

1 HASSAN A. ZAVAREEI
 2 ANDREA GOLD (Pro Hac Vice)
 3 ANDREW SILVER (Pro Hac Vice)
TYCKO & ZAVAREEI LLP
 4 1828 L Street, N.W., Suite 1000
 Washington, DC 20036
 Telephone: (202) 973-0900
 5 Facsimile: (202) 973-0950
hzavareei@tzlegal.com
 6 *agold@tzlegal.com*
asilver@tzlegal.com

Counsel for Plaintiffs and Proposed Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10
11 JENNA LLOYD and JAMIE
12 PLEMONS, on behalf of themselves
and all others similarly situated,

13 Plaintiffs,

14 vs.

15 NAVY FEDERAL CREDIT UNION,

16 Defendant.

**SECOND AMENDED CLASS
ACTION COMPLAINT**

CASE NO. 3:17-cv-01280-BAS-RBB

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLASS ACTION COMPLAINT

Plaintiffs, Jenna Lloyd and Jamie Plemons, individually and on behalf of all persons similarly situated, for complaint against Defendant Navy Federal Credit Union, allege as follows:¹

INTRODUCTION

1. This is a civil action seeking monetary damages, restitution and declaratory relief from Defendant, Navy Federal Credit Union (“NFCU”), arising from the unfair and unconscionable assessment and collection of “Optional Overdraft Protection Fees” (“OOPFs”).

2. At the moment debit card transactions are authorized on an account with positive funds to cover the transaction, NFCU immediately decrements consumers’ checking accounts for the amount of the purchase and sets aside funds in a checking account to cover that specific transaction. As a result, and with limited exceptions, customers’ accounts *always* have sufficient available funds to cover these transactions throughout their entire life-cycle.

3. However, NFCU still assesses crippling \$20 OOPFs on many of these transactions, in violation of its contractual promises not to do so.

4. Despite putting aside sufficient available funds for debit card transactions, NFCU charges OOPFs on those same transactions if they purportedly settle—days later—into a negative balance (“Authorize Positive, Purportedly Settle Negative Transactions” or “APPSN Transactions”).

5. Here is how it works. NFCU maintains a running account balance in real time, tracking funds consumers have for immediate use. This running account balance is adjusted, in real-time, to account for debit card transactions at the precise instant they

¹ This Second Amended Complaint excludes claims for Unjust Enrichment and violations of the California’s and Consumer Legal Remedies Act, which claims were dismissed with prejudice. ECF No. 33 at 44. Plaintiffs elect not to amend their claims for violations of California’s Unfair Competition Law, which were dismissed without prejudice. Plaintiffs reserve their right to appeal the dismissal of those claims upon entry of a final order in this action.

1 are made. When a customer makes a purchase with a debit card, NFCU sequesters the
2 funds needed to pay the transaction, subtracting the dollar amount of the transaction
3 from the customer's account balance. Such funds are not available for any other use
4 by the accountholder, and such funds are specifically associated with a given debit card
5 transaction.

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

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

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

16 7. That means when any *subsequent*, intervening transactions are initiated
17 on a checking account, they are compared against an account balance that has been
18 reduced to account for earlier debit card transactions. This means that many subsequent
19 transactions incur OOPFs due to the unavailability of the funds sequestered for those
20 debit card transactions.

21 8. Still, despite keeping those held funds off-limits for other transactions,
22 NFCU improperly charges OOPFs on APPSN Transactions—the latter which always
23 have sufficient available funds to be "covered."

24 9. Indeed, the Consumer Financial Protection Bureau ("CFPB") has
25 expressed concern with this very issue, flatly calling the practice "deceptive" when:

26 a financial institution authorized an electronic transaction, which
27 reduced a customer's available balance but did not result in an overdraft
28 at the time of authorization; settlement of a subsequent unrelated
transaction that further lowered the customer's available balance and
pushed the account into overdraft status; and when the original

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

16 Consumer Financial Protection Bureau, Winter 2015 “Supervisory Highlights.”
17 [https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf)
18 [2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_supervisory-highlights-winter-2015.pdf) (last visited April 20, 2018).

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

26 11. Besides being deceptive, unfair and unconscionable, these practices
27 breach contract promises made in the NFCU's adhesion contracts—contracts which
28

1 fundamentally misconstrue the true nature of the NFCU’s processes and practices.
2 These practices also exploit contractual discretion to gouge consumers.

3 12. In plain, clear, and simple language, the checking account contract
4 documents covering OOPFs promise that the NFCU will only charge OOPFs on
5 transactions with insufficient funds to “cover” a given transaction:

6 An overdraft occurs when you do not have enough money in your
7 account to cover a transaction, but we pay it anyway.

8 Ex. A, NFCU “What You Need to Know About Overdrafts and Overdraft Fees.”

9 13. But for APPSN transactions, which are immediately deducted from a
10 positive account balance and held aside for payment of that same transaction, there are
11 always funds to “cover” those transactions—yet NFCU assesses OOPFs on them
12 anyway.

13 14. Moreover, NFCU reaffirms that debit cards transactions are “authorized
14 and approved” immediately, in one fell swoop:

15 We may **authorize and approve** the following types of transactions
16 under our Optional Overdraft Protection Service (OOPS) if you ask us
(see below):

17 • Checks and other transactions made using your checking account
18 number • ATM transactions • Debit card transactions • Electronic
debits cleared through the Automated Clearing House (ACH)

19 *Id.*

20 15. This promise indicates that transactions are only “OOPS” transactions
21 when they are “authorized and approved” into a negative balance. Of course, that is
22 not true for APPSN transactions.

23 16. Lest there be any doubt, NFCU also clarifies that “authorization” and
24 “payment” are a linked and essentially coterminous process—in other words, that
25 authorization necessitates payment, and account balances are deducted once for any
26 given transaction:

27 We pay overdrafts at our discretion, which means we do not guarantee
28 that we will always authorize and pay any type of transaction. If we do

1 not authorize and pay an overdraft, your transaction will be declined
and/or your check/ACH will be returned.

2 *Id.*

3 17. In fact, NFCU actually “authorizes” transactions on positive funds, sets
4 those funds aside on a hold, then fails to use those same funds to “pay” those same
5 transactions when they settle.

6 18. All these representations and contractual promises are untrue. In fact,
7 NFCU charges OOPFs even when sufficient funds exist to “cover” transactions that
8 are “authorized and approved” into a positive balance.

9 19. Bizarrely, this means NFCU actually debits an account twice for the same
10 transaction—not just at the moment of purchase, but later during a secret posting
11 process described below.

12 20. The NFCU breaches these plain contractual promises when it assesses
13 OOPFs on APPSN Transactions that *did* have funds to cover them throughout their
14 lifecycle. By definition, there are always available funds sufficient to “cover” debit
15 card transactions authorized into positive funds, for the simple reason that those funds
16 are sequestered at the instant of authorization (as described above).

17 21. The contract also fundamentally misconstrues the process by which
18 OOPFs are determined—and, more generally, how debit card transactions are
19 executed.

20 22. In short, NFCU is not authorized by contract to charge OOPFs on APPSN
21 Transactions, but it has done so and continues to do so, to the tune of millions of dollars
22 in consumer harm every year.

23 23. Plaintiffs and other NFCU customers have been injured by NFCU’s
24 practices. On behalf of themselves and the putative class, Plaintiffs seek damages,
25 restitution and injunctive relief for NFCU’s breach of contract, unjust enrichment,
26 conversion, and violation of California consumer protection law.

27 **JURISDICTION AND VENUE**

28 24. This Court has original jurisdiction of this action under the Class Action

1 Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has
2 original jurisdiction because the aggregate claims of the putative class members exceed
3 \$5 million, exclusive of interest and costs, and at least one of the members of the
4 proposed class is a citizen of a different state than NFCU.

5 25. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because
6 NFCU is subject to personal jurisdiction here and regularly conducts business in the
7 Central District of California, and because a substantial part of the events or omissions
8 giving rise to the claims asserted herein occurred in this district.

9 **PARTIES**

10 26. Plaintiffs are citizens of the State of California. At all times relevant,
11 Plaintiffs patronized NFCU banking centers located in Orange County, CA, Riverside
12 County, CA, and San Diego County, CA.

13 27. Defendant NFCU is a national bank with its headquarters and principal
14 place of business located in Vienna, Virginia. Among other things, NFCU is engaged
15 in the business of providing retail banking services to consumers, including Plaintiffs
16 and members of the putative class, which includes the issuance of debit cards for use
17 by its customers in conjunction with their checking accounts. NFCU operates banking
18 centers, and thus conducts business, throughout the State of California and the United
19 States.

20 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

21 28. Plaintiffs have checking accounts with NFCU.

22 29. NFCU issues debit cards to its checking account customers, including
23 Plaintiffs, which allows its customers to have electronic access to their checking
24 accounts for purchases, payments, withdrawals and other electronic debit transactions.

25 30. Pursuant to its standard account agreement, NFCU charges OOPFs (at all
26 materials times in the amount of \$20) for debit card transactions that purportedly result
27 in an overdraft.
28

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

2 31. A debit card transaction occurs in two parts. First, authorization for the
3 purchase amount is instantaneously obtained by the merchant from the NFCU. When
4 a merchant physically or virtually “swipes” a customer’s debit card, the credit card
5 terminal connects, via an intermediary, to NFCU, which verifies that the customer’s
6 account is valid and that sufficient available funds exist to “cover” the transaction
7 amount.

8 32. At this step, if the transaction is approved, NFCU immediately decrements
9 the funds in a consumer’s account and sequesters funds in the amount of the
10 transaction, but does not yet transfer the funds to the merchant.

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

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

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

21 34. Sometime thereafter, the funds are actually transferred from the
22 customer’s account to the merchant’s account. This is referred to in the banking
23 industry as “posting” or “settling”—something which may occur several days after the
24 transaction was initially initiated.

25 35. There is no change—no impact whatsoever—to the available funds in an
26 account when posting or payment of a transaction that settles in the same amount for
27 which it authorized occurs. That is because available funds amounts do not change for
28 debit card transactions that settle in the same amount for which they were authorized.

1 **B. NFCU Account Documents**

2 36. Plaintiffs’ checking accounts with NFCU were, at all relevant times,
3 governed by NFCU’s standardized contract for deposit accounts, the material terms of
4 which are drafted by NFCU, amended by NFCU from time to time at its convenience
5 and complete discretion, and imposed by NFCU on all of its customers.

6 37. NFCU’s “What You Need to Know About Overdrafts and Overdraft
7 Fees,” the portion of the standardized contract dealing with overdraft fees, contains the
8 following relevant provisions.

9 38. The checking account contract documents covering OOPFs promise that
10 the NFCU will only charge OOPFs on transactions with insufficient funds to “cover”
11 a given transaction:

12 An overdraft occurs when you do not have enough money in your
13 account to cover a transaction, but we pay it anyway.

14 Ex. A.

15 39. The critical contract term “to cover” is never defined.

16 40. For APPSN transactions, which are immediately deducted from a positive
17 account balance and held aside for payment of that same transaction, there are always
18 funds to “cover” those transactions—yet NFCU assesses OOPFs on them anyway.

19 41. Moreover, NFCU reaffirms that debit card transactions are “authorized
20 and approved” immediately, in one fell swoop:

21 We may **authorize and approve** the following types of transactions
22 under our Optional Overdraft Protection Service (OOPS) if you ask us
 (see below):

- 23 • Checks and other transactions made using your checking account
24 number • ATM transactions • Debit card transactions • Electronic
 debits cleared through the Automated Clearing House (ACH)

25 *Id.*

26 42. This promise indicates that transactions are only “OOPS” transactions
27 when they are “authorized and approved” into a negative balance. Of course, that is
28 not true for APPSN transactions.

1 43. Lest there be any doubt, NFCU also clarifies that “authorization” and
2 “payment” are a linked and essentially coterminous process—in other words, that
3 authorization necessitates payment, and account balances are deducted once for any
4 given transaction:

5 We pay overdrafts at our discretion, which means we do not guarantee
6 that we will always authorize and pay any type of transaction. If we do
7 not authorize and pay an overdraft, your transaction will be declined
and/or your check/ACH will be returned.

8 *Id.*

9 44. In fact, NFCU actually “authorizes” transactions on positive funds, sets
10 those funds aside on a hold, then fails to use those same funds to “pay” those same
11 transactions when they settle. Instead, it uses a secret posting process described below.

12 45. All these representations and contractual promises are untrue. In fact,
13 NFCU charges OOPFs even when sufficient funds exist to “cover” transactions that
14 are “authorized and approved” into a positive balance.

15 46. No express language in any document states that the NFCU may impose
16 fees for overdrafts on APPSN Transactions.

17 **C. The Account Documents Fundamentally Misconstrue the NFCU’s True**
18 **Overdraft Fee and Debit Processing Practices**

19 47. The Account Documents misconstrue the NFCU’s true debit card
20 processing and OOPF practices in at least four ways.

21 48. First, and most fundamentally, the NFCU charges OOPFs on debit card
22 transactions for which there are sufficient available funds to “cover” the transactions.
23 That is despite contractual representations that the NFCU will only charge OOPFs on
24 transactions with insufficient available funds to “cover” a given transaction.

25 49. The NFCU assesses OOPFs on APPSN Transactions that do have
26 sufficient available funds to “cover” them throughout their lifecycle.

27 50. Those available funds are sequestered at the moment a debit card
28 transaction is approved by NFCU.

1 51. The NFCU’s practice of charging OOPFs even where sufficient available
2 funds exist to “cover” a transaction violates a contractual promise not to do so. This
3 discrepancy between the NFCU’s actual practice and the contract causes consumers
4 like Plaintiffs to incur more OOPFs than they should.

5 52. Third, sufficient funds for APPSN Transactions actually are debited from
6 the account immediately, consistent with standard industry practice.

7 53. Because these withdrawals take place upon initiation, then cannot be re-
8 debited later. But that is what NFCU does when it re-debits the account during a secret
9 batch posting process.

10 54. In reality, the NFCU’s actual practice is to assay the same debit card
11 transaction twice to determine if the transaction overdraws an account—both at the
12 time a transaction is authorized and at the time of settlement. Then the NFCU makes
13 that determination again, at settlement.

14 55. At the time of settlement, however, an available balance *does not change*
15 *at all* for these transactions previously authorized into good funds. As such, NFCU
16 cannot then charge an OOPF on such a transaction because the available balance has
17 not been rendered insufficient due to the pseudo-event of settlement.

18 56. Upon information and belief, something more is going on: at the moment
19 a debit card transaction is getting ready to settle, NFCU does something new and
20 unexpected, during the middle of the night, during its nightly batch posting process.
21 Specifically, NFCU releases the hold it had placed on funds for the transaction for a
22 split second, putting money back into the account, then re-debits the same transaction
23 a second time.

24 57. This secret step allows it to charge overdraft fees on transactions that
25 never should have gotten them—transactions that were authorized into sufficient funds,
26 and for which NFCU specifically set aside money to pay them.

27 58. This discrepancy between the NFCU’s actual practices and the contract
28 causes consumers to incur more OOPFs than they should.

1 59. In sum, there is a yawning gap between the NFCU’s practices as described
2 in the account documents and the NFCU’s practices in reality.

3 **D. The NFCU Abuses Contractual Discretion**

4 60. The NFCU’s treatment of debit card transactions to charge OOPFs is not
5 simply a breach of the express terms of the numerous account documents. In addition,
6 NFCU exploits contractual discretion to the detriment of accountholders when it uses
7 these policies.

8 61. The term “to cover” a transaction is undefined. The NFCU uses its
9 discretion to define “to cover” in a manner contrary to any reasonable, common sense
10 understanding of that term. In NFCU’s definition, a transaction is not “covered” even
11 if the NFCU sequesters sufficient available funds for that transaction.

12 62. Moreover, NFCU uses its contractual discretion to cause APPSN
13 Transactions to incur OOPFs by knowingly authorizing later transactions that it allows
14 to consume available funds previously sequestered for APPSN Transactions: “We pay
15 overdrafts at our discretion, which means we do not guarantee that we will always
16 authorize and pay any type of transaction. If we do not authorize and pay an overdraft,
17 your transaction will be declined and/or your check/ACH will be returned.” Ex. A.

18 63. NFCU uses all of these contractual discretion points unfairly to extract
19 OOPFs on transactions that no reasonable consumer would believe could cause
20 OOPFs.

21 **E. Reasonable Consumers Understand Debit Card Transactions are Debited**
22 **Immediately**

23 64. The assessment of OOPFs on APPSN Transactions is fundamentally
24 inconsistent with immediate withdrawal of funds for debit card transactions. That is
25 because if funds are immediately debited, they cannot be depleted by intervening
26 transactions (and it is that subsequent depletion that is the necessary condition of
27 APPSN Transactions). If funds are immediately debited, then they are necessarily
28 applied to the debit card transactions for which they are debited.

1 65. NFCU was and is aware that this is precisely how its accountholders
2 reasonably understand debit card transactions to work.

3 66. NFCU well knows that many consumers prefer debit cards for these very
4 reasons. Consumer research indicates that consumers prefer debit cards as a budgeting
5 device because they don't allow debt like credit cards do, and because the money comes
6 directly out of a checking account.

7 67. Consumer Action, a national nonprofit consumer education and advocacy
8 organization, advises consumers determining whether they should use a debit card that
9 “[t]here is no grace period on debit card purchases the way there is on credit card
10 purchases; the money is immediately deducted from your checking account. Also,
11 when you use a debit card you lose the one or two days of ‘float’ time that a check
12 usually takes to clear.” See [https://www.consumer-](https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card)
13 [action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card](https://www.consumer-action.org/helpdesk/articles/what_do_i_need_to_know_about_using_a_debit_card)
14 (last visited April 20, 2018).

15 68. Further, Consumer Action informs consumers that, “Debit cards offer the
16 convenience of paying with plastic without the risk of overspending. When you use a
17 debit card, you do not get a monthly bill. You also avoid the finance charges and debt
18 that can come with a credit card if not paid off in full.” See [https://www.consumer-](https://www.consumer-action.org/english/articles/understanding_debit_cards)
19 [action.org/english/articles/understanding_debit_cards](https://www.consumer-action.org/english/articles/understanding_debit_cards) (last visited April 20, 2018).

20 69. This is a large part of the reason that debit cards have risen in popularity.
21 The number of terminals that accept debit cards in the United States has increased by
22 approximately 1.4 million in the last five years, and with that increasing ubiquity,
23 consumers have (along with credit cards) viewed debit cards “as a more convenient
24 option than refilling their wallets with cash from an ATM.”²

25

26

27 ² Maria LaMagna, *Debit Cards Gaining on Case for Smallest Purchases*,
28 MARKETWATCH, Mar. 23, 2016, <http://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23>

1 70. Not only have consumers increasingly substituted from cash to debit
2 cards, but they believe that a debit cards purchase is the functional equivalent to a cash
3 purchase, with the swipe of a card equating to handing over cash, permanently and
4 irreversibly.

5 71. NFCU was aware of a consumer perception that debit card transactions
6 reduce an available balance *in a specified order*—namely, the order the transactions
7 are actually initiated—and its account agreement only supports this perception.

8 **F. Plaintiffs' Experience**

9 72. On October 27, 2014, Plaintiff Lloyd was assessed three OOPFs in the
10 amount of \$20.00 each for six transactions that settled that day, five of which were
11 debit card transactions that were initiated on or prior to October 26, 2014—all despite
12 the fact that positive funds were deducted immediately for at least three of the debit
13 card transactions on which she was assessed OOPFs.

14 73. Indeed, the only reason any of the five debit card transactions that settled
15 on October 27 incurred overdraft fees was because of a \$260 ATM withdrawal that
16 Plaintiff Lloyd made *after* the debit card transactions had already been initiated.

17 74. Plaintiff Lloyd does not dispute that NFCU was within its rights to charge
18 an OOPF on the ATM transaction, because it was authorized into insufficient funds.
19 Plaintiff Lloyd disputes that NFCU was authorized to charge OOPFs on the prior in
20 time debit card transactions.

21 75. On January 31, 2014, 2014, Plaintiff Lloyd was assessed three OOPFs in
22 the amount of \$20.00 each for four transactions, three of which were debit card
23 transactions. Upon information and belief, positive funds were deducted immediately
24 for at least two of the debit card transactions on which she was assessed OOPFs.

25 76. Indeed, the only reason any of the three debit card transactions that settled
26 on January 31 incurred overdraft fees was because of a \$400 ATM withdrawal that
27 Plaintiff Lloyd made *after* some or all of the debit card transactions had already been
28 initiated.

1 All NFCU checking account holders in the United States who, from
2 June 22, 2011, through the date of class certification, were charged
3 OOPFs on transactions that were authorized into a positive available
4 balance (the “Class”).

5 85. Plaintiffs reserve the right to modify or amend the definition of the
6 proposed Class before the Court determines whether certification is appropriate.

7 86. Excluded from the Class are NFCU, its parents, subsidiaries, affiliates,
8 officers and directors, any entity in which NFCU has a controlling interest, all
9 customers who make a timely election to be excluded, governmental entities, and all
10 judges assigned to hear any aspect of this litigation, as well as their immediate family
11 members.

12 87. The members of the Class are so numerous that joinder is impractical. The
13 Class consists of thousands of members, the identity of whom is within the knowledge
14 of and can be ascertained only by resort to NFCU’s records.

15 88. The claims of the representative Plaintiffs are typical of the claims of the
16 Class in that the representative Plaintiffs, like all Class members, were charged OOPFs
17 by NFCU as a result of charging OOPFs on transactions that were authorized into a
18 sufficient available balance, but whose available balances were insufficient at the time
19 the transactions were settled. The representative Plaintiffs, like all Class members,
20 have been damaged by NFCU’s misconduct in that they have been assessed unfair and
21 unconscionable overdraft charges. Furthermore, the factual basis of NFCU’s
22 misconduct is common to all Class members, and represents a common thread of unfair
23 and unconscionable conduct resulting in injury to all members of the Class.

24 89. There are numerous questions of law and fact common to the Class and
25 those common questions predominate over any questions affecting only individual
26 Class members.

27 90. Among the questions of law and fact common to the Class are whether
28 NFCU:

- a. Imposed OOPFs on debit card transactions when those transactions were

- 1 authorized into sufficient available balances or funds available;
- 2 b. Breached its contract and the covenant of good faith and fair dealing with
- 3 Plaintiffs and other members of the Class through its overdraft policies
- 4 and practices on APPSN Transactions;
- 5 c. Converted money belonging to Plaintiffs and other members of the Class
- 6 through its overdraft policies and practices;

7 Other questions of law and fact common to the Class include:

- 8 d. The proper method or methods by which to measure damages, and
- 9 e. The declaratory relief to which the Class are entitled.

10 91. Plaintiffs' claims are typical of the claims of other Class members, in that
11 they arise out of the same wrongful overdraft policies and practices of NFCU's Rules
12 Governing Deposit Accounts. Plaintiffs have suffered the harm alleged and have no
13 interests antagonistic to the interests of any other Class member.

14 92. Plaintiffs are committed to the vigorous prosecution of this action and
15 have retained competent counsel experienced in the prosecution of class actions and,
16 in particular, class actions on behalf of consumers and against financial institutions.
17 Accordingly, Plaintiffs are adequate representatives and will fairly and adequately
18 protect the interests of the Class.

19 93. A class action is superior to other available methods for the fair and
20 efficient adjudication of this controversy. Since the amount of each individual Class
21 member's claim is small relative to the complexity of the litigation, and due to the
22 financial resources of NFCU, no Class member could afford to seek legal redress
23 individually for the claims alleged herein. Therefore, absent a class action, the Class
24 members will continue to suffer losses and NFCU's misconduct will proceed without
25 remedy.

26 94. Even if Class members themselves could afford such individual litigation,
27 the court system could not. Given the complex legal and factual issues involved,
28 individualized litigation would significantly increase the delay and expense to all

1 parties and to the Court. Individualized litigation would also create the potential for
2 inconsistent or contradictory rulings. By contrast, a class action presents far fewer
3 management difficulties, allows claims to be heard which might otherwise go unheard
4 because of the relative expense of bringing individual lawsuits, and provides the
5 benefits of adjudication, economies of scale and comprehensive supervision by a single
6 court.

7 **FIRST CLAIM FOR RELIEF**
8 **Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing**

9 95. Plaintiffs repeats paragraphs 1 through 94 above.

10 96. Plaintiffs and members of the Class and NFCU have contracted for bank
11 account deposit, checking, ATM, and debit card services, agreeing that Virginia law
12 applies.

13 97. NFCU misconstrued in the account documents its true debit card
14 processing and OOPF practices and breached the express terms of the account
15 documents.

16 98. NFCU breached promises included in the account documents.

17 99. No contract provision authorizes NFCU to charge OOPFs on APPSN
18 Transactions.

19 100. Therefore, NFCU breached the terms of its account documents by
20 charging OOPFs on transactions that were authorized into a sufficient available
21 balance, but whose available balances were allegedly insufficient at the time the
22 transactions were settled.

23 101. Under Virginia law, every contract carries with it an implied covenant of
24 good faith and fair dealing. Good faith and fair dealing, in connection with executing
25 contracts and discharging performance and other duties according to their terms, means
26 preserving the spirit – not merely the letter – of the bargain. Put differently, the parties
27 to a contract are mutually obligated to comply with the substance of their contract in
28 addition to its form. The covenant requires faithfulness to an agreed common purpose

1 and consistency with the justified expectations of the other party to a contract. Evading
2 the spirit of the bargain and abusing the power to specify terms constitute examples of
3 bad faith in the performance of contracts.

4 102. Subterfuge and evasion violate the obligation of good faith in performance
5 even when an actor believes their conduct to be justified. Bad faith may be overt or
6 may consist of inaction, and fair dealing may require more than honesty. Examples of
7 bad faith are evasion of the spirit of the bargain, willful rendering of imperfect
8 performance, abuse of a power to specify contract terms, and interference with or
9 failure to cooperate in the other party's performance.

10 103. NFCU has breached the covenant of good faith and fair dealing in the
11 contract through its overdraft policies and practices as alleged herein. Specifically,
12 NFCU harms consumers by exercising its contractual discretion in bad faith, even
13 though that discretion is only vested in NFCU, in a number of ways which no
14 reasonable consumer would anticipate. First, the term "to cover" a transaction is
15 undefined, and the NFCU uses its discretion to define "to cover" in a manner contrary
16 to any reasonable, common sense understanding of that term. In NFCU's definition, a
17 transaction is not "covered" even if NFCU sequesters sufficient available funds for the
18 transaction at the time it is initiated.

19 104. Second, NFCU exercised its contractual discretion in bad faith to cause
20 APPSN Transactions to incur OOPFs by knowingly authorizing later transactions that
21 it allows to consume available funds previously sequestered for APPSN Transactions:
22 "We pay overdrafts at our discretion, which means we do not guarantee that we will
23 always authorize and pay any type of transaction. If we do not authorize and pay an
24 overdraft, your transaction will be declined and/or your check/ACH will be returned."

25 105. NFCU uses these contractual discretion points to extract OOPFs on
26 transactions that no reasonable consumer would believe could cause OOPFs.

27
28

1 106. Plaintiffs and members of the Class have performed all, or substantially
2 all, of the obligations imposed on them under the contract.

3 107. Plaintiffs and members of the Class have sustained damages as a result of
4 NFCU's breach of the contract.

5 **SECOND CLAIM FOR RELIEF**

6 **Conversion**

7
8 108. Plaintiffs repeats paragraphs 1 through 94 above.

9 109. NFCU had and continues to have a duty to maintain and preserve its
10 customers' checking accounts and to prevent their diminishment through its own
11 wrongful acts.

12 110. NFCU has wrongfully collected OOPFs from Plaintiffs and the members
13 of the Class, and has taken specific and readily identifiable funds from their accounts
14 in payment of these fees in order to satisfy them.

15 111. NFCU has, without proper authorization, assumed and exercised the right
16 of ownership over these funds, in hostility to the rights of Plaintiffs and the members
17 of the Class, without legal justification.

18 112. NFCU continues to retain these funds unlawfully without the consent of
19 Plaintiffs or members of the Class.

20 113. NFCU intends to permanently deprive Plaintiffs and the members of the
21 Class of these funds.

22 114. These funds are properly owned by Plaintiffs and the members of the
23 Class, not NFCU, which now claims that it is entitled to their ownership, contrary to
24 the rights of Plaintiffs and the members of the Class.

25 115. Plaintiffs and the members of the Class are entitled to the immediate
26 possession of these funds.

27 116. NFCU has wrongfully converted these specific and readily identifiable
28 funds.

1 117. NFCU's wrongful conduct is continuing.

2 118. As a direct and proximate result of this wrongful conversion, Plaintiffs
3 and the members of the Class have suffered and continue to suffer damages.

4 119. By reason of the foregoing, Plaintiffs and the members of the Class are
5 entitled to recover from NFCU all damages and costs permitted by law, including all
6 amounts that NFCU has wrongfully converted.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Plaintiffs and the Class demand a jury trial on all claims so
9 triable and judgment as follows:

- 10 1. Declaring NFCU's OOPF policies and practices to be wrongful, unfair
11 and unconscionable;
- 12 2. Restitution of all OOPFs paid to NFCU by Plaintiffs and the Class, as a
13 result of the wrongs alleged herein in an amount to be determined at trial;
- 14 3. Disgorgement of the ill-gotten gains derived by NFCU from its
15 misconduct;
- 16 4. Actual damages in an amount according to proof;
- 17 5. Punitive and exemplary damages;
- 18 6. Pre-judgment interest at the maximum rate permitted by applicable law;
- 19 7. Costs and disbursements assessed by Plaintiffs in connection with this
20 action, including reasonable attorneys' fees pursuant to applicable law; and
- 21 8. Such other relief as this Court deems just and proper.

22 **DEMAND FOR JURY TRIAL**

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

25

26

27

28

1 Dated: May 4, 2018

Respectfully submitted,

2
3 /s/ Hassan A. Zavareei
4 HASSAN A. ZAVAREEI
5 ANDREA GOLD (Pro Hac Vice)
6 ANDREW SILVER (Pro Hac Vice)
7 **TYCKO & ZAVAREEI LLP**
8 1828 L Street, N.W., Suite 1000
9 Washington, DC 20036
10 Telephone: (202) 973-0900
11 Facsimile: (202) 973-0950
12 hzavareei@tzlegal.com
13 agold@tzlegal.com
14 asilver@tzlegal.com

15 JEFF OSTROW (Pro Hac Vice)
16 JONATHAN M. STREISFELD (Pro Hac Vice)
17 **KOPELOWITZ OSTROW**
18 **FERGFUSON WEISELBERG GILBERT**
19 One West Las Olas Blvd., Suite 500
20 Fort Lauderdale, FL 33301
21 Telephone: (954) 525-4100
22 Facsimile: (954) 525-4300
23 ostrow@kolawyers.com
24 streisfeld@kolawyers.com

25 CHICHARU SEKINO
26 **SHEPHERD, FINKELMAN, MILLER &**
27 **SHAH, LLP**
28 401 West A Street, Suite 2550
San Diego, CA 92101
Telephone: (619) 235-2416
Facsimile: (866) 300-7367
csekino@sfmslaw.com

JAMES C. SHAH
SHEPHERD, FINKELMAN, MILLER &
SHAH, LLP
35 East State Street
Media, PA 19063
Telephone: (610) 891-9880
Facsimile: (610) 891-9883
jshah@sfmslaw.com

Counsel for Plaintiffs and Proposed Class

EXHIBIT A



What You Need to Know About Overdrafts and Overdraft Fees

An overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway. We can cover overdrafts in two different ways:

1. We have standard overdraft practices that come with your account.
2. We also offer Checking Line of Credit (requires credit approval), which may be less expensive than our standard overdraft practices. To learn more, ask us about this plan.

This notice explains our standard overdraft practices.

► What are the standard overdraft practices that come with my account?

We will authorize and pay overdrafts at no charge through Automatic Overdraft Savings Transfers (up to six (6) times per month, which includes any other savings transfers that you do or have set up to automatically transfer from the savings account) as long as funds are available. This limitation includes pre-authorized or automatic transfers by Navy Federal to cover overdrafts, savings-to-savings transfer requests, and requests submitted by telephone (including the Automated Telephone Service), through Navy Federal Online®, or by fax.

We will not authorize and pay overdrafts for any transactions, except through Automatic Overdraft Savings Transfers, unless you ask us to. We may authorize and approve the following types of transactions under our Optional Overdraft Protection Service (OOPS) if you ask us (see below):

- Checks and other transactions made using your checking account number
- ATM transactions
- Debit card transactions
- Electronic debits cleared through the Automated Clearing House (ACH)

We pay overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction. If we do not authorize and pay an overdraft, your transaction will be declined and/or your check/ACH will be returned. Navy Federal Credit Union reserves the right to revoke OOPS privileges at any time without prior notification and to deny the payment of any transactions. Should the account remain overdrawn beyond thirty (30) days, the OOPS will be frozen. Should the account remain overdrawn beyond forty-five (45) days, the OOPS will be terminated.

► What fees will I be charged if Navy Federal pays my overdraft?

Under our standard overdraft practices:

- There is no charge for paying an overdraft through an Automatic Overdraft Savings Transfer.
- OOPS:
 - We will charge a fee of \$20 each time we pay an overdraft.
 - You will not be charged a fee on transactions of \$5 or less.
 - You will not be charged a fee if your total overdrawn outstanding balance at the end of the business day for your checking account is less than \$15.
 - You can only be assessed three (3) overdraft fees per day per account.

► What if I want Navy Federal to authorize and pay overdrafts on my transactions?

If you want us to authorize and pay overdrafts on certain transactions under our Overdraft Service, call 1-888-842-6328, visit navyfederal.org, or complete the form below. You can present the form at a branch, fax it to 703-206-4244, or mail it to PO Box 3000, Merrifield, VA 22119-3000.

Navy Federal® Optional Overdraft Protection Service Opt In

Name: First		MI	Last	Suffix
Access No.	Date (MM/DD/YY)	Account Number(s)		
I want Navy Federal to authorize and pay overdrafts on: <input type="checkbox"/> check and ACH transactions only <input type="checkbox"/> ATM and debit card transactions only <input type="checkbox"/> all of the above transactions				
Signature				

You must be at least eighteen (18) years of age or older and a member for a minimum of ninety (90) days for Optional Overdraft Protection Service (OOPS) to be extended. Members may not have both Checking Line of Credit and OOPS on the same account.



EXHIBIT B

NAVY FEDERAL CREDIT UNION
**IMPORTANT
DISCLOSURES**



navyfederal.org
1.888.842.6328

**Membership/Savings/
Checking Disclosure
Statement**

**Required IRS and Bank Secrecy Act
(BSA) Information**

Membership/Savings/Checking Disclosure Statement 1

Navy Federal Funds Availability Policy 5

Electronic Funds Transfer Agreement and Disclosure 7

What Does Navy Federal Do With Your Personal Information? 10

Your Affiliate Marketing Choices 12

Membership

Upon verification of eligibility following submission of a completed membership application and acceptance for membership by the membership officer, and upon purchase of at least one share (\$5), a membership/savings account will be established in your name, indicating that you are a member-owner of Navy Federal Credit Union. Membership at Navy Federal Credit Union comes with certain ongoing responsibilities. By signing your original membership application, you and your joint owner(s), if any, agree to abide by the properly disclosed terms and conditions of all accounts or services that you may receive at Navy Federal. You also agree to keep Navy Federal informed of your current mailing address. The terms and conditions of these accounts and services are subject to change without notice to you, unless prior notification is required by law.

The membership/savings balance must not be reduced below the value of one share (\$5) at any given time. To protect your member-owner status, we may limit access to your initial share (\$5). You will be considered an active member in Navy Federal as long as you have a membership/savings balance of \$50 or more; or have a membership/savings account balance of \$5 or more and a checking account, a Money Market Savings Account (MMSA), a certificate, an Individual Retirement Account, a credit card account, or a current consumer loan or mortgage account; or have a membership/savings account balance of \$5 or more and are a member under the age of 24. If you do not meet one of the above criteria, you will be considered an inactive member and may be subject to a quarterly Inactive Member Fee in the amount listed on Navy Federal's current *Schedule of Fees and Charges*. The fee will be assessed until you meet one of the criteria listed above or the membership/savings account is closed, thereby terminating your membership. Once this happens, you must be in Navy Federal's field of membership to reopen the account. A savings account may not be used for commercial or business purposes.

Federal law requires each individual becoming a member to certify under penalty of perjury that the Taxpayer Identification Number (TIN) furnished to Navy Federal is the individual's correct number and the individual is not subject to backup withholding. For an individual, your TIN is usually your Social Security Number. The Internal Revenue Service does not require your consent to any provision of this document other than the certifications required for backup withholding. Failure to provide a valid TIN and to complete and sign a membership application certifying your Social Security Number for this purpose could result in backup withholding being applied to all of your interest earnings (dividends) at Navy Federal. If you are not a U.S. citizen or U.S. resident alien, you must complete a Form W-8BEN verifying non-resident alien status.

In addition, in compliance with the Currency and Foreign Transactions Act, also known as the Bank Secrecy Act (BSA), the U.S. government now requires that we ask you to supply certain information about your employment and other sources of income.

Dividends

Dividends are a division and distribution of earnings among members, after all expenses have been paid and the required amount has been set aside for reserves. Dividend rates are declared prospectively by the Board of Directors in the month preceding the dividend period. These prospective dividend rates may change at the determination of the Board. Navy Federal also provides the Annual Percentage Yield (APY) for each dividend rate declared by the Board. Payment of all dividends is dependent on the availability of earnings at the end of the period. Dividends at Navy Federal are earned on deposits, including non-cash deposits, from day-of-deposit to day-of-withdrawal and are computed using the daily balance method by applying the daily periodic rate to the full amount in the account at the end of each day. Dividends for the savings and checking accounts, where applicable, are credited the last day of the period they are earned and are compounded monthly. The dividend period is monthly—for example, the beginning date of the first dividend period of the calendar year is January 1, and the ending date of such dividend period is January 31. All other dividend periods follow this same pattern of dates.

Transfers and Withdrawals

You may transfer and/or withdraw funds from your savings account as often as you want under the following conditions: in person, by mail, by automatic teller, to pay your Navy Federal loan, to have funds mailed directly to you, or as distributions of your direct deposit. Otherwise, federal regulations limit the number of certain types of transfers and/or withdrawals that you can make from the savings account to six per month. The types of transfers and withdrawals that are limited are those requested by fax, telephone, Internet, pre-authorized transfers, or transfers automatically generated from savings to cover checking overdrafts. Navy Federal may, at its option, pay a check that exceeds the share balance in the checking account by transferring the amount of the resulting overdraft from the corresponding savings account.

Order of Transactions

All credits to your account will post first, followed by withdrawals in the following order: Automated Teller Machine (ATM), Visa® Check Card Point-of-Sale (POS), Automated Clearing House (ACH), and check. When multiple transactions are processed from these groups of transactions, the items will be posted in the order of lowest to highest amount within each group of transactions.

Current Rates and Fees

Current rates may be obtained online at navyfederal.org or by calling Navy Federal Credit Union toll-free in the U.S. at 1-888-842-6328. For toll-free numbers when overseas, visit navyfederal.org. Use 1-703-255-8837 for collect international calls. Fees and charges that may be assessed are disclosed on Navy Federal's current *Schedule of Fees and Charges*.

Joint Ownership

If you designate a joint owner on any depository account(s), it is co-owned equally by you and the joint owner. Joint ownership means that the shares and accumulated dividends may be withdrawn or transferred by you or the joint owner, or pledged as collateral against a loan by you or the joint owner (if a member) at any time. Navy Federal is not liable for carrying out any of these requested actions. A joint owner cannot be removed from an account without his/her written permission. Like the owner, a joint owner may close the account.

Overdrawn Accounts

The owner and joint owner (if any) agree to be jointly and severally liable for negative balances on any accounts in which either or both owners have an ownership interest, including any overdrafts, regardless of the cause, and agree to immediately deposit sufficient funds to cover the negative amount of the overdraft. The owner and joint owner (if any) agree that Navy Federal has the right to transfer funds from any accounts, in which either have an ownership interest, to correct a negative or overdrawn amount on any account on which either of their names appear. The owner and joint owner agree to reimburse Navy Federal for all costs of collection, including reasonable attorney's fees.

Optional Overdraft Protection Service

Standard Practices:

- We will charge a fee of \$20 each time we pay an overdraft.
- You will not be charged a fee on transactions of \$5 or less.
- You will not be charged a fee if your total overdrawn outstanding balance at the end of the business day for your checking account is less than \$15.
- You can only be assessed three overdraft fees per day per account.

Navy Federal Credit Union reserves the right to revoke Optional Overdraft Protection Service privileges at any time without prior notification and to deny the payment of any transactions. Navy Federal Credit Union pays overdrafts at our discretion, which means we do not guarantee that we will always authorize and pay any type of transaction. The Automatic Overdraft Savings Transfer will automatically transfer funds from your linked savings account first. If you have no funds in the savings account or have reached the maximum transactions for the period, your Optional Overdraft Protection Service will be used, and you will be assessed an Optional Overdraft Protection Service fee.

Overdrafts on your checking account up to a total limit of \$500, not to exceed more than 10% of the limit, may be paid by Navy Federal. The \$500 limit includes the amount of the overdrawn item(s), Optional Overdraft Protection Service fee(s), and any other transactions that may have occurred to overdraw your account, such as returned deposits

or other fees. All credits to your account will post first, followed by withdrawals in the following order: ATM, Visa Check Card POS, ACH, and check. When multiple transactions are processed from these groups of transactions, the items will be posted in the order of lowest to highest amount within each group of transactions. Optional Overdraft Protection Service is not a loan, must be repaid promptly, and cannot extend beyond 30 days of the initial transaction posting. The account must be in a positive status for a minimum of one business day to allow the deposited funds to clear. For example, if you overdraft \$100 on the 1st of the month and \$200 on the 20th, then a total of \$300 is due on or before the 30th. Should the account remain overdrawn beyond 30 days, the service will be frozen. Should the account remain overdrawn beyond 45 days, the Optional Overdraft Protection Service will be terminated. The failure to deposit funds to bring the account to a positive balance may result in the overdrawn balance being charged off as a loss to Navy Federal. Such action could result in the checking account being closed and restriction of your membership privileges.

You have the right to opt out of Optional Overdraft Protection Service at any time through navyfederal.org or by phone toll-free in the U.S. by calling 1-888-842-6328. For toll-free numbers when overseas, visit navyfederal.org. Use 1-703-255-8837 for collect international calls. If you prefer, you may also opt out at any branch location, by faxing a request to 1-703-206-4244, or by mailing the request to: PO Box 3000, Merrifield, VA 22119-3000.

Survivorship

The "survivorship" designation on the membership/savings account applies to all other joint accounts with the same joint owner, unless specifically designated otherwise for a particular account on a separate application. If "Joint Account-With Survivorship" is designated, on the death of an owner of the account, the deceased owner's shares in the account pass to the surviving owner of the account. If "Joint Account-No Survivorship" is designated, on the death of an owner of the account, the deceased owner's shares in the account pass as a part of the deceased owner's estate.

Request for Information

When necessary for business purposes, you and the joint owner(s) (if any) authorize any person to furnish upon request by Navy Federal any information concerning either or both of your financial affairs.

Consumer Reporting Agency Information

I authorize Navy Federal to obtain a consumer credit report in connection with the application, update, or renewal of any share or loan account that I apply for. I authorize and understand that Navy Federal may obtain such reports at any time after I establish membership with Navy Federal. I authorize Navy Federal to use these consumer credit reports to consider me for other products and services with Navy Federal.

Share Insurance Coverage

Your shares at Navy Federal Credit Union are federally insured. Share insurance coverage is provided by the National Credit Union Administration (NCUA), an independent government agency that charters, regulates, and insures federal credit unions. Your shares are backed by our solid financial standing. The insurance protects members against loss if a federal credit union fails.

Individual accounts are insured for up to \$250,000 for combined balances in your savings, checking, share certificates, and MMSAs. Joint accounts are insured for up to \$250,000 for each joint owner on the account. The most share insurance coverage any member can have as a result of joint ownership is \$250,000, regardless of the number of joint accounts he or she co-owns.

The combined balances in your Traditional, Simplified Employee Pension (SEP), and Roth Individual Retirement Account (IRA) plans are insured separately from your other Navy Federal accounts for up to \$250,000. Educational Savings Accounts (ESAs) are insured separately from your other Navy Federal accounts for up to \$250,000.

Payable on Death (POD) accounts are insured separately from your other Navy Federal accounts. Each owner is insured for up to \$250,000 per beneficiary.

Deposit Trust Accounts are insured separately from your other Navy Federal accounts. Each grantor is insured for up to \$250,000 per beneficiary.

For more information about NCUA share insurance, please see the "Insurance on Your Savings" brochure (NFCU 1116e).

Governing Laws

Navy Federal accounts are maintained and governed in accordance with federal law and the laws of the Commonwealth of Virginia, as amended. Property may be transferred to the appropriate state if there has been no activity within the time period specified by state law.

Checking Account

We may deny opening a checking account if you have had any previous checking accounts closed for unsatisfactory reasons. A personal checking account may not be used for commercial or business purposes. Shares in the checking account may not be pledged as collateral on any loan. All non-cash share purchases or payments made to the checking account will be credited subject to final payment of the deposited item(s). Navy Federal encourages you to use blue or black ink when writing checks.

It is agreed that checks may be used to withdraw funds from this checking account. By requesting a checking account, you authorize Navy Federal to pay checks signed by you or the joint owner (if any) of this account and to charge the payments against the checking account. You shall discharge Navy Federal from any liability for carrying out any requested actions. The right or authority of Navy Federal under this agreement shall not be changed or terminated by you except by written notice to Navy Federal, which shall not affect transactions previously made. Each negotiated check will be charged to the checking account as of the date of receipt by Navy Federal. Navy Federal will not be responsible for checks that are postdated if they are paid before the date of the instrument. Navy Federal is under no obligation to pay or refuse payment of a check on which the date is more than six months old. The credit union is authorized to refuse checks that exceed funds available in the checking account. A fee will be assessed in the amount shown on Navy Federal's current *Schedule of Fees and Charges* for each refused check. You agree to be liable for negative balances on your accounts, including any overdrafts, regardless of the cause, and agree to immediately deposit sufficient funds to cover the overdrafts. You agree to reimburse Navy Federal for all costs of collection, including reasonable attorney's fees and court costs. Checks deposited in other financial institutions may be sent to us electronically. Except for negligence, Navy Federal is not liable for any action that it takes regarding the payment or non-payment of a check.

The owner and joint owner (if any) may request that payment of a check be stopped by providing notification to Navy Federal. A fee will be assessed in the amount shown on Navy Federal's current *Schedule of Fees and Charges* for each stop-payment request. The owner and joint owner (if any) may request copies of paid checks. A fee may be assessed as provided on Navy Federal's current *Schedule of Fees and Charges* for each check copy.

Navy Federal may return debits to the checking account (e.g., an ACH payment) if the amount of the debit exceeds funds available in the checking account. A fee may be assessed in the amount shown on Navy Federal's current *Schedule of Fees and Charges* for each returned debit item. Navy Federal may, at its option, pay a Visa Check Card transaction that exceeds the balance in the checking account by transferring the amount of the resulting overdraft from your savings account. You will be held responsible for the amount of any Visa Check Card transaction that cannot be paid out of your checking account or line of credit accessed by your Visa Check Card.

A Navy Federal membership account generally includes one or more savings subaccounts and one or more checking subaccounts. Periodically, we may transfer funds between a checking subaccount and a savings subaccount for account management purposes. This savings subaccount will be subject to federal regulation transfer limitations, as are shares in any Navy Federal savings account. Should there be a sixth transfer of funds in a month, all remaining funds will be transferred to the checking subaccount for the remainder of the month.

Inactive Checking Account

An Inactive Checking Account fee in the amount shown on Navy Federal's *Schedule of Fees and Charges* may be assessed if you have not engaged in checking account activity in 365 days, you carry a combined balance of less than \$50 in your checking and membership savings accounts, and you have no other Navy Federal products during that time (note: this fee will not be assessed for members under the age of 24). You agree that we may close your checking account if it reaches a zero balance as a result.

Change in Terms

Navy Federal reserves the right to change or terminate this agreement. The terms of this account may change upon 30 days' notice. The right or authority of Navy Federal under this agreement shall not be changed or terminated by you except by written notice, which shall not affect transactions previously made.

Other Terms and Conditions

You must notify Navy Federal in writing of an error concerning an item on your statement no later than the 60th day following the day the statement was delivered to limit your liability. Navy Federal has the right of assignment of this agreement.

Verification and Correction of Transactions

All transactions are subject to final verification by Navy Federal. Navy Federal may reverse or adjust any transaction, credit, or debit that Navy Federal believes was erroneously made to your account at any time without prior notice being provided to you, except as may be required by regulation or federal law. In addition, you agree that if any deposit or other credit is made to you that Navy Federal determines should not have been made to you, Navy Federal may reverse the credit without prior notice to you.

Statutory Lien

I/We acknowledge and pledge to Navy Federal a statutory lien in my/our shares and dividends on deposit in all joint and individual accounts and any monies held by Navy Federal now and in the future, to the extent of any loan made and any charges payable. The statutory lien does not apply to shares in any IRA.

I/We acknowledge and pledge to Navy Federal a security interest in the collateral securing loan(s) that I/we have with Navy Federal now and in the future, including any type of change or increase and any proceeds from the sale of such collateral and of insurance thereon, not to exceed the unpaid balance of the loan. This security interest in collateral securing other loans does not apply to any loan(s) on my/our primary residence.

Navy Federal Funds Availability Policy

Your Ability to Withdraw Funds at Navy Federal Credit Union

Our general policy is to make funds available from your deposits made on or before the first business day after the day we receive your deposit. At that time, you can withdraw the funds in cash, and we will use the funds to pay checks that you have written. For example, if you deposit a check on Monday, you may not be able to access the funds from that deposit, to include paying other checks, until Tuesday or possibly later.

See the availability timelines below for details about when you can use the funds from different types of deposits. Longer delays (of up to 14 business days) may apply to checks deposited in branches and ATMs outside of the continental United States and Hawaii. Additionally, we will place a longer hold and credit will not be received on non-U.S. items until the collection process is completed.

Navy Federal ATMs: The first \$200 from a deposit of cash or checks will be available immediately. The remaining funds will be available by the second business day after the day of your deposit.

Deposits at Nonproprietary ATMs (Vcom® ATMs): Funds from any deposits made at ATMs that we do not own or operate will not be available until the fifth business day after the date of deposit.

Determining When a Deposit is Received

To determine the availability of your deposits, business days are Monday through Friday, except federal holidays. If you make a deposit before the locally posted settlement time (which is before 2:00 pm, local time, for a staffed office or 12:00 noon, Eastern Time, for a Navy Federal Automatic Teller) on a business day when we are open, we will consider that day to be the day we received your deposit. However, if you make a deposit after the locally posted settlement time or on a non-business day, we will consider the next business day as the day we received your deposit. When you mail deposits, we will consider the deposit made on the day we receive the deposit at our office in Vienna, Virginia.

Availability and Notice for Electronic Entries

In the case of credit entries subject to Article 4A of the Uniform Commercial Code, Navy Federal hereby provides notice that such entries may be transmitted through the ACH Network pursuant to the ACH Rules governed by the National Automated Clearing House Association (NACHA). Your rights and obligations concerning these entries shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia. Credit provided by the Receiving Depository Financial Institution (RDFI) to the Receiver for these entries is provisional until the RDFI has received final settlement through a Federal Reserve Bank. If the RDFI does not receive such payment for the entry, the RDFI is entitled to a refund from the Receiver in the amount of the credit to the Receiver's account, and the Originator of the entry will not be considered to have paid the amount of the credit to the Receiver. Navy Federal has not agreed to provide you with notice if we have received a credit entry subject to Article 4A of the Uniform Commercial Code.

Next-Day Availability

Funds from the following deposits are available by the next business day after we receive your deposit:

- U.S. Treasury checks
- Electronic payments, such as wire transfers, ACH credits, and pre-authorized payments (e.g., direct deposits of Social Security benefits and payroll payments)
- Checks drawn on any bank, amount less than \$200
- State and local government checks
- Cashier's, certified, and teller's checks
- Federal Reserve Bank checks, Federal Home Loan Bank checks, and postal money orders
- Cash

If your deposit of these checks (excluding U.S. Treasury checks) is not made in person to a Member Service Representative at a branch, the funds may not be available until the second business day after we receive your deposit.

Checks \$200 and Over

The first \$200 of a deposit of checks will be available on or before the first business day after we receive your deposit. The remaining amount will be available for withdrawal the second business day following the date of deposit.

For example, if you deposit a check of \$1,000 on a Monday, \$200 of the deposit is available on or before Tuesday. The remaining \$800 is available on or before Wednesday.

Longer Delays May Apply

Funds you deposit by check may be delayed for a longer period under the following circumstances: We believe that a check you deposit will not be paid; you deposit checks totaling more than \$5,000 on any one day; you re-deposit a check that has been returned unpaid; you have overdrawn your account repeatedly in the last six months; you are a new member (account opened less than 30 days); or there is an emergency, such as a natural disaster or failure of communications equipment.

We will notify you if we delay your ability to withdraw funds for any of these reasons, and we will tell you when the funds will be available. Funds will generally be available no later than seven business days after the day of your deposit.

Except in California, New York, and Connecticut, deposits into a savings account may be held up to five business days.

Check Cashing

If we cash a check for you that is drawn on another financial institution, we may withhold the availability of a corresponding amount of funds that are already in your account. Those funds will be available using the same hold policy as if you had deposited it.

Rights Reserved

Navy Federal reserves the right to:

- Accept or reject any check presented.
- Revoke any settlement with respect to a check accepted by us, and to charge back to your account the amount of the check based on the return of the check or a receipt of notice of non-payment of the check, or claim a refund for such credit.
- Require that the space reserved for endorsement by Navy Federal on the back of any check accepted for deposit be free and clear of any prior markings or endorsements.

Payment of Dividends

Dividends are paid on all deposits to your savings and checking accounts, where applicable, as of the date of receipt, including non-cash deposits (e.g., checks).

Electronic Funds Transfer Agreement and Disclosure

Types of Transfers, Limitations, and Fees

We can accept transfers to your checking or savings accounts and make transfers from your checking or savings accounts electronically. Such transfers are often received or sent in the form of ACH debits and credits. For example, an ACH credit to your account might be in the form of an electronic deposit of your pay, stock dividends, or tax refund. An ACH debit might be made as a result of an authorization you gave a third party to automatically transfer funds from your account to pay your monthly insurance premium, utility bills, or car payment. You may also authorize third parties to use information from one of your checks or MMSA checks to initiate a one-time ACH debit from your checking or MMSA account.

Please Note: Savings accounts may only receive ACH credits. Checking accounts may receive ACH credits and debits. MMSAs may receive ACH credits and debits in accordance with the limitations set forth in the MMSA agreement.

There are no limitations on the dollar amount of received ACH transfers, and Navy Federal does not charge fees for received transfers. Different types of accounts have different limitations on ACH transfers originated through Navy Federal. You should refer to your account disclosures to determine what, if any, transfer limitations exist.

Documentation of Transfers

You may verify the posting of your transfers by calling us at the telephone numbers listed at the end of this agreement and disclosure, or by accessing your account information through Automated Telephone Service or Navy Federal Online® Account Access.

Periodic Statements

You will receive a monthly account statement (unless there are no electronic fund transfers in a particular month, in which case you will receive a statement at least annually).

Business Days

Our business days are Monday through Friday, excluding federal holidays.

Unauthorized Transfers

If you believe that someone has transferred or may transfer money from your account without your permission, or if you believe that a transfer has been made without your permission using information from one of your checks or MMSA checks, call us, write us, or contact us online using the telephone numbers and address listed at the end of this agreement and disclosure.

Your Liability for Unauthorized Electronic Funds Transfers

If your statement shows transfers that you did not make, tell us at once. If you do not tell us within 60 days from the date the statement was mailed to you, you may not get back any money you lost after the 60 days if we can prove that we could have stopped someone from taking the money if you had told us in time. If a good reason (such as a long trip or a hospital stay) kept you from telling us, we may extend the 60-day time period.

Stop Payment Procedure

Navy Federal cannot cancel an agreement that you have with a third party or revoke the authorization that you have provided a third party for recurring automatic transfers from your accounts. To cancel your agreement with a third party and revoke your authorization for recurring automatic transfers, you must contact the third party with whom you have an agreement. Navy Federal can only stop payment on one future pre-authorized transfer at a time. We must receive your stop-payment request three business days or more before the transfer is scheduled to be made. You may contact us by calling or writing us using the telephone numbers or address listed at the end of this agreement and disclosure. You will be charged for each stop-payment request in accordance with Navy Federal's *Schedule of Fees and Charges*. If you order us to stop one of these payments three business days or more before the transfer is scheduled, and we do not do so, we will be liable for your losses or damages.

Notice of Varying Amounts

If your recurring transfers vary in amount, the third party debiting your account will tell you 10 days before each payment, in addition to when the debit will be made and how much it will be.

Navy Federal's Liability

If Navy Federal does not complete a transfer to or from your account on time, or for the correct amount according to our agreement with you, we will be liable for your losses or damages. However, there are some exceptions. We will NOT be liable, for instance:

- 1) If, through no fault of ours, you do not have enough money in your account or available credit in your Checking Line of Credit to make the transfer.
- 2) If the funds in your account are subject to legal process, such as garnishment or attachment, or if the account is subject to a pledge or security agreement.
- 3) If circumstances beyond our control (such as fire or flood) prevent the transfer, despite reasonable precautions that we have taken.
- 4) When there are additional exceptions specified under other agreements that you have with us.

In Case of Errors or Questions about Your Electronic Transfers

If you have arranged to have electronic transfers made to your account at least once every 60 days from the same person or company, you can call us by using the telephone numbers listed at the end of this agreement and disclosure to find out whether or not the transfer has been made.

Contact us by using the telephone numbers or address listed at the end of this agreement and disclosure as soon as you can if you think your statement or receipt is wrong, or if you need more information about a transaction listed on the statement or receipt. We must hear from you no later than 60 days after we sent the FIRST statement on which the problem or error appeared.

- 1) Tell us your name and account number.
- 2) Describe the error or the transfer that you are unsure about and clearly explain why you believe it is an error or why you need more information.
- 3) Tell us the dollar amount of the suspected error. If you tell us orally, we may require that you send us your complaint or question in writing within 10 business days. We will tell you the results of our investigation within 10 business days (20 business days for new accounts) after we hear from you and will correct any error promptly.

If we need more time, however, we may take up to 45 days to investigate your complaint or question and determine whether an error occurred. If we decide to do this, we will provisionally credit your account within 10 business days (20 business days for new accounts) for the amount that you think is in error, so that you will have the use of the money during the time it takes us to complete our investigation. A provisional credit is a temporary credit adjustment to your account during the time it takes us to complete our investigation. If we ask you to put your complaint or question in writing and we do not receive it within 10 business days, we may remove the provisional credit from your account. **Please note that contacting us by telephone does not preserve your rights.** If it is determined that there was no error, we will reverse any provisional credits within one business day of finishing our investigation and send you a written explanation within three business days. If there are insufficient funds in your account to cover the amount of the provisional credit, the account will be overdrawn, and you will be responsible for payment. You may ask for copies of the documents that we used in our investigation.

Account Information Disclosures

We will disclose information to third parties about your account or the transactions you make:

- 1) If we are unable to complete an electronic fund transfer because of insufficient funds.
- 2) When it is necessary for completing transfers.
- 3) To verify the existence or conditions of your account for a third party, such as a consumer reporting agency or merchant.
- 4) To comply with government agency or court orders.
- 5) If you give us your written permission.
- 6) In accordance with our privacy policy.

Contact Numbers and Addresses

Whenever possible, please contact us by telephone or at Navy Federal Online Account Access to report unauthorized transfers or request stop payments. Contacting us by these methods is the quickest way for us to comply with your requests.

Telephone Us

Call 1-888-842-6328 toll-free in the U.S. For toll-free numbers when overseas, visit navyfederal.org. Use 1-703-255-8837 for collect international calls.

Online

If you are signed up for Navy Federal Online Account Access, you may send us an electronic message through our e-Messaging system at navyfederal.org.

Write Us

Navy Federal Credit Union
Account Servicing Section
PO Box 3000
Merrifield, VA 22119-3001



Rev. 7/13

FACTS

What Does Navy Federal Do With Your Personal Information?

Why?

Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.

What?

The types of personal information that we collect and share depend on the product or service that you have with us. This information can include:

- Social Security Number and income
- Account balances and payment history
- Account transactions and checking account information

When you are *no longer* our member, we continue to share your information as described in this notice.

How?

All financial companies need to share members' personal information to run their everyday businesses. In the section below, we list the reasons financial companies can share their members' personal information, whether Navy Federal chooses to share, and whether you can limit this sharing.

Reasons we can share your personal information	Does Navy Federal share?	Can you limit this sharing?
For our everyday business purposes— such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus	Yes	No
For our marketing purposes— to offer our products and services to you	Yes	No
For joint marketing with other financial companies	Yes	No
For our affiliates' everyday business purposes— information about your transactions and experiences	Yes	No
For our affiliates' everyday business purposes— information about your creditworthiness	No	We don't share
For nonaffiliates to market to you	No	We don't share

Questions?

Call toll-free **1-888-842-6328** or go to **navyfederal.org**.

Who we are	
Who is providing this notice?	Navy Federal Credit Union; Navy Federal Financial Group, LLC; Navy Federal Brokerage Services, LLC; and Navy Federal Asset Management, LLC

What we do	
How does Navy Federal protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings. Navy Federal regularly tests and assesses its information security measures, systematically trains employees, and adopts upgrades and enhancements as necessary to protect your information.
How does Navy Federal collect my personal information?	We collect your personal information, for example, when you: <ul style="list-style-type: none"> • Open an account or deposit money • Pay your bills or apply for a loan • Use your credit or debit card We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.
Why can't I limit all sharing?	Federal law gives you the right to limit only: <ul style="list-style-type: none"> • Sharing for affiliates' everyday business purposes—information about your creditworthiness • Affiliates from using your information to market to you • Sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing.

Definitions	
Affiliates	Companies related by common ownership or control. They can be financial and non-financial companies. <ul style="list-style-type: none"> • <i>Our affiliates include companies with a Navy Federal name; financial companies such as Navy Federal Credit Union; Navy Federal Financial Group, LLC; Navy Federal Brokerage Services, LLC; and Navy Federal Asset Management, LLC.</i>
Nonaffiliates	Companies not related by common ownership or control. They can be financial and non-financial companies. <ul style="list-style-type: none"> • <i>Navy Federal does not share with nonaffiliates so they can market to you.</i>
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. <ul style="list-style-type: none"> • <i>Our joint marketing partners include investment, insurance, and other financial services companies.</i>

Your Affiliate Marketing Choices

For personal information (such as your name, address, or certain account-related information) shared among affiliates, you may opt out of direct marketing of products and services by those affiliates with whom you do not have a prior business relationship. You may do this by calling the toll-free number of the appropriate Navy Federal company provided. An opt-out by a joint account holder will be treated as applying to all associated joint account holders. Your choice to limit marketing offers from our affiliates will apply until you notify us to modify your preference. **Note:** If you have already requested this, there is no need to do so again.

Contact the Navy Federal Family

If you have questions or if you need to correct information that we have on file, please contact us at:

Navy Federal Credit Union

PO Box 3000

Merrifield, VA 22119-3000

Toll-free in the U.S. **1-888-842-6328**

For toll-free numbers when overseas,

visit navyfederal.org.

Collect internationally **1-703-255-8837**

Navy Federal Financial Group

Navy Federal Brokerage Services

Navy Federal Asset Management

1007 Electric Avenue

Vienna, VA 22180

1-877-221-8108

Fax: 703-206-1510

Notes

1 HASSAN A. ZAVAREEI (CA 181547)
2 **TYCKO & ZAVAREEI LLP**
3 1828 L Street, N.W., Suite 1000
4 Washington, DC 20036
5 Telephone: (202) 973-0900
6 Facsimile: (202) 973-0950
7 *hzavareei@tzlegal.com*

8 *Counsel for Plaintiffs and Proposed Classes*

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 JENNA LLOYD and JAMIE
12 PLEMONS, on behalf of themselves
13 and all others similarly situated,

14 Plaintiffs,

15 vs.

16 NAVY FEDERAL CREDIT UNION,

17 Defendant.

18 **CERTIFICATE OF SERVICE**

19 CASE NO. 3:17-cv-01280-BAS-RBB

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the May 4, 2018, the Plaintiffs’
SECOND AMENDED CLASS ACTION COMPLAINT was filed electronically on
the CM/ECF system, which caused all CM/ECF participants to be served by
electronic means.

Dated: May 4, 2018

Respectfully submitted,

/s/ Hassan A. Zavareei
HASSAN A. ZAVAREEI (CA 181547)
TYCKO & ZAVAREEI LLP
1828 L Street, N.W., Suite 1000
Washington, DC 20036
Telephone: (202) 973-0900
Facsimile: (202) 973-0950
hzavareei@tzlegal.com

Attorney for Plaintiffs