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13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**

11	DONNA BURTON, individually and)	Case No.
12	on behalf of all others similarly situated,))	
13	Plaintiff,)	<u>CLASS ACTION</u>
14	vs.)	COMPLAINT FOR VIOLATIONS
15	Smart Living Company and)	OF:
16	EMerchantclub, LLC and DOES 1-10,)	1. VIOLATIONS OF
17	Defendant(s).)	ELECTRONIC FUNDS
18)	TRANSFER ACT [15 U.S.C.
19)	§1693 ET SEQ.]
20)	<u>DEMAND FOR JURY TRIAL</u>
21)	
22)	

23 Plaintiff DONNA BURTON (“Plaintiff”), on behalf of herself and all others
 24 similarly situated, alleges the following against Defendants Smart Living Company
 25 and EMerchantClub, LLC upon information and belief based upon personal
 26 knowledge:

27 **INTRODUCTION**

28 1. Plaintiff’s Class Action Complaint is brought pursuant to the

1 Electronic Funds Transfer Act, 15 U.S.C. 1693 et seq. (“EFTA”).

2 2. Plaintiff, individually, and on behalf of all others similarly situated,
3 brings this Complaint for damages, injunctive relief, and any other available legal
4 or equitable remedies, resulting from the illegal actions of Defendants debiting
5 Plaintiff’s and also the putative Class members’ bank accounts on a recurring basis
6 after clear revocation of any authorization or similar authentication for
7 preauthorized electronic fund transfers from Plaintiff’s and also the putative Class
8 members’ accounts, thereby violating Section 907(a) of the EFTA, 15 U.S.C. §
9 1693e(a), and Regulation E, 12 C.F.R. § 205.10(c)(1).

10 3. Such conduct is inherently deceptive in that it misrepresents to
11 consumers the price of Defendants’ services and the consumers’ rights regarding
12 those services and misleads the average consumer.

13 4. Plaintiff alleges as follows upon personal knowledge as to herself and
14 her own acts and experiences, and, as to all other matters, upon information and
15 belief, including investigation conducted by her attorneys.

16
17 **JURISDICTION AND VENUE**

18 5. This Court has jurisdiction under 28 U.S.C. 1331, because this action
19 is brought pursuant to the EFTA, 15 U.S.C. 1693 *et seq.*

20 6. Jurisdiction of this Court arises pursuant to 15 U.S.C. 1693(m), which
21 states that, “without regard to the amount in controversy, any action under this
22 section may be brought in any United States district court.”

23 7. Venue and personal jurisdiction in this District are proper pursuant to
24 28 U.S.C. 1391(b) because Plaintiff resides within this District and Defendant does
25 or transact business within this District, and a material portion of the events at issue
26 occurred in this District.

27 **PARTIES**

28 8. Plaintiff, Donna Burton (“PLAINTIFF”), is a natural person residing

1 in Mendocino County in the state of California, and is a “consumer” as defined by
2 15 U.S.C. §1693a(6).

3 9. At all relevant times herein, DEFENDANTS, Smart Living Company
4 and EMerchantclub LLC (“DEFENDANTS”), were companies engaged in the
5 business of providing website hosting services.

6 10. The above named Defendant, and its subsidiaries and agents, are
7 collectively referred to as “Defendants.” The true names and capacities of the
8 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
9 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
10 names. Each of the Defendants designated herein as a DOE is legally responsible
11 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend
12 the Complaint to reflect the true names and capacities of the DOE Defendants
13 when such identities become known.
14

15 11. Plaintiff is informed and believes that at all relevant times, each and
16 every Defendant was acting as an agent and/or employee of each of the other
17 Defendants and was acting within the course and scope of said agency and/or
18 employment with the full knowledge and consent of each of the other Defendants.
19 Plaintiff is informed and believes that each of the acts and/or omissions
20 complained of herein was made known to, and ratified by, each of the other
21 Defendants.
22

FACTUAL ALLEGATIONS - EFTA

23 12. Beginning in or around 2008, Plaintiff signed up for website hosting
24 services sold and managed by Defendants. For consideration for the website
25 hosting services, Plaintiff paid approximately \$29.99 every month and with yearly
26 upgrades of \$199.99. Defendant would deduct these sums on a reoccurring basis
27 from Plaintiff’s account.
28

13. In or around March of 2016, Plaintiff informed Defendants that she

1 no longer wished to pay for the yearly upgrades of \$199.99. Plaintiff sent multiple
2 email to Defendant clearly revoking any consent or authorization from Defendant
3 to deduct these funds.

4 14. However, despite Plaintiff's clear revocation of authorization,
5 Defendants continued to deduct funds from Plaintiff's account on a reoccurring
6 basis without Plaintiff's consent or authorization.

7 15. Defendants recorded that Plaintiff canceled its membership and
8 authorization to deduct funds from her account.

9 16. Defendants had knowledge that Plaintiff revoked authorization in
10 writing on multiple occasions and had no intention of honoring that revocation.

11 17. Plaintiff alleges such activity to be in violation of the Electronic
12 Funds Transfer Act, 15 U.S.C. 1693 et seq. ("EFTA"), and its surrounding
13 regulations, including, but not limited to, 12 C.F.R. § 205.10(c)(1).
14

15 **CLASS ACTION ALLEGATIONS**

16 18. Plaintiff brings this action on behalf of herself and all others similarly
17 situated, as a member of the proposed class (hereafter "The Class") defined as
18 follows:

19 All persons in the United States whose bank accounts
20 were debited on a reoccurring basis by Defendants after
21 Defendants recorded a cancellation request for a monthly
22 membership, between one year from the filing of this
23 complaint and the present.

24 19. Plaintiff represents, and is a member of, The Class, consisting all
25 persons in the United States whose bank accounts were debited on a reoccurring
26 basis by Defendants after Defendants recorded a cancellation request for a monthly
27 membership, between one year from the filing of this complaint and the present.

28 20. Defendants, their employees and agents are excluded from The Class.
Plaintiffs do not know the number of members in The Class, but believe the Class

1 members number in the hundreds, if not more. Thus, this matter should be certified
2 as a Class Action to assist in the expeditious litigation of the matter.

3 21. The Class is so numerous that the individual joinder of all of its
4 members is impractical. While the exact number and identities of The Class
5 members are unknown to Plaintiff at this time and can only be ascertained through
6 appropriate discovery, Plaintiff is informed and believes and thereon alleges that
7 The Class includes hundreds, if not thousands, of members. Plaintiff alleges that
8 The Class members may be ascertained by the records maintained by Defendants.

9 22. This suit is properly maintainable as a class action pursuant to Fed.
10 R. Civ. P. 23(a) because the Class is so numerous that joinder of the Class members
11 is impractical and the disposition of their claims in the class action will provide
12 substantial benefits both to the parties and to the Court.

13 23. There are questions of law and fact common to the Class affecting the
14 parties to be represented. The questions of law and fact to the Class predominate
15 over questions which may affect individual Class members and include, but are
16 not necessarily limited to, the following:

17 a. Whether the members of the Class' bank accounts were debited on a
18 reoccurring basis by Defendants on or after Defendants recorded a cancellation
19 request for a monthly membership within one year of the filing of this Complaint
20 to the present; and,

21 b. Whether Defendants requested written confirmation of the
22 cancelation and refused to honor an oral cancellation of an EFT, as is permitted
23 under 12 CFR 205.10(c)(1).t.

24 24. As someone whose bank accounts was debited on a reoccurring basis
25 by Defendants, Plaintiff is asserting claims that are typical of The Class.

26 25. Plaintiff will fairly and adequately protect the interests of the members
27 of The Class. Plaintiff has retained attorneys experienced in the prosecution of class
28

1 actions.

2 26. A class action is superior to other available methods of fair and
3 efficient adjudication of this controversy, since individual litigation of the claims
4 of all Class members is impracticable. Even if every Class member could afford
5 individual litigation, the court system could not. It would be unduly burdensome
6 to the courts in which individual litigation of numerous issues would proceed.
7 Individualized litigation would also present the potential for varying, inconsistent,
8 or contradictory judgments and would magnify the delay and expense to all parties
9 and to the court system resulting from multiple trials of the same complex factual
10 issues. By contrast, the conduct of this action as a class action presents fewer
11 management difficulties, conserves the resources of the parties and of the court
12 system, and protects the rights of each Class member.

13 27. The prosecution of separate actions by individual Class members
14 would create a risk of adjudications with respect to them that would, as a practical
15 matter, be dispositive of the interests of the other Class members not parties to such
16 adjudications or that would substantially impair or impede the ability of such non-
17 party Class members to protect their interests.

18 28. Defendants have acted or refused to act in respects generally
19 applicable to The Class, thereby making appropriate final and injunctive relief with
20 regard to the members of the Class as a whole.

21 29. Defendants failed to comply with the requirements of the EFTA, 15
22 U.S.C. § 1693e(a) and Regulation E, 12 C.F.R. § 205.10(c)(1) as to the Class
23 members with respect to the above alleged transactions.

24 30. The EFTA, 15 U.S.C. §1693e(a), provides that “[a] consumer may
25 stop payment of a preauthorized electronic fund transfer by notifying the financial
26 institution orally or in writing at any time up to three business days preceding the
27 scheduled date of such transfer.”
28

1 31. Section 205.10(c)(1) of Regulation E provides that “[a] consumer may
2 stop payment of a preauthorized electronic fund transfer from the consumer's
3 account by notifying the financial institution orally or in writing at least
4 three business days before the scheduled date of the transfer.””

5 32. In multiple instances, Defendants debited bank accounts of the Class
6 members on a recurring basis after the consumer requested to stop payments of
7 a preauthorized electronic fund transfer from the consumer's account by notifying
8 the financial institution orally or in writing at least three business days before the
9 scheduled date of the transfer in violation of the EFTA, 15 U.S.C. § 1693e(a) and
10 Regulation E, 12 C.F.R. § 205.10(c)(1).

11 33. The size and definition of the Class can be identified through
12 Defendant’s records and/or Defendant’s agents’ records.
13

14
15 **COUNT I:**
16 **DEFENDANTS VIOLATED THE ELECTRONIC FUNDS TRANSFER**
17 **ACT**
18 **(On Behalf of Plaintiff and the Class)**

19 34. Plaintiff reincorporates by reference all of the preceding paragraphs.

20 35. The EFTA, 15 U.S.C. §1693e(a), provides that “[a] consumer may
21 stop payment of a preauthorized electronic fund transfer by notifying the financial
22 institution orally or in writing at any time up to three business days preceding the
23 scheduled date of such transfer.”

24 36. Section 205.10(c)(1) of Regulation E provides that “[a] consumer may
25 stop payment of a preauthorized electronic fund transfer from the consumer's
26 account by notifying the financial institution orally or in writing at least
27 three business days before the scheduled date of the transfer.””

28 37. In multiple instances, Defendants debited bank accounts of the Class
members on a recurring basis after the consumer requested to stop payments of

1 a preauthorized electronic fund transfer from the consumer's account by notifying
2 the financial institution orally or in writing at least three business days before the
3 scheduled date of the transfer in violation of the EFTA, 15 U.S.C. § 1693e(a) and
4 Regulation E, 12 C.F.R. § 205.10(c)(1).

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff, DONNA BURTON, individually, and on behalf of
7 all others similarly situated, respectfully requests judgment be entered against
8 Defendant, Smart Living Company, for the following:

- 9 (a) An order certifying the Class and appointing Plaintiff as
10 Representative of the Class;
- 11 (a) An order certifying the undersigned counsel as Class Counsel;
- 12 (b) An order requiring Defendants, at its own cost, to notify all
13 Class Members of the unlawful and deceptive conduct herein;
- 14 (c) Restitution for the monies spent by Plaintiff and Class members
15 on the Class Products;
- 16 (d) An order requiring Defendants to engage in corrective
17 advertising regarding the conduct discussed above;
- 18 (e) Actual damages suffered by Plaintiff and Class Members as
19 applicable from the sale of misbranded Class Products during
20 the relevant class period;
- 21 (f) Punitive damages, as allowable, in an amount determined by
22 the Court or jury;
- 23 (g) Any and all statutory enhanced damages;
- 24 (h) All reasonable and necessary attorneys' fees and costs provided
25 by statute, common law or the Court's inherent power;
- 26 (i) Pre- and post-judgment interest; and
- 27 (j) All other relief, general or special, legal and equitable, to which
28

1 Plaintiff and Class Members may be justly entitled as deemed
2 by the Court.

3 **TRIAL BY JURY**

4 38. Pursuant to the seventh amendment to the Constitution of the United
5 States of America, Plaintiff is entitled to, and demands, a trial by jury.

6
7 Respectfully submitted this 13th day of February, 2017.

8
9 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

10
11 By: /s/ Todd M. Friedman
12 Todd M. Friedman
13 Law Offices of Todd M. Friedman
14 Attorney for Plaintiff
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CIVIL COVER SHEET

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

I. (a) PLAINTIFFS

DONNA BURTON, individually and on behalf of all others similarly situated

(b) County of Residence of First Listed Plaintiff Mendocino (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) The Law Offices of Todd M. Friedman, P.C. 21550 Oxnard St., Suite 780 Woodland Hills, CA 91367 877-206-4741

DEFENDANTS

Smart Living Company and EMerchantclub, LLC and DOES 1-10

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, PERSONAL INJURY, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation-Transfer, 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. §1693 ET SEQ. Brief description of cause: I. VIOLATIONS OF ELECTRONIC FUNDS TRANSFER ACT

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

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

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2) (Place an "X" in One Box Only) [X] SAN FRANCISCO/OAKLAND [] SAN JOSE [] EUREKA-MCKINLEYVILLE

DATE: 02/13/2017 SIGNATURE OF ATTORNEY OF RECORD: s/ Todd M. Friedman

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Lawsuit: Smart Living Company Violated Electronic Funds Transfer Act](#)
