

1 Jeffrey D. Kaliel (CA Bar No. 238293)
Sophia G. Gold (CA Bar No. 307971)
2 jkaliel@kalielllc.com
3 sgold@kalielllc.com
KALIEL PLLC
4 1875 Connecticut Ave., NW, 10th Floor
5 Washington, D.C. 20009
(202) 350-4783

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7 Attorneys for Plaintiff James Foreman
and the Putative Class

8
9 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
10 **(San Jose Division)**

11 JAMES FOREMAN, on behalf of
12 himself and all others similarly situated,

13 Plaintiff,

CLASS ACTION COMPLAINT

14 v.

15 BANK OF AMERICA, N.A.,

16 Defendant.
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1 Plaintiff JAMES FOREMAN, on behalf of himself and all others similarly
2 situated, sues Defendant BANK OF AMERICA, N.A., and alleges:

3 **INTRODUCTION**

4 1. For consumers who authorize recurring electronic funds transfers
5 (“EFTs”) from their checking accounts—for anything from gym memberships to loan
6 payments—federal law provides a very important right: upon notice to his bank that
7 a consumer no longer authorizes the recurring debits, his bank is obligated to
8 immediately cease such debits. Defendant Bank of America, N.A. (“BANA”) fails to
9 allow consumers to avail themselves of this right, and places hurdles to consumers’
10 use of this right—namely, by imposition of a large fee before the right can be
11 exercised.

12 2. This federally provided right to end recurring EFTs is especially
13 important for consumers who unwittingly fall into predatory and illegal internet
14 payday loans.

15 3. Payday loans and high-cost installment loans trap consumers into debt
16 they cannot afford. Typically, the lenders of these “payday debt traps” require
17 consumers to provide their bank account information and an authorization to
18 electronically debit future payments from the consumer’s bank account.

19 4. California severely restricts payday loans. Only lenders who receive a
20 license from the Department of Corporations and abide by the interest and fee limits
21 are authorized to make payday loans. The maximum amount of those loans is
22 capped, as are the fees a payday lender can charge. Loans made by unlicensed
23 lenders must comply with California’s constitutional usury restrictions.

24 5. Certain payday lenders—many based offshore or purportedly on Indian
25 reservations—make use of the Internet to circumvent these prohibitions and offer
26 payday loans to consumers residing in California (the “Illegal Payday Lenders”).
27 These loans (“Illegal Payday Loans”) feature interest rates of 400%, 500%, and
28 higher.

1 **JURISDICTION AND VENUE**

2 14. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C.
3 §§ 1693m and 1693h.

4 15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because
5 BANA regularly does business in this District and a substantial part of the events
6 giving rise to Plaintiff’s claims occurred in this District.

7 **FACTUAL ALLEGATIONS**

8 **EFTs and Payday Loans**

9 16. An EFT is the electronic transfer of money from one bank account to
10 another, either within a single financial institution or across multiple institutions, via
11 computer-based systems, without the direct intervention of bank staff. Consumers
12 commonly use EFTs to pay insurance and utility bills, loan payments, and personal
13 services memberships such as gyms.

14 17. A payday loan is a short-term (typically a matter of weeks) high fee,
15 closed-end loan, traditionally made to consumers to provide funds in anticipation of
16 an upcoming paycheck. A borrower obtaining an online payday loan must usually
17 enter into an “Authorization to Initiate ACH Transactions” with the lender that
18 permits the lender to “initiate” credit and debit entries on the loan.

19 18. Payday loans target the most vulnerable and desperate of borrowers, who
20 might not qualify for a conventional unsecured loan or who are in such desperate
21 need of cash that they cannot wait for the formal approval process that a conventional
22 unsecured loan requires.

23 19. Payday loans feature exorbitant annual percentage rates (sometimes
24 misleadingly referred to as “fees”) and require “balloon” repayments shortly after the
25 loan is made.

26 20. If a borrower is unable to repay the full amount of the loan on the due
27 date, the lender typically gives the borrower the option to “roll over” the loan balance
28 by paying another “fee,” usually equal to the initial fee at the time of loan funding.

1 The cycle then continues until such time as the borrower is either able to pay off the
2 loan in full or the borrower defaults on the loan.

3 21. Many borrowers repeatedly roll over or take out additional payday
4 loans, often on the same day as a previous one is repaid. Over 75 percent of payday
5 loan volume is the result of “churn”—borrowers having to take out additional loans
6 to pay off the original debt.

7 22. For these and other reasons, California severely restricts payday loans.

8 23. Only licensed payday lenders may make payday loans. The Illegal
9 Payday Lenders used by Plaintiff Foreman—and to whom he wanted to stop
10 recurring EFTs—were at no time licensed by the Department of Corporations.

11 24. Illegal Payday Lenders, while not permitted to operate in California,
12 have simply moved to the Internet in order to solicit desperate borrowers into Illegal
13 Payday Loans using an online application process. This scheme could not have been
14 accomplished without the complicity of Defendant who provided Illegal Payday
15 Lenders with access to the ACH Network.

16 25. The Illegal Payday Lenders are subject to the California Constitution’s
17 maximum annual interest rate of 10% for loans used “primarily for personal, family,
18 or household purposes.” Cal. Const. art. XV, § 1.

19 26. In addition, the Illegal Payday Lenders are subject to California statutory
20 provisions providing that parties may: “. . . contract for the payment and receipt of a
21 rate of interest not exceeding twelve dollars on the one hundred dollars for one year
22 and not exceeding that rate for a greater or less sum or for a longer or shorter time, in
23 which case such rate exceeding seven dollars on one hundred dollars shall be clearly
24 expressed in writing.” Cal. Civ. Code § 1916-1.

25 27. Yet such lenders charged interest rates in the hundreds of percent.

26 28. Under California law, a contract to pay interest in excess of the lawful
27 maximum is void and the lender may not recover interest on the loan. Furthermore, if
28

1 the borrower actually pays interest at a usurious rate he may recover the amount so
2 paid in an action brought for that purpose.

3 **The Electronic Fund Transfer Act**

4 29. The Electronic Fund Transfer Act (EFTA) gives consumers the right to
5 stop payment of preauthorized electronic fund transfers.

6 30. Congress enacted the EFTA in 1978 with the “primary objective” to
7 provide for individual consumer rights with respect to electronic fund and remittance
8 transfers. 15 U.S.C. § 1693.

9 31. The EFTA “sets minimum safeguards for consumers who arrange for
10 regular payments (such as insurance premiums or utility bills) to be deducted
11 automatically from their bank accounts.” S. Rep. No. 95-1273 supra, at 31. These
12 safeguards protect the consumer’s control over his or her own account.

13 32. Under the EFTA, stopping preauthorized withdrawals is meant to be as
14 easy as initiating them. Accordingly, “[a] consumer is given the right to stop payment
15 on a preauthorized transfer by notifying his financial institution orally or in writing
16 up to 3 business days before the scheduled date of transfer. In the case of an oral
17 notice, the financial institution may require written confirmation within fourteen
18 days.” S. Rep. No. 95-1273 supra, at 31; *see also* 15 U.S.C. § 1693e.

19 33. A consumer may stop preauthorized electronic payments by informing
20 his or her financial institution that the electronic transfers are no longer authorized.
21 *See* 12 C.F.R. Pt. 1005, Supp. I, cmt. 10(c). “Once a financial institution has been
22 notified that the consumer’s authorization is no longer valid, it must block all future
23 payments for the particular debit transmitted by the designated payee-originator.” *Id.*
24 Because the electronic funds transfers are considered unauthorized electronic funds
25 transfers and the consumer has provided notice to the financial institution, the
26 financial institution is liable for any subsequent electronic funds transfers. *See* 15
27 U.S.C. § 1693g; *see also id.* § 1693a(12) (defining the term “unauthorized electronic
28 fund transfer).

1 institutions often charge stop-payment fees. Consumers also may not know to contest
2 the payments as unauthorized and may simply ask that the payments be stopped.
3 Even if the consumer says that the payment is illegal and unauthorized, the bank may
4 still charge a stop payment fee.”

5 37. Moreover, “Under both Regulation E and NACHA rules, a consumer
6 may initiate a stop-payment order by an oral request. The RDFI may ask the
7 consumer to follow up with a written request and to confirm that the consumer has
8 revoked the payee’s authorization. The initial stop-payment order may expire in 14
9 days if the consumer does not follow up with the requested information. But the
10 RDFI may not refuse to honor the initial oral stop-payment order pending receipt of
11 that information. Indeed, the requirement that financial institutions stop payments
12 would be superfluous if consumers could, or were required to, effectively stop
13 payments with the payee directly. The UCC, EFTA and NACHA rules do not
14 specifically address stop-payment fees. But fees that are so high as to inhibit the right
15 to stop payment should be viewed as violating that right. Such fees are also
16 potentially unfair, deceptive or abusive.”

17 **Plaintiff Foreman’s Experience**

18 38. Plaintiff took out loans with predatory lenders, including
19 MyPaydayLoan.com. MyPaydayLoan.com charged exorbitantly high interest rates in
20 violation of California law, and was not licensed to make payday loans in California,
21 also in violation of California law.

22 39. As a part of his loan agreements with the predatory lenders, including
23 MyPaydayLoan.com, Plaintiff provided a preauthorization for the predatory lenders
24 to electronically withdraw payments from his BANA checking account.

25 40. After learning that the loans were illegal and thus invalid in the State of
26 California, in approximately November 2017, Plaintiff called BANA and informed
27 BANA that he was withdrawing his authorization for continued payments.
28

1 41. BANA stated it would not stop the illegal payments, unless Plaintiff paid
2 a \$30 Stop Payment Fee. This violated the EFTA. However, Plaintiff had no choice
3 but to pay this fee if he was to escape from the illegal debt trap in which he found
4 himself.

5 42. This same pattern also occurred with another of Plaintiff's predatory
6 internet payment loans, in August 2017. Again, Plaintiff was forced to pay a \$30 Stop
7 Payment Fee to stop payments to the predatory loan company. This also violated the
8 EFTA.

9 43. BANA's policy violates EFTA; hinders consumers' rights to extricate
10 themselves from devastating and illegal financial transactions; and provides a
11 significant and unjustified revenue source for BANA doing nothing more than
12 performing its statutory duty.

13 **CLASS ALLEGATIONS**

14 44. Plaintiff brings this action on behalf of himself and all others similarly
15 situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action
16 satisfies the numerosity, commonality, typicality, adequacy, predominance and
17 superiority requirements of Rule 23. The proposed class is defined as:

18 All holders of a BANA checking account who, within the
19 applicable statute of limitations, incurred one or more
20 SPFs to cease recurring EFTs (the "SPF Class").

21 In addition, the proposed California subclass is defined as follows:

22 All holders of a BANA checking account in California
23 who, within the applicable statute of limitations, incurred
24 one or more SPFs to cease recurring EFTs (the
25 "California SPF Class").

26 The classes are collectively referred to as the "Classes."

27 45. Plaintiff brings this action on his own behalf and on behalf of all others
28 similarly situated pursuant to Fed. R. Civ. P. 23. Excluded from the class are BANA,

1 its subsidiaries and affiliates, its officers, directors and member of their immediate
2 families and any entity in which defendant has a controlling interest, the legal
3 representatives, heirs, successors or assigns of any such excluded party, the judicial
4 officer(s) to whom this action is assigned, and the members of their immediate
5 families.

6 46. Plaintiff reserves the right to modify or amend the definition of the
7 proposed Classes if necessary before this Court determines whether certification is
8 appropriate.

9 47. This case is properly brought as a class action under Fed. R. Civ. P.
10 23(a) and (b)(3), and all requirements therein are met for the reasons set forth in the
11 following paragraphs.

12 48. Numerosity under Fed. R. Civ. P. 23(a)(1). The members of the Class
13 are so numerous that separate joinder of each member is impracticable. Upon
14 information and belief, and subject to class discovery, the Class consists of thousands
15 of members or more, the identity of whom are within the exclusive knowledge of and
16 can be ascertained only by resort to BANA's records. BANA has the administrative
17 capability through its computer systems and other records to identify all members of
18 the Class, and such specific information is not otherwise available to Plaintiff.

19 49. Commonality under Fed. R. Civ. P. 23(a)(2). There are numerous
20 questions of law and fact common to the Class relating to BANA's business practices
21 challenged herein, and those common questions predominate over any questions
22 affecting only individual Class members. The common questions include, but are not
23 limited to:

24 a) Whether BANA improperly assessed SPFs;

25 b) Whether BANA's assessment of SPFs on unauthorized EFTs violated
26 the EFTA;

27 c) Whether BANA's assessment of SPFs on unauthorized EFTs is unfair
28 under the UCL;

1 d) Whether Plaintiff and other members of the Class have sustained
2 damages as a result of BANA's conduct.

3 50. Typicality under Fed. R. Civ. P. 23(a)(3). Plaintiff's claims are typical
4 of the claims of the other Class members in that they arise out of the same wrongful
5 business practice by BANA, as described herein.

6 51. Adequacy of Representation under Fed. R. Civ. P. 23(a)(4). Plaintiff is
7 an adequate representatives of the Class in that he has an BANA checking account
8 and has suffered damages as a result of BANA's conduct. In addition:

9 a) Plaintiff is committed to the vigorous prosecution of this action on
10 behalf of himself and all others similarly situated and has retained competent counsel
11 experienced in the prosecution of class actions and, in particular, class actions on
12 behalf of consumers against financial institutions;

13 b) There is no hostility of interest between Plaintiff and the unnamed Class
14 members;

15 c) Plaintiff anticipates no difficulty in the management of this litigation as a
16 class action; and

17 d) Plaintiff's legal counsel has the financial and legal resources to meet the
18 substantial costs and legal issues associated with this type of litigation.

19 52. Predominance under Fed. R. Civ. P. 23(b)(3). The questions of law and
20 fact common to the Class as set forth in the "commonality" allegation above
21 predominate over any individual issues. As such, the "commonality" allegations are
22 restated and incorporated herein by reference.

23 53. Superiority under Fed. R. Civ. P. 23(b)(3). A class action is superior to
24 other available methods and highly desirable for the fair and efficient adjudication of
25 this controversy. Since the amount of each individual Class member's claim is very
26 small relative to the complexity of the litigation and since the financial resources of
27 BANA are enormous, no Class member could afford to seek legal redress
28 individually for the claims alleged herein. Therefore, absent a class action, the Class

1 members will continue to suffer losses and BANA's misconduct will proceed without
2 remedy. In addition, even if Class members themselves could afford such individual
3 litigation, the court system could not. Given the complex legal and factual issues
4 involved, individualized litigation would significantly increase the delay and expense
5 to all parties and to the Court. Individualized litigation would also create the
6 potential for inconsistent or contradictory rulings. By contrast, a class action presents
7 far fewer management difficulties, allows claims to be heard which might otherwise
8 go unheard because of the relative expense of bringing individual lawsuits, and
9 provides the benefits of adjudication, economies of scale and comprehensive
10 supervision by a single court.

11 54. All conditions precedent to bringing this action have been satisfied
12 and/or waived.

13 **COUNT ONE: VIOLATIONS OF 15 U.S.C. § 1693e**
14 **(On behalf of the Classes)**

15 55. Plaintiff incorporates by reference each of the allegations set forth in the
16 preceding paragraphs.

17 56. As alleged above, Plaintiff and the putative class members attempted to
18 stop a withdrawal on their BANA account by instructing BANA that they did not
19 want a particular lender to automatically withdraw funds from their account any
20 longer.

21 57. In violation of 15 U.S.C. § 1693e, and as a common practice, BANA
22 assesses a \$30 "stop-payment fee" when a consumer instructs BANA to stop an
23 automatic payment

24 58. As a result of these violations, Plaintiff and the putative class members
25 suffered concrete and particularized harms. In particular, they suffered the imposition
26 of unnecessary fees as a result of BANA's violations.

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1 59. BANA's noncompliance with 15 U.S.C. § 1693e is intentional in part
2 because these practices are in direct contravention to a consumer's right to stop
3 payment.

4 60. Accordingly, BANA is liable to Plaintiff and the class members for any
5 actual damages, statutory damages, attorney's fees, and costs. 15 U.S.C. § 1693m.

6 **COUNT TWO: Violation of California's Unfair Competition Law,**
7 **Unlawful Prong**
8 **(On behalf of the California Subclass)**

9 61. Plaintiff incorporates by reference each of the allegations set forth in the
10 preceding paragraphs.

11 62. Defendant's conduct described herein violates the Unfair Competition
12 Law (the "UCL"), codified at California Business and Professions Code section
13 17200, *et seq.*

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

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

23 65. Defendant's conduct violates the UCL's "unlawful" prong in the
24 following respects, among others: Defendant inhibited Plaintiff's statutory right to
25 instruct BANA to stop EFTs.

26 66. The conduct of Defendant was not motivated by any business or
27 economic need or rationale. The harm and adverse impact of Defendant's conduct on
28 members of the general public was neither outweighed nor justified by any legitimate
reasons, justifications, or motives.

1 67. Defendant's conduct was substantially injurious to consumers in that
2 they have been forced to endure unauthorized EFTs and forced to pay fees to enjoy
3 their statutory rights.

4 68. As a result of Defendant's violations of the UCL's "unlawful" prong,
5 Plaintiff and members of the Class have paid, and/or will continue to pay,
6 unreasonably excessive amounts of money for banking services and thereby have
7 suffered and will continue to suffer actual damages.

8 **COUNT THREE: Violation of California Unfair Competition Law,**
9 **Unfair Prong**
10 **(On behalf of the California Subclass)**

11 69. Plaintiff incorporates by reference each of the allegations set forth in the
12 preceding paragraphs.

13 70. Defendant's conduct described herein violates the Unfair Competition
14 Law (the "UCL"), codified at California Business and Professions Code section
15 17200, *et seq.*

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

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

25 73. Defendant's conduct violates the UCL's "unfair" prong in the following
26 respects, among others: Defendant inhibited Plaintiff's statutory right to instruct
27 BANA to stop EFTs.

28 74. Defendant's conduct was not motivated by any business or economic
need or rationale. The harm and adverse impact of Defendant's conduct on members

1 of the general public was neither outweighed nor justified by any legitimate reasons,
2 justifications, or motives.

3 75. The harm to Plaintiff and Class Members arising from Defendant's
4 unfair practices relating to the imposition of unlawful payday loans outweighs the
5 utility, if any, of those practices.

6 76. Defendant's unfair business practices relating to the requirement of SPFs
7 to stop payments to unlawful payday lenders are immoral, unethical, oppressive,
8 unscrupulous, unconscionable and/or substantially injurious to Plaintiff and members
9 of the Class.

10 77. Defendant's conduct was substantially injurious to consumers in that
11 they have been forced to endure unauthorized EFTs and forced to pay fees to enjoy
12 their statutory rights.

13 78. As a result of Defendant's violations of the UCL's "unfair" prong,
14 Plaintiff and members of the Class have paid, and/or will continue to pay,
15 unreasonably excessive amounts of money in SPFs and thereby have suffered and
16 will continue to suffer actual damages.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff and the members of the Class demand a jury trial on all
19 claims so triable and judgment against Defendant as follows:

20 A. An order certifying that this action may be maintained as a class action,
21 that Plaintiff be appointed Class Representative and Plaintiff's counsel be appointed
22 Class Counsel;

23 B. Declaring that Defendant's policies and practices to be wrongful, unfair,
24 and unconscionable;

25 C. Ordering BANA to immediately cease the wrongful conduct set forth
26 above and enjoining BANA from conducting business via the unlawful and unfair
27 business acts and practices complained of herein;

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1 D. Restitution of all fees paid to BANA by Plaintiff and the Classes as a
2 result of the wrongs alleged herein in an amount to be determined at trial;

3 E. Actual, punitive, and statutory damages in an amount to be determined at
4 trial;

5 F. Pre-judgment interest at the maximum rate permitted by applicable law;

6 G. Costs and disbursements assessed by Plaintiff in connection with this
7 action, including reasonable attorneys' fees pursuant to applicable law;

8 H. Granting such other relief as the Court deems just and proper.

9 **DEMAND FOR JURY TRIAL**

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

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13 Dated: March 2, 2018

Respectfully submitted,

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/s/ Jeffrey D. Kaliel

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Jeffrey D. Kaliel (CA Bar No. 238293)

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Sophia G. Gold (CA Bar No. 307971)

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KALIEL PLLC

19

1875 Connecticut Ave., NW, 10th Floor

20

Washington, D.C. 20009

21

(202) 350-4783

22

jkaliel@kalielllc.com

23

sgold@kalielllc.com

24

Attorneys for Plaintiff and the Putative Class

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