Class pursuant to

Cal. Civ. Proc. Code § 382, for settlement purposes only; (c) approve the Notice Program set forth herein and approve the form and content of the Notices of the Settlement; (d) approve the procedures set forth herein for Settlement Class members to exclude themselves from the Settlement Class or for Settlement Class Members to object to the Settlement; (e) stay the Action pending Final Approval of the Settlement; and (f) schedule a Final Approval Hearing for a time and date mutually convenient for the Court, Class Counsel, and counsel for Defendant, at which the Court will conduct an inquiry into the fairness of the Settlement, determine whether it was made in good faith, and determine whether to approve the Settlement and the Application for Attorneys' Fees, Costs, and Incentive Award to the Class Representative.

**VI. Discovery and Settlement Data**

67. Class Counsel and Defendant have engaged in certain informal discovery related to liability and damages. Additionally, for purposes of effectuating the Settlement, Defendant made available to Class Counsel damages analyses based on analyses of fee data by Defendant's damages consultant, which the Parties have agreed represent the APPSN Fees and Retry Fees for the Class Periods. From its analysis of the fee data, Defendant's damages consultant determined the Accountholders in the Settlement Class and ultimately the amount of each Settlement Class member's Relevant Fees and Uncollected Relevant Fees. Defendant's damages consultant has worked with Defendant to create a list of Settlement Class members, which includes, to the extent available, the names of the Settlement Class members, their Account numbers, and their electronic mail and postal addresses. This list will be provided to the Settlement Administrator for the Notice Program and to use in distributing Settlement Class Member Payments.

**VII. Settlement Administrator**

68. The Settlement Administrator shall administer various aspects of the Settlement as

described in the next paragraph and perform such other functions as are specified for the Settlement Administrator elsewhere in this Agreement, including, but not limited to, effectuating the Notice Program and distributing the Settlement Fund as provided herein.

69. The duties of the Settlement Administrator are as follows:

a. Use the name and address information for Settlement Class members provided by Defendant in connection with the Notice Program approved by the Court, for the purpose of distributing the Postcard Notice and Email Notice, and later mailing Settlement Class Member Payments to Past Accountholder Settlement Class Members and to Current Accountholder Settlement Class Members where it is not feasible or reasonable for Defendant to make the Settlement Class Member Payments by a credit to the Current Accountholder Settlement Class Members' Accounts;

b. Establish and maintain a post office address for requests for exclusion from the Settlement Class;

c. Establish and maintain the Settlement Website;

d. Establish and maintain an automated toll-free telephone line for Settlement Class members to call with Settlement-related inquiries, and answer the frequently asked questions of Settlement Class members who call with or otherwise communicate such inquiries;

e. Respond to any mailed Settlement Class member inquiries;

f. Process all opt-out requests from the Settlement Class;

g. Provide weekly reports to Class Counsel and Defendant that summarize: (1) the status of the Notice Program; (2) the number of requests for exclusion and objections received; (3) the number and aggregate amount of checks cashed; and (4) any residual funds.

h. In advance of the Final Approval Hearing, prepare a declaration or affidavit to

submit to the Court confirming that the Notice Program was completed, describing how the Notice Program was completed, providing the names of each Settlement Class member who timely and properly opted-out from the Settlement Class, the names of Settlement Class Members who timely objected to the Settlement and any materials provided with the objections; and other information as may be necessary to allow the Parties to seek and obtain Final Approval.

i. Distribute Settlement Class Member Payments by check to Past Accountholder Settlement Class Members and Current Accountholder Settlement Class Members who are unable to receive credits;

j. Provide to Defendant the amount of the Settlement Class Member Payments to Current Accountholder Settlement Class Members and instruct Defendant to initiate the direct deposit or credit of Settlement Class Member Payments to Current Accountholder Settlement Class Members, and to forgive Uncollected Relevant Fees.

k. Pay invoices, expenses, and costs upon approval by Class Counsel and Defendant, as provided in this Agreement; and

l. Any other Settlement Administration function at the instruction of Class Counsel and Defendant, including, but not limited to, verifying that the Settlement Funds have been distributed and distributing the any Residual Funds to the Court-approved *cy pres* recipient.

70. The Settlement Administrator provided a reasonable estimated bid to administer the Notice Program and otherwise perform the duties of Settlement Administrator required by this Agreement. The reasonableness of the bid accounts for the direct costs associated with the Notice Program and the later distribution of Settlement Class Member Payments following entry of the Final Approval Order, and the hourly rates for the work of the Settlement Administrator to perform the tasks required by this Agreement are competitively priced. The Settlement Administrator has



procedures in place to protect the security of class data and adequate insurance in the event of a data breach or defalcation of funds.

71. Settlement Class Counsel and Defendant may, by agreement, substitute a different organization as Settlement Administrator, subject to approval by the Court if the Court has previously approved the Settlement preliminarily or finally. In the absence of agreement, either Class Counsel or Defendant may move the Court to substitute a different organization as Settlement Administrator, upon a showing that the responsibilities of Settlement Administrator have not been adequately executed by the incumbent.

#### **VIII. Notice to Settlement Class Members**

72. Beginning no later than 60 days following entry of the Preliminary Approval Order or by the date ordered by the Court, the Settlement Administrator shall initiate the Notice Program provided herein, using the forms of Notice approved by the Court. The Notice shall include, among other information: a description of the material terms of the Settlement; a date by which Settlement Class members may exclude themselves from or “opt-out” of the Settlement Class; a date by which Settlement Class members may object to the Settlement and/or to Class Counsel’s application for attorneys’ fees and costs and/or the Incentive Award for the Class Representative; the date upon which the Final Approval Hearing is originally scheduled to occur; and the address of the Settlement Website at which Settlement Class members may access this Agreement and other related documents and information. Class Counsel and Defendant shall insert the correct dates and deadlines in the Notice before the Notice Program commences, based upon those dates and deadlines set by the Court in the Preliminary Approval Order. Notices provided under or as part of the Notice Program shall not bear or include Defendant’s logo or trademarks or the return address of Defendant, or otherwise be styled to appear to originate from Defendant. The Long

Form Notice will be translated to Spanish language and a Spanish language notation will be made on the Postcard Notice and Email Notice regarding the available translated Long Form Notice. Within a reasonable time before initiating the Email Notice and Postcard Notice, the Settlement Administrator shall establish the Settlement Website.

73. The Long Form Notice also shall include a procedure for Settlement Class members to opt-out of the Settlement Class, and the Email Notice and Postcard Notice shall direct Settlement Class members to review the Long Form Notice to obtain the instructions. A Settlement Class member may opt-out of the Settlement Class at any time during the Opt-Out Period by mailing an opt-out request to the Settlement Administrator postmarked no later than the last day of the Opt-Out Period. The opt-out request must state the Settlement Class member's name, the last four digits of the member number(s), address, telephone number, and email address (if any), and include a statement indicating a request to be excluded from the Settlement Class. Any Settlement Class member who does not timely and validly request to opt-out shall be bound by the terms of this Agreement. If an Account has more than one Accountholder, and if one Accountholder excludes himself or herself from the Settlement Class, then all Accountholders on that Account shall be deemed to have opted-out of the Settlement with respect to that Account, and no Accountholder shall be entitled to a payment under the Settlement.

74. The Long Form Notice also shall include a procedure for Settlement Class members to object in writing to the Settlement and/or to Class Counsel's application for attorneys' fees and costs and/or the Incentive Award for the Class Representative, and the Email Notice and Postcard Notice shall direct Settlement Class members to review the Long Form Notice to obtain the instructions. Objections to the Settlement, to the application for attorneys' fees and costs, and/or to the Incentive Award must be mailed to the Settlement Administrator and not filed with the

Court. For an objection to be considered by the Court, the objection must be submitted no later than the last day of the Objection Period, as specified in the Notice. If submitted by mail, an objection shall be deemed to have been submitted when posted if received with a postmark date indicated on the envelope if mailed first-class postage prepaid and addressed in accordance with the instructions. If submitted by private courier (*e.g.*, Federal Express), an objection shall be deemed to have been submitted on the shipping date reflected on the shipping label.

75. For an objection to be considered by the Court, the objection must also set forth:
- a. the name of the Action;
  - b. the objector's full name, address, telephone number, and email address (if any);
  - c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector's counsel;
  - d. the identity of all counsel who represent the objector and whether they will appear at the Final Approval hearing;
  - e. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; and
  - f. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing.

76. Class Counsel and/or Defendant may conduct limited discovery on any objector or objector's counsel consistent with the California Rules of Civil Procedure.

77. For those Settlement Class members who have agreed to receive notices from Defendant by email, Defendant shall provide the Settlement Administrator with the most recent email addresses it has for these members. The Settlement Administrator shall send the Email Notice to each such member's last known email address, in a manner that is calculated to avoid

being caught and excluded by spam filters or other devices intended to block mass email. For any emails that are returned undeliverable, the Settlement Administrator shall send a Postcard Notice in the manner described below. The Email Notice shall inform Settlement Class members how they may obtain a copy of the Long Form Notice on the Settlement Website or via mail upon request to the Settlement Administrator.

78. For those Settlement Class members who have not agreed to receive notices from Defendant by email, the Postcard Notice shall be mailed to these members by first class United States mail to the best available mailing addresses. Defendant shall provide the Settlement Administrator with last known mailing addresses for these members. Prior to mailing the Postcard Notice, the Settlement Administrator shall run the names and addresses through the National Change of Address Registry and update as appropriate. If a mailed Postcard Notice is returned with forwarding address information, the Settlement Administrator shall re-mail the Postcard Notice to the forwarding address. For all mailed Postcard Notices that are returned as undeliverable, the Settlement Administrator shall use standard skip tracing devices to obtain forwarding address information and, if the skip tracing yields a different forwarding address, the Settlement Administrator shall re-mail the Postcard Notice once to the address identified in the skip trace, as soon as reasonably practicable after the receipt of the returned mail. The Postcard Notice shall inform Settlement Class members how they may obtain a copy of the Long Form Notice on the Settlement Website or via mail upon request to the Settlement Administrator.

79. The Notice Program shall be completed no later than 60 days before the date upon which the Final Approval Hearing is originally scheduled to occur.

80. The Settlement Administrator shall maintain a database showing mail and email addresses to which each Notice was sent and any Notices that were not delivered by mail and/or

email. In addition to weekly updates to the Parties regarding the progress of the Notice Program and the declaration or affidavit by the Settlement Administrator in advance of the Final Approval Hearing and in support of the Motion for Final Approval, a summary report of the Notice Program shall be provided to the Parties 3 days prior to the Final Approval Hearing. The database maintained by the Settlement Administrator regarding the Notices shall be available to the Parties and the Court upon request. It shall otherwise be confidential and shall not be disclosed to any third party. To the extent the database is provided to Class Counsel, it shall be kept confidential, not be shared with any third party and used only for purposes of implementing the terms of this Agreement, and shall not be used for any other purposes.

81. The Email Notice, Postcard Notice, and Long Form Notice shall be in forms approved by the Court, and substantially similar to the notice forms attached hereto as ***Exhibits 1 and 2***. Not all Accountholders in the Settlement Class will receive all three forms of Notice, as detailed herein. The Parties may by mutual written consent make non-substantive changes to the Notices without Court approval.

#### **IX. Final Approval Order and Judgment**

82. Plaintiff shall file her Motion for Final Approval of the Settlement, inclusive of the Application for Attorneys' Fees, Costs, and Incentive Award for the Class Representative, no later than 45 days before the original date set for the Final Approval Hearing. At the Final Approval Hearing, the Court will hear argument on Plaintiff's Motion for Final Approval of the Settlement, and on the Application for Attorneys' Fees, Costs, and Incentive Award for the Class Representative. In the Court's discretion, the Court also will hear argument at the Final Approval Hearing from any Settlement Class members (or their counsel) who object to the Settlement or to Class Counsel's application for attorneys' fees and costs, or the Incentive Award, provided the

objectors submitted timely objections that meet all of the requirements listed in the Agreement. If the date or location of the Final Approval Hearing changes, that information will be included on the Settlement Website for the Settlement Class's benefit. Notice to Settlement Class Members of final judgment will be posted on the Settlement Website.

83. At or following the Final Approval Hearing, the Court will determine whether to enter the Final Approval Order granting Final Approval of the Settlement and final judgment thereon, and whether to approve Class Counsel's request for attorneys' fees and costs, and any Incentive Award. Such proposed Final Approval Order shall, among other things:

- a. Determine that the Settlement is fair, adequate and reasonable;
- b. Finally certify the Settlement Class for settlement purposes only;
- c. Determine that the Notice provided satisfies Due Process requirements;
- d. Bar and enjoin all Releasing Parties from asserting any of the Released Claims; bar and enjoin all Releasing Parties from pursuing any Released Claims against Released Parties at any time, including during any appeal from the Final Approval Order; and retain jurisdiction over the enforcement of the Court's injunctions;
- e. Release Defendant and the Released Parties from the Released Claims; and
- f. Reserve the Court's continuing and exclusive jurisdiction over the Parties to this Agreement, including Defendant, all Settlement Class Members, and all objectors, to administer, supervise, construe, and enforce this Agreement in accordance with its terms.

**X. Calculation and Disbursement of Settlement Class Member Payments.**

84. Payments shall be made from the Settlement Fund as follows:
- a. Class Counsel's Fees and Costs. Class Counsel's reasonable attorneys' fees and costs, as determined and approved by the Court, shall be paid from the Settlement Fund within

15 days after the Effective Date. Class Counsel shall apply for an award of attorneys' fees of up to 33.33% of the Value of the Settlement, plus reimbursement of reasonable litigation costs, to be approved by the Court. This Settlement is not contingent on approval of a request for attorneys' fees and costs, and if the Court denies the request or grants it in an amount other than what was requested, the remaining provisions of the Settlement Agreement shall remain in force.

b. Incentive Award. The Class Representative may apply to the Court for an Incentive Award of up to \$5,000.00. Subject to Court approval, the Incentive Award shall be paid no later than 15 days after the Effective Date. This Settlement is not contingent on approval of a request for an Incentive Award, and if the Court denies the request or grants it in an amount other than what was requested, the remaining provisions of the Settlement Agreement shall remain in force.

c. Settlement Administrator's Fees and Costs. Consistent with Section IV above, the Settlement Administrator's fees and costs shall be paid from the Settlement Fund within 10 days after invoicing to and approval by the Parties. The Parties and the Settlement Administrator agree that any fees or costs incurred by the Settlement Administrator prior to funding of the Settlement Fund shall be deferred and not invoiced until at least fifteen 15 days after the Effective Date. In the event the Final Approval Order is not entered or this Agreement is terminated pursuant to Section XIII below, Defendant agrees to cover any costs incurred and fees charged by the Settlement Administrator pursuant to Section VII above prior to the denial of Final Approval or the termination of this Agreement.

d. Settlement Class Member Payments. Of the \$1,872,814.00 paid into the Settlement Fund, \$1,470,159.00 (78.5%) is allocated to the APPSN Funds Fee Class and \$402,655.00 (21.5%) is allocated to the Retry Fee Class. If applicable, Settlement Class Members

may receive payments as members of the APPSN Fee Class and the Retry Fee Class. Based on this allocation, payments from the Settlement Fund to the Settlement Class Members shall be calculated as follows:

- i. Settlement Class Members of the APPSN Fee Class shall be paid per incurred APPSN Fee calculated as follows:

$(0.785 \text{ of the Net Settlement Fund} / \text{Total APPSN Fees}) \times \text{Total number of APPSN Fees charged to and paid by each APPSN Fee Class Member.}$

- ii. Settlement Class Members of the Retry Fee Class shall be paid per Retry Fee calculated as follows:

$(0.215 \text{ of the Net Settlement Fund} / \text{Total Retry Fees}) \times \text{Total number of Retry Fees charged to and paid by each Retry Fee Class Member.}$

- iii. Settlement Class Member Payments shall be made no later than 30 days after the Effective Date, as follows:

(1) For those Settlement Class Members who are Current Accountholders at the time of the distribution of the Net Settlement Fund, a credit in the amount of the Settlement Class Member Payment they are entitled to receive shall be applied by Defendant to the Account that was assessed APPSN Fees and/or Retry Fees. If that account is no longer active, then a credit may be made to any checking or savings account they are then maintaining at Defendant that is held by them individually. If by the deadline for Defendant to apply credits of Settlement Class Member Payments to accounts Defendant is unable to complete certain credit(s), Defendant shall deliver the total amount of such unsuccessful Settlement Class Member Payment



credits to the Settlement Administrator to be paid by check in accordance with subsection 2 below. Defendant shall provide a declaration or affidavit confirming its efforts to complete the required Account credits, including both completed and unsuccessful credits, and its delivery of the funds required to attempt payments by check for the unsuccessful credits.

(2) For those Settlement Class Members who are Past Accountholders at the time of the distribution of the Net Settlement Fund, they shall be sent a check by the Settlement Administrator at the address used to provide the Notice, or at such other address as designated by the Settlement Class Member. For jointly held accounts, checks will be payable to all members, and will be mailed to the first member listed on the account. The Settlement Administrator will make reasonable efforts to locate the proper address for any check returned by the Postal Service as undeliverable and will re-mail it once to the updated address or, in the case of a jointly held account, and in the Settlement Administrator's discretion, to an accountholder other than the one listed first. The Settlement Class Member shall have 180 days to negotiate the check. Any checks uncashed after 180 days shall be distributed pursuant to Section XI.

iv. In no event shall any portion of the Settlement Fund revert to Defendant.

85. All funds held by the Settlement Administrator shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until distributed pursuant to this Agreement.

86. All funds held by the Settlement Administrator at any time shall be deemed to be a

Qualified Settlement Fund as described in Treasury Regulation §1.468B-1, 26 C.F.R. §1.468B-1.

**XI. Disposition of Residual Funds**

87. Within one year after the date the Settlement Administrator mails the first Settlement Class Member Payment, any remaining amounts resulting from uncashed checks (“Residual Funds”) shall be distributed as follows:

a. First, any Residual Funds remaining after the first distribution shall be distributed on a *pro rata* basis to Settlement Class Members who either cashed their checks or received an Account credit, to the extent feasible and practical in light of the costs of administering such subsequent payments, unless the amounts involved are too small to make individual distributions economically feasible or other specific reasons exist that would make such further distributions impossible or unfair. Should such a second distribution be made, the participating Settlement Class Members will be sent a check by the Settlement Administrator. Any second distribution checks shall be valid for 90 days.

b. Second, in the event the costs of preparing, transmitting and administering such subsequent payments to Settlement Class Members do not make individual distributions economically feasible or practical or other specific reasons exist that would make such further distributions impossible or unfair, or if such a second distribution is made and Residual Funds still remain, the Residual Funds shall be distributed to a *cy pres* recipient. The Parties agree to propose Frontwave Foundation as the *cy pres* recipient. If the Court is not inclined to approve Frontwave Foundation as the *cy pres* recipient, the Parties propose the Armed Services YMCA (Camp Pendleton, 29 Palms & San Diego) as an alternative *cy pres* recipient with the Residual Funds divided as follows: 50% to ASYMCA Camp Pendleton, 25% to ASYMCA 29 Palms, and 25% to ASYMCA San Diego.

## **XII. Releases**

88. Except as to the rights and obligations provided for under the terms of this Agreement, as of the Effective Date, Releasing Parties shall automatically be deemed to fully and irrevocably release and forever discharge the Released Parties of and from the Released Claims.

89. Each Settlement Class Member is barred and permanently enjoined from bringing on behalf of themselves, or through any person purporting to act on their behalf or purporting to assert a claim under or through them, any of the Released Claims against Defendant in any forum, action, or proceeding of any kind.

90. The Releasing Parties, agree to waive any rights they may have under Section 1542 of the California Civil Code as to those releases contained in this Agreement, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Releasing Parties acknowledge that they may later discover facts different from, or in addition to, those which they now know and believe, or should now know and believe, to be true with respect to the releases herein made. Releasing Parties agree that their releases shall, and will remain, effective notwithstanding the existence, and/or subsequent discovery, of such additional facts.

91. Nothing in this Agreement shall operate or be construed to release any claims or rights that Defendant has to recover any past, present, or future amounts that may be owed by Plaintiff or by any Settlement Class Member on his/her accounts, loans, or any other debts with Defendant, pursuant to the terms and conditions of such accounts, loans, or any other debts. Likewise, nothing in this Agreement shall operate or be construed to release any defenses or rights of set-off that Plaintiff or any Settlement Class Member has, other than with respect to the claims

expressly released by this Agreement, in the event Defendant and/or its assigns seeks to recover any past, present, or future amounts that may be owed by Plaintiff or by any Settlement Class Member on his/her accounts, loans, or any other debts with Defendant, pursuant to the terms and conditions of such accounts, loans, or any other debts.

### **XIII. Termination of Settlement**

92. This Settlement may be terminated by either Class Counsel or Defendant by serving on counsel for the opposing Party and filing with the Court a written notice of termination within 15 days (or such longer time as may be agreed in writing between Class Counsel and Defendant) after any of the following occurrences:

- a. Class Counsel and Defendant agree to termination;
- b. the Court rejects, materially modifies, materially amends, or changes, or declines to grant Preliminary Approval or Final Approval;
- c. an appellate court vacates or reverses the Final Approval Order, and the Settlement is not reinstated and finally approved without material change by the Court on remand within 360 days after such reversal;
- d. any court incorporates into, or deletes or strikes from, or modifies, amends, or changes, the Preliminary Approval Order, Final Approval Order, or the Settlement in a way that Class Counsel or Defendant seeking to terminate the Settlement reasonably considers material;
- e. the Effective Date does not occur; or
- f. any other ground for termination provided for elsewhere in this Agreement.

93. Defendant also shall have the right to terminate the Settlement by serving on Class Counsel and filing with the Court a notice of termination within 10 days after its receipt from the Settlement Administrator of any report indicating that the number of Accountholders in the

Settlement Class who timely opt-out from the Settlement Class equals or exceeds 5% of the total Settlement Class members.

94. In the event of a termination, this Agreement shall be considered null and void; all of Plaintiff's, Class Counsel's, and Defendant's obligations under the Settlement shall cease to be of any force and effect; and the Parties shall return to the status *quo ante* in the Action as if the Parties had not entered into this Agreement. In addition, in the event of such a termination, all of the Parties' respective pre-Settlement rights, claims and defenses will be retained and preserved.

95. In the event the Settlement is terminated in accordance with the provisions of this Agreement, any discussions, offers, or negotiations associated with this Settlement shall not be discoverable or offered into evidence or used in the Action or any other action or proceeding for any purpose. In such event, all Parties to the Action shall stand in the same position as if this Agreement had not been negotiated, made or filed with the Court.

#### **XIV. No Admission of Liability**

96. Defendant continues to dispute its liability for the claims alleged in the Action and maintains that its overdraft practices and representations concerning those practices complied, at all times, with applicable laws and regulations and the terms of the account agreements with its members. Defendant does not admit any liability or wrongdoing of any kind, by this Agreement or otherwise. Defendant has agreed to enter into this Agreement to avoid the further expense, inconvenience, and distraction of burdensome and protracted litigation, and to be completely free of any further claims that were asserted or could possibly have been asserted in the Action relating to Defendant's assessment of APPSN Fees or Retry Fees.

97. Class Counsel believe that the claims asserted in the Action have merit, and they have examined and considered the benefits to be obtained under the proposed Settlement set forth

in this Agreement, the risks associated with the continued prosecution of this complex, costly, and time-consuming litigation, and the likelihood of success on the merits of the Action. Class Counsel fully investigated the facts and law relevant to the merits of the claims, conducted significant informal discovery, and conducted independent investigation of the challenged practices. Class Counsel concluded that the proposed Settlement set forth in this Agreement is fair, adequate, reasonable, and in the best interests of the Settlement Class Members.

98. The Parties understand and acknowledge that this Agreement constitutes a compromise and settlement of disputed claims. No action taken by the Parties either previously or in connection with the negotiations or proceedings connected with this Agreement shall be deemed or construed to be an admission of the truth or falsity of any claims or defenses heretofore made, or an acknowledgment or admission by any party of any fault, liability, or wrongdoing of any kind whatsoever.

99. Neither the Settlement, nor any act performed or document executed pursuant to or in furtherance of the Settlement: (a) is or may be deemed to be, or may be used as, an admission of, or evidence of, the validity of any claim made by the Plaintiff or Settlement Class Members, or of any wrongdoing or liability of the Released Parties; or (b) is or may be deemed to be, or may be used as, an admission of, or evidence of, any fault or omission of any of the Released Parties, in the Action or in any proceeding in any court, administrative agency, or other tribunal.

100. In addition to any other defenses Class Counsel may have at law, in equity, or otherwise, to the extent permitted by law, this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding that may be instituted, prosecuted, or attempted in breach of this Agreement or the Releases contained herein.

**XIX. Confidentiality**

101. None of the Parties shall issue any press release or shall otherwise initiate press coverage of the Settlement, nor shall any Party post about the Settlement on social media or any website other than the fact that the Settlement was reached and that it was a fair and reasonable result. If contacted, the Party may respond generally, either online or in person, by stating that they are happy that the Settlement was reached and that it was a fair and reasonable result.

**XX. Miscellaneous Provisions**

102. Gender and Plurals. As used in this Agreement, the masculine, feminine or neuter gender, and the singular or plural number, shall each be deemed to include the others whenever the context so indicates.

103. Binding Effect. This Agreement shall be binding upon, and inure to for the benefit of, the successors and assigns of the Releasing Parties and the Released Parties.

104. Cooperation of Parties. The Parties to this Agreement agree to cooperate in good faith to prepare and execute all documents, to seek Court approval, uphold Court approval, and do all things reasonably necessary to complete and effectuate the Settlement described in this Agreement.

105. Obligation to Meet and Confer. Before filing any motion in the Court raising a dispute arising out of or related to this Agreement, the Parties shall consult with each other and certify to the Court that they have consulted.

106. Integration. This Agreement constitutes a single, integrated written contract expressing the entire agreement of the Parties relative to the subject matter hereof. No covenants, agreements, representations, or warranties of any kind whatsoever have been made by any Party hereto, except as provided for herein.

107. No Conflict Intended. Any inconsistency between the headings used in this

Agreement and the text of the paragraphs of this Agreement shall be resolved in favor of the text.

108. Governing Law. Except as otherwise provided herein, the Agreement shall be construed in accordance with, and be governed by, the laws of the State of California, without regard to the principles thereof regarding choice of law.

109. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument, even though all Parties do not sign the same counterparts. Original signatures are not required. Any signature submitted by facsimile or through email of an Adobe PDF shall be deemed an original.

110. Jurisdiction. The Court shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement, and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to this Agreement that cannot be resolved by negotiation and agreement by counsel for the Parties. The Court shall retain jurisdiction with respect to the administration, consummation, and enforcement of the Agreement and shall retain jurisdiction for the purpose of enforcing all terms of the Agreement. The Court shall also retain jurisdiction over all questions and/or disputes related to the Notice Program and the Settlement Administrator. As part of their agreement to render services in connection with this Settlement, the Settlement Administrator shall consent to the jurisdiction of the Court for this purpose. The Court shall retain jurisdiction over the enforcement of the Court's injunction barring and enjoining all Releasing Parties from asserting any of the Released Claims and from pursuing any Released Claims against Defendant or its affiliates at any time, including during any appeal from the Final Approval Order.

111. Notices. All notices to Class Counsel provided for herein, shall be sent by email



with a hard copy sent by overnight mail to:

KALIEL GOLD PLLC  
Sophia Goren Gold  
950 Gilman Street, Suite 200  
Berkeley, California 94710  
Email: sgold@kalielgold.com  
*Class Counsel*

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Email: camille.brooks@katten.com  
*Counsel for Frontwave Credit Union*

The notice recipients and addresses designated above may be changed by written notice.

Upon the request of any of the Parties, the Parties agree to promptly provide each other with copies of objections, requests for exclusion, or other filings received as a result of the Notice program.

112. Modification and Amendment. This Agreement may not be amended or modified, except by a written instrument signed by Class Counsel and counsel for Defendant and, if the Settlement has been approved preliminarily by the Court, approved by the Court.

113. No Waiver. The waiver by any Party of any breach of this Agreement by another

Party shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Agreement.

114. Authority. Class Counsel (for Plaintiff and the Settlement Class Members), and Defendant's Counsel (for Defendant), represent and warrant that the persons signing this Agreement on their behalf have full power and authority to bind every person, partnership, corporation or entity included within the definitions of Plaintiff and Defendant to all terms of this Agreement. Any person executing this Agreement in a representative capacity represents and warrants that he or she is fully authorized to do so and to bind the Party on whose behalf he or she signs this Agreement to all of the terms and provisions of this Agreement.

115. Agreement Mutually Prepared. Neither Defendant nor Plaintiff, nor any of them, shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement.

116. Independent Investigation and Decision to Settle. The Parties understand and acknowledge that they: (a) have performed an independent investigation of the allegations of fact and law made in connection with this Action; and (b) that even if they may hereafter discover facts in addition to, or different from, those that they now know or believe to be true with respect to the subject matter of the Action as reflected in this Agreement, that will not affect or in any respect limit the binding nature of this Agreement. Both Parties recognize and acknowledge that they and their experts reviewed and analyzed data for a subset of the time at issue and that they and their experts used extrapolation to make certain determinations, arguments, and settlement positions. The Parties agree that this Settlement is reasonable and will not attempt to renegotiate or otherwise void or invalidate or terminate the Settlement irrespective of what any unexamined data later

shows. It is the Parties' intention to resolve their disputes in connection with this Action pursuant to the terms of this Agreement now and thus, in furtherance of their intentions, the Agreement shall remain in full force and effect notwithstanding the discovery of any additional facts or law, or changes in law, and this Agreement shall not be subject to rescission or modification by reason of any changes or differences in facts or law, subsequently occurring or otherwise.

117. Receipt of Advice of Counsel. Each Party acknowledges, agrees, and specifically warrants that he, she, or it has fully read this Agreement and the Releases contained herein, received independent legal advice with respect to the advisability of entering into this Agreement and the Releases, and the legal effects of this Agreement and the Releases, and fully understands the effect of this Agreement and the Releases.

*Signature Page Follows*

AGREED AND APPROVED as of the dates indicated below.

Dated: \_\_\_\_\_

\_\_\_\_\_  
ELAINE WARD-HOWIE  
*Plaintiff*

Dated: September 15, 2023

Frontwave Credit Union

\_\_\_\_\_  
By: WILLIAM BURNIE  
Its: PRESIDENT/CEO

APPROVED AS TO FORM.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Sophia Goren Gold, Esq.  
KALIEL GOLD PLLC  
*Class Counsel*

Dated: \_\_\_\_\_

\_\_\_\_\_  
Jeffrey D. Kaliel, Esq.  
KALIEL GOLD PLLC  
*Class Counsel*

Dated: \_\_\_\_\_

\_\_\_\_\_  
Jeff Ostrow, Esq.  
KOPELOWITZ OSTROW P.A.  
*Class Counsel*

Dated: September 15, 2023

\_\_\_\_\_  
Stuart M. Richter  
Stuart M. Richter, Esq.  
KATTEN MUCHIN ROSENMAN LLP  
Counsel for Frontwave Credit Union

AGREED AND APPROVED as of the dates indicated below.

Dated: Sep 18, 2023

 Elaine Ward-Howie (Sep 18, 2023 08:08 PDT)

ELAINE WARD-HOWIE  
*Plaintiff*

Dated: \_\_\_\_\_

Frontwave Credit Union

By: \_\_\_\_\_  
Its: \_\_\_\_\_

APPROVED AS TO FORM.

Dated: Sep 15, 2023

 Sophia Gold (Sep 15, 2023 08:35 PDT)

Sophia Goren Gold, Esq.  
KALIEL GOLD PLLC  
*Class Counsel*

Dated: Sep 15, 2023

 Jeffrey Kalien (Sep 15, 2023 11:40 EDT)

Jeffrey D. Kalien, Esq.  
KALIEL GOLD PLLC  
*Class Counsel*

Dated: Sep 15, 2023

 Jeffrey Ostrow (Sep 15, 2023 11:56 EDT)

Jeff Ostrow, Esq.  
KOPELOWITZ OSTROW P.A.  
*Class Counsel*

Dated: \_\_\_\_\_

Stuart M. Richter, Esq.  
KATTEN MUCHIN ROSENMAN LLP  
Counsel for Frontwave Credit Union

AGREED AND APPROVED as of the dates indicated below.

Dated: \_\_\_\_\_

\_\_\_\_\_  
ELAINE WARD-HOWIE  
*Plaintiff*

Dated: September 15, 2023

Frontwave Credit Union

\_\_\_\_\_  
By: WILLIAM BURNIE  
Its: PRESIDENT/CEO

APPROVED AS TO FORM.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Sophia Goren Gold, Esq.  
KALIEL GOLD PLLC  
*Class Counsel*

Dated: \_\_\_\_\_

\_\_\_\_\_  
Jeffrey D. Kaliel, Esq.  
KALIEL GOLD PLLC  
*Class Counsel*

Dated: \_\_\_\_\_

\_\_\_\_\_  
Jeff Ostrow, Esq.  
KOPELOWITZ OSTROW P.A.  
*Class Counsel*

Dated: September 15, 2023

\_\_\_\_\_  
Stuart M. Richter  
Stuart M. Richter, Esq.  
KATTEN MUCHIN ROSENMAN LLP  
Counsel for Frontwave Credit Union

## Exhibit 1 – Email and Postcard Notice

Elaine Ward-Howie v. Frontwave Credit Union  
Case No. 37-2022-00016328-CU-BC-CTL

**NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT**  
**READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT MAY AFFECT YOUR RIGHTS!**

**IF YOU HAVE OR HAD A CHECKING ACCOUNT WITH FRONTWAVE CREDIT UNION AND YOU WERE CHARGED CERTAIN OVERDRAFT FEES ON DEBIT CARD PAYMENTS BETWEEN APRIL 29, 2018 AND JUNE 30, 2022 AND/OR CERTAIN RETURNED ITEM FEES AND/OR OVERDRAFT FEES ON CHECK AND ACH PAYMENTS BETWEEN JANUARY 4, 2019 AND JUNE 30, 2022, THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT**

Para una notificación en español, visite nuestro sitio de web: [INSERT WEBSITE ADDRESS]

This is not a solicitation from a lawyer

The San Diego County Superior Court for the State of California has authorized this Notice.

You may be a member of the Settlement Class in *Elaine Ward-Howie v. Frontwave Credit Union*, in which the plaintiff alleges that defendant Frontwave Credit Union (“Defendant”) improperly assessed certain overdraft fees for debit card payments between April 29, 2018 and June 30, 2022 and/or certain returned item and/or overdraft fees for check and ACH payments between January 4, 2019 and June 30, 2022. If you are a member of the Settlement Class and the Settlement is approved, you may be entitled to receive a cash payment from the \$1,872,814.00 Settlement Fund and/or the forgiveness of certain overdraft and/or returned item fees that were assessed but have not yet been collected. Defendant denies all claims in the action and denies it charged any fees that were not authorized and disclosed. Defendant has agreed to settle to avoid the time, expense and distraction of litigation.

The Court has preliminarily approved this Settlement. It will hold a Final Approval Hearing in this case on [INSERT DATE]. At that hearing, the Court will consider whether to grant Final Approval to the Settlement, and whether to approve payment from the Settlement Fund of up to \$5,000.00 for an incentive award to the class representative, up to \$666,600.00, equal to 33.33% of the Value of the Settlement as attorneys’ fees, and reimbursement of costs to the attorneys estimated to be \$ [REDACTED] and to the Settlement Administrator estimated to be \$ [REDACTED]. If the Court grants Final Approval of the Settlement and you do not request to be excluded from the Settlement, you will release your right to bring any claim covered by the Settlement. In exchange, Defendant has agreed to issue a credit to your Account, a cash payment to you if you are no longer a member, and/or to forgive certain overdraft and/or returned item fees.

**To obtain a Long Form Notice and other important documents, please visit [INSERT WEBSITE ADDRESS]. Alternatively, you may call [INSERT PHONE #].**

*If you do not want to participate in this Settlement—you do not want to receive a credit or cash payment and/or the forgiveness of uncollected overdraft and/or returned item fees and you do not want to be bound by any judgment entered in this case—you may exclude yourself by submitting an opt-out request postmarked no later than [PARTIES TO INSERT DATE]. If you want to object to this Settlement because you think it is not fair, adequate, or reasonable, you may object by submitting an objection postmarked no later than [PARTIES TO INSERT DATE]. You may learn more about the opt-out and objection procedures by visiting [PARTIES TO PROVIDE WEBSITE ADDRESS] or by calling [Insert Phone #].*

## Exhibit 2 – Long Form Notice

Elaine Ward-Howie v. Frontwave Credit Union

### NOTICE OF PENDING CLASS ACTION AND PROPOSED SETTLEMENT

**READ THIS NOTICE FULLY AND CAREFULLY; THE PROPOSED SETTLEMENT  
MAY AFFECT YOUR RIGHTS!**

**IF YOU HAVE OR HAD A CHECKING ACCOUNT WITH FRONTWAVE CREDIT UNION AND YOU WERE CHARGED CERTAIN OVERDRAFT FEES ON DEBIT CARD PAYMENTS BETWEEN APRIL 29, 2018 AND JUNE 30, 2022 AND/OR CERTAIN RETURNED ITEM FEES AND/OR OVERDRAFT FEES ON CHECK AND ACH PAYMENTS BETWEEN JANUARY 4, 2019 AND JUNE 30, 2022, THEN YOU MAY BE ENTITLED TO A PAYMENT FROM A CLASS ACTION SETTLEMENT**

The San Diego County Superior Court for the State of California has authorized this Notice; it is not a solicitation from a lawyer.

SUMMARY OF YOUR OPTIONS AND THE LEGAL EFFECT OF EACH OPTION	
<b>DO NOTHING</b>	If you don't do anything, you will receive a payment or account credit from the Settlement Fund and/or forgiveness of Uncollected Relevant Fees so long as you do not opt out of or exclude yourself from the Settlement (described in the next box).
<b>EXCLUDE YOURSELF FROM THE SETTLEMENT; RECEIVE NO PAYMENT BUT RELEASE NO CLAIMS</b>	You can choose to exclude yourself from the Settlement or "opt out." This means you choose not to participate in the Settlement. You will keep your individual claims against Defendant but you will not receive a payment for Relevant Fees and/or forgiveness of Uncollected Relevant Fees. If you exclude yourself from the Settlement but want to recover against Defendant, you will have to file a separate lawsuit or claim.
<b>OBJECT TO THE SETTLEMENT</b>	You can file an objection with the Court explaining why you believe the Court should reject the Settlement. If your objection is overruled by the Court, then you may receive a payment and/or forgiveness of Uncollected Relevant Fees and you will not be able to sue Defendant for the claims asserted in this litigation. If the Court agrees with your objection, then the Settlement may not be approved.

These rights and options – *and the deadlines to exercise them* – along with the material terms of the Settlement are explained in this Notice.



## **BASIC INFORMATION**

### **1. What is this lawsuit about?**

The lawsuit that is being settled is entitled *Elaine Ward-Howie v. Frontwave Credit Union*. It is pending in the San Diego County Superior Court for the State of California, Case No. 37-2022-00016328-CU-BC-CTL. San Diego Superior Court Judge Katherine A. Bacal is overseeing this case.

The case is a “class action.” That means that the “Class Representative,” Elaine Ward-Howie, is an individual who is acting on behalf of current and former members who were purportedly improperly assessed APPSN Fees between April 29, 2018 and June 30, 2022 and Retry Fees between January 4, 2019 and June 30, 2022. “APPSN Fees” mean Overdraft Fees that Defendant charged and did not refund on signature Point of Sale Debit Card transactions, where there was a sufficient available balance at the time the transaction was authorized, but an insufficient available balance at the time the transaction was presented to Defendant for payment and posted to the account. “Retry Fees” mean Returned Item Fees and Overdraft Fees that were charged and not refunded during the Retry Fee Class Period, for Automated Clearing House (ACH) and check transactions that were re-submitted by a merchant after being returned by Defendant for insufficient funds. The Class Representative has asserted claims for breach of contract, including breach of the covenant of good faith and fair dealing, and violation of California’s Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*). The Amended Complaint in this lawsuit is posted on the Settlement Website.

Defendant does not deny it charged the fees the Class Representative is complaining about, but contends it did so properly and in accordance with the terms of its agreements and applicable law. Defendant therefore denies that its practices give rise to claims for damages by the Class Representative or any Settlement Class members, but is settling to avoid expense and distraction resulting from the litigation.

### **2. Why did I receive this Notice of this lawsuit?**

You received this Notice because Defendant’s records indicate that you were charged one or more APPSN Fees and/or Retry Fees that are the subject of this Action. The Court directed that this Notice be sent to all Settlement Class members because each such member has a right to know about the proposed settlement and the options available to him or her before the Court decides whether to approve the settlement.

### **3. Why did the parties settle?**

In any lawsuit, there are risks and potential benefits that come with a trial versus settling at an earlier stage. It is the Class Representative’s and her lawyers’ job to identify when a proposed settlement offer is good enough that it justifies recommending settling the case instead of continuing to trial. In a class action, the Class Representative’s lawyers, known as Class Counsel, make this recommendation to the Class Representative. The Class Representative has the duty to act in the best interests of the class as a whole and, in this case, it is her belief, as well as Class Counsel’s opinion, that this Settlement is in the best interest of all Settlement Class members.

There is legal uncertainty about whether a judge or a jury will find that Defendant was contractually and otherwise legally obligated not to assess the fees at issue. And even if it was contractually wrong to assess these fees, there is uncertainty about whether the Class Representative's claims are subject to other defenses that might result in no or less recovery to Settlement Class members. Even if the Class Representative was to win at trial, there is no assurance that the Settlement Class members would be awarded more than the current settlement amount and it may take years of litigation before any payments would be made. By settling, the Settlement Class members will avoid these and other risks and the delays associated with continued litigation.

While Defendant disputes the allegations in the lawsuit and denies any liability or wrongdoing, it enters into the Settlement solely to avoid the expense, inconvenience, and distraction of further proceedings in the litigation.

### **WHO IS IN THE SETTLEMENT**

#### **4. How do I know if I am part of the Settlement?**

If you received this notice, then Defendant's records indicate that you are a member of the Settlement Class who is entitled to receive a payment or credit to your account and/or forgiveness of Uncollected Relevant Fees.

### **YOUR OPTIONS**

#### **5. What options do I have with respect to the Settlement?**

You have three options: (1) do nothing and you will receive a check payment or account credit and/or forgiveness of Uncollected Relevant Fees according to the terms of this Settlement; (2) exclude yourself from the Settlement ("opt out" of it); or (3) participate in the Settlement but object to it. Each of these options is described in a separate section below.

#### **6. What are the critical deadlines?**

There is no deadline to receive the Settlement benefits. If you do nothing, then you will get a check payment or account credit and/or forgiveness of Uncollected Relevant Fees.

The deadline for sending a letter to exclude yourself from or opt out of the Settlement is [REDACTED].

The deadline to file an objection with the Court is also [REDACTED].

#### **7. How do I decide which option to choose?**

If you do not like the Settlement and you believe that you could receive more money by pursuing your claims on your own (with or without an attorney that you could hire) and you are comfortable with the risk that you might lose your case or get less than you would in this Settlement, then you may want to consider opting out.

If you believe the Settlement is unreasonable, unfair, or inadequate and the Court should reject the Settlement, you can object to the Settlement terms. The Court will decide if your objection is valid. If the Court agrees, then the Settlement may not be approved and no payments and/or forgiveness of Uncollected Relevant Fees will be made to you or any other member of the Settlement Class. If

your objection (and any other objection) is overruled, and the Settlement is approved, then you may still get a payment and/or forgiveness of Uncollected Relevant Fees, and will be bound by the Settlement, including the release of claims.

If you want to participate in the Settlement, then you don't have to do anything; you will receive a payment or account credit and/or forgiveness of Uncollected Relevant Fees if the Settlement is approved by the Court.

**8. What has to happen for the Settlement to be approved?**

The Court has to decide that the Settlement is fair, reasonable, and adequate before it will approve it. The Court already has decided to provide Preliminary Approval of the Settlement, which is why you received a Notice. The Court will make a final decision regarding the Settlement at a "Final Approval Hearing," which is currently scheduled for [REDACTED].

**THE SETTLEMENT PAYMENT**

**9. How much is the Settlement?**

Defendant has agreed to create a Settlement Fund of \$1,872,814.00, allocated \$1,470,159.00 to the APPSN Fee Class and \$402,655.00 to the Retry Fee Class. It will also forgive Uncollected Relevant Fees totaling \$127,186.00, as defined in the Settlement Agreement.

As discussed separately below, attorneys' fees, litigation costs, and the costs paid to a third-party Settlement Administrator to administer the Settlement (including mailing and emailing Notice) will be paid out of the Settlement Fund. The Net Settlement Fund will be divided among all Settlement Class Members entitled to Settlement Class Member Payments based on formulas described in the Settlement Agreement.

**10. How much of the Settlement Fund will be used to pay for attorney fees and costs?**

Class Counsel will request the Court to approve attorneys' fees of not more than \$666,600.00, equal to 33.33% of the Value of the Settlement, and will request that it be reimbursed for litigation costs incurred in prosecuting the case estimated to be \$[REDACTED]. The Court will decide the amount of the attorneys' fees and costs based on a number of factors, including the risk associated with bringing the case on a contingency basis, the amount of time spent on the case, the amount of costs incurred to prosecute the case, the quality of the work, and the outcome of the case.

**11. How much of the Settlement Fund will be used to pay the Class Representative an Incentive Award?**

Class Counsel will request that the Class Representative be paid an Incentive Award in the amount of up to \$[REDACTED] for her work in connection with this case. The Incentive Award must be approved by the Court.

**12. How much of the Settlement Fund will be used to pay the Settlement Administrator's expenses?**

The Settlement Administrator estimates its expenses at \$[REDACTED].

**13. How much will my payment be?**

The balance of the Settlement Fund after attorneys' fees and costs, the Incentive Award, and the Settlement Administrator's fees, also known as the Net Settlement Fund, will be divided among all Settlement Class Members entitled to Settlement Class Member Payments in accordance with the formulas outlined in the Settlement Agreement. Current Accountholders will receive a credit to their accounts for the amount they are entitled to receive. Past Accountholders shall receive a check from the Settlement Administrator. Settlement Class Members entitled to forgiveness of Uncollected Relevant Fees shall receive this benefit automatically.

**14. What am I giving up to stay in the Settlement Class?**

If you stay in the Settlement Class, all of the decisions by the Court will bind you, and you give Defendant a "release." A release means you cannot sue, continue to sue, or be part of any other lawsuit against Defendant about the legal issues in this case. As of the Effective Date, you shall automatically be deemed to have fully and irrevocably released and forever discharged Defendant from any and all liabilities, rights, claims, actions, causes of action, demands, damages, costs, attorneys' fees, losses and remedies, whether known or unknown, existing or potential, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, based on contract, tort or any other theory, that arise from or relate to Defendant's assessment of APPSN Fees or Retry Fees, and claims that were asserted or could possibly have been asserted in the Action relating Defendant's assessment of APPSN Fees or Retry Fees. More information about the release may be found in the Settlement Agreement.

**15. Do I have to do anything if I want to participate in the Settlement?**

No. If you received this Notice, then you may be entitled to receive a check payment or credit for Relevant Fees and/or forgiveness of Uncollected Relevant Fees without having to make a claim, unless you choose to exclude yourself from the Settlement, or "opt out."

**16. When will I receive my check payment or account credit?**

The Court will hold a Final Approval Hearing on [REDACTED], at [REDACTED] a.m./p.m. to consider whether the Settlement should be approved. If the Court approves the Settlement, then payments should be made or credits should be issued within 30 days of the Effective Date. However, if someone objects to the Settlement, and the objection is sustained, then there may be no Settlement. Even if all objections are overruled and the Court approves the Settlement, an objector could appeal, and it might take months or even years to have the appeal resolved, which would delay any payment.

Subject to Court approval, any Residual Funds from uncashed checks remaining after the first distribution shall be distributed on a *pro rata* basis to Settlement Class Members who either cashed their checks or received Account credits, to the extent feasible and practical in light of the costs of administering such subsequent payments, unless the amounts involved are too small to make individual distributions economically feasible or other specific reasons exist that would make such further distributions impossible or unfair. Should such a second distribution be made, the participating Settlement Class Members will be sent a check by the Settlement Administrator. Any second distribution checks shall be valid for 90 days.

Also subject to Court approval, in the event the costs of preparing, transmitting, and administering such subsequent payments to Settlement Class Members do not make individual distributions economically feasible or practical, or other specific reasons exist that would make such further distributions impossible or unfair, or if such a second distribution is made and Residual Funds still remain, the Residual Funds shall be distributed to a *cy pres* recipient approved by the Court. The Parties agree to propose Frontwave Foundation or Armed Services YMCA (Camp Pendleton, 29 Palms & San Diego) as the *cy pres* recipient.

### **EXCLUDING YOURSELF FROM THE SETTLEMENT**

#### **17. How do I exclude myself from the Settlement?**

If you do not want to receive a payment or if you want to keep any right you may have to sue Defendant for the claims alleged in this lawsuit, then you must exclude yourself, or “opt out.”

To opt out, you **must** send a letter to the Settlement Administrator that you want to be excluded. Your letter can simply say “I hereby elect to be excluded from the settlement in the *Elaine Ward-Howie v. Frontwave Credit Union* class action.” Be sure to include your name, the last four digits of your current or former member number(s), address, telephone number, and email address (if any). Your exclusion or opt out request must be postmarked by [REDACTED], and sent to:

Elaine Ward-Howie v. Frontwave Credit Union

Attn:

ADDRESS OF THE SETTLEMENT ADMINISTRATOR

#### **18. What happens if I opt out of the Settlement?**

If you opt out of the Settlement, you will preserve and not give up any of your rights to sue Defendant for the claims alleged in this case. However, you will not be entitled to receive a check payment or credit and/or forgiveness of Uncollected Relevant Fees from the Settlement.

### **OBJECTING TO THE SETTLEMENT**

#### **19. How do I notify the Court that I do not like the Settlement?**

You can object to the Settlement or any part of it that you do not like **IF** you do not opt-out from the Settlement. (Settlement Class members who opt-out from the Settlement have no right to object to how other Settlement Class Members are treated.) To object, you **must** send a written document by mail or private courier (e.g., Federal Express) to the Settlement Administrator at the address below. Your objection must include the following information:

- a. the name of the Action;
- b. the objector’s full name, address, telephone number, and email address (if any);
- c. all grounds for the objection, accompanied by any legal support for the objection known to the objector or objector’s counsel;

- d. the identity of all counsel who represent the objector and whether they will appear at the Final Approval Hearing;
- e. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; and
- f. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing.

All objections must be post-marked no later than [REDACTED], and must be mailed to the Settlement Administrator as follows:

Elaine Ward-Howie v. Frontwave Credit Union

Attn:

**ADDRESS OF THE SETTLEMENT ADMINISTRATOR**

**20. What is the difference between objecting and opting-out from the Settlement?**

Objecting is telling the Court that you do not believe the Settlement is fair, reasonable, and adequate for the Settlement Class, and asking the Court to reject it. You can object only if you do not opt-out of the Settlement. If you object to the Settlement and do not opt-out, then you are entitled to a check payment or credit for Relevant Fees and/or forgiveness of Uncollected Relevant Fees if the Settlement is approved, but you will release claims you might have against Defendant.

Opting-out is telling the Court that you do not want to be part of the Settlement, and do not want to receive a check payment or credit for Relevant Fees and/or forgiveness of Uncollected Relevant Fees, or release claims you might have against Defendant for the claims alleged in this lawsuit.

**21. What happens if I object to the Settlement?**

If the Court sustains your objection, or the objection of any other member of the Settlement Class, then there may be no Settlement. If you object, but the Court overrules your objection and any other objection(s), then you will be part of the Settlement; provided, however, that an objection to Class Counsel's requested attorneys' fees and costs or to the requested Incentive Award amount, may result in approval of the Settlement but the award of a lower attorneys' fee and cost amount or lower Incentive Award. If you object, but the Court overrules your objection and any other objection(s), then you will be part of the Settlement. If the Court approves the Settlement, then the objector will participate in the Settlement. If the Court does not approve the settlement, then there is no Settlement.

**THE COURT'S FINAL APPROVAL HEARING**

**22. When and where will the Court decide whether to approve the Settlement?**

The Court will hold a Final Approval Hearing at [REDACTED] a.m./p.m. on [REDACTED], 2023 in Department 69 of the San Diego County Superior Court for the State of California, which is located at the Hall of Justice, 330 West Broadway, San Diego, CA 92101. At this hearing, the Court will consider whether the Settlement is fair, reasonable and adequate. If there are objections, the Court will



consider them. The Court may also decide how much to award Class Counsel for attorneys' fees and litigation costs and the amount of the Incentive Award to the Class Representative. The hearing may be virtual, in which case the instructions to participate shall be posted on the Settlement Website at [www.settlement.com](http://www.settlement.com). Also, if the date and/or location of the Final Approval Hearing changes, that information will be posted on the same website.

**23. Do I have to come to the hearing?**

No. Class Counsel will answer any questions the Court may have. You may attend if you desire to do so. If you have submitted an objection, then you may want to attend.

**24. May I speak at the hearing?**

If you have objected, you may ask the Court for permission to speak at the Final Approval Hearing. To do so, you must include with your objection, described in Question 19, above, the statement, "I hereby give notice that I intend to appear at the Final Approval Hearing." The Court will consider your objection even if you do not appear.

**THE LAWYERS REPRESENTING YOU**

**25. Do I have a lawyer in this case?**

The Court ordered that the lawyers and their law firms referred to in this Notice as "Class Counsel" will represent you and the other Settlement Class Members. However, you may retain a lawyer to represent you at your own expense.

**26. Do I have to pay the lawyer for accomplishing this result?**

No. Class Counsel will be paid directly from the Settlement Fund for the legal services provided to accomplish the Settlement for Settlement Class Members' benefit. Class Counsel's award of attorneys' fees and costs is deducted from the Settlement Fund, reducing that amount in calculating the Net Settlement Fund from which Settlement Class Members will be paid..

**27. Who determines what the attorneys' fees will be?**

The Court will be asked to approve the amount of attorneys' fees at the Final Approval Hearing. Class Counsel will file an application for attorneys' fees and costs and will specify the amount being sought as discussed above. You may review a physical copy of the fee application at the Settlement Website established by the Settlement Administrator.

**GETTING MORE INFORMATION**

This Notice only summarizes the proposed Settlement. More details are contained in the Settlement Agreement, which can be viewed/obtained online at [\[WEBSITE\]](#) or by contacting the Settlement Administrator (details below) and requesting a copy.

For additional information about the Settlement and/or to obtain copies of the Settlement Agreement, or to change your address for purposes of receiving a payment, you should contact the Settlement Administrator as follows:

Elaine Ward-Howie v. Frontwave Credit Union  
Settlement Administrator  
Attn:

ADDRESS OF THE SETTLEMENT ADMINISTRATOR

For more information, you also can contact the Class Counsel as follows:

KALIEL GOLD PLLC  
Sophia Goren Gold  
950 Gilman Street, Suite 200  
Berkeley, California 94710  
Email: sgold@kalielgold.com

KALIEL GOLD PLLC  
Jeffrey D. Kaliel  
1100 15th Street NW 4th Floor  
Washington, D.C. 20005  
Email: jkaliel@kalielgold.com

KOPELOWITZ OSTROW P.A.  
Jeff Ostrow  
1 West Las Olas Blvd., Suite 500  
Fort Lauderdale, FL 33301  
Email: ostrow@kolawyers.com

***PLEASE DO NOT CONTACT THE COURT OR ANY REPRESENTATIVE OF  
DEFENDANT CONCERNING THIS NOTICE OR THE SETTLEMENT.***



1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am  
4 employed in the District of Columbia. My business address is 950 Gilman Avenue, Suite 200,  
Berkeley, California 94710.

5 On October 5, 2023, I served true copies of the following document(s) described as:

6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
7 **PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF**  
8 **CLASS ACTION SETTLEMENT**

9 on the interested parties in this action as follows:

10 Stuart M. Richter	Attorneys for Defendant
11 Camille A. Brooks	FRONTWAVE CREDIT UNION
12 Ashley T. Brines	
13 KATTEN MUCHIN ROSENMAN LLP	
2029 Century Park East, Suite 2600	
Los Angeles, CA 90067-3012	

14 **[ ] BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the  
15 persons at the addresses listed in the Service List and placed the envelope for collection and mailing,  
16 following our ordinary business practices. I am readily familiar with KalieGold PLLC's practice  
17 for collecting and processing correspondence for mailing. On the same day that the correspondence  
is placed for collection and mailing, it is deposited in the ordinary course of business with the United  
States Postal Service, in a sealed envelope with postage fully prepaid.

18 **[ X ] BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s)  
19 to be sent from e-mail address ngarcia@kaliellpc.com to the persons at the e-mail addresses listed  
20 in the Service List. I did not receive, within a reasonable time after the transmission, any electronic  
message or other indication that the transmission was unsuccessful.

21 I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct.

22 Executed on October 5, 2023, at Los Angeles, California.

23 

24 NEVA GARCIA