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(USA), N.A. and Capital One, N.A.*

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ROBERT ROSS, ANDREA KUNE,
WOODROW CLARK, HERVE SENEQUIER,
S. BYRON BALBACH, JR., MATTHEW
GRABELL, PAUL IMPELLEZZERI, and
RICHARD MANDELL, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

BANK OF AMERICA, N.A. (USA) (N/K/A
FIA CARD SERVICES, N.A.), BANK OF
AMERICA, N.A., CAPITAL ONE BANK
(USA), N.A., CAPITAL ONE, N.A., J.P.
MORGAN CHASE, CHASE BANK USA,
N.A., CITIGROUP, INC., CITIBANK (SOUTH
DAKOTA) N.A., CITIBANK USA, N.A.,
UNIVERSAL BANK, N.A., UNIVERSAL
FINANCIAL CORP., CITICORP DINERS
CLUB, INC., DFS SERVICES LLC,
DISCOVER FINANCIAL SERVICES,
DISCOVER BANK, HSBC FINANCE CORP.,
HSBC BANK, NEVADA, N.A., AND
NATIONAL ARBITRATION FORUM,

Defendants.

05 Civ. 7116 (WHP)

**AMENDED ANSWER OF DEFENDANTS
CAPITAL ONE BANK (USA), N.A. AND
CAPITAL ONE, N.A. TO PLAINTIFFS'
FIRST AMENDED CLASS ACTION
COMPLAINT**

Defendants Capital One Bank (USA), N.A. and Capital One, N.A., (collectively, "Capital One"), by and through their attorneys, O'Melveny & Myers LLP, hereby answer the allegations of the First Amended Class Action Complaint (the "Complaint") as follows:

Capital One denies the allegations in the prefatory paragraph of the Complaint and the prayer for relief, as well as any allegations contained in any headings, footnotes, or any other text that is not contained in a numbered paragraph, except as expressly stated below.

1. Capital One denies the allegations in paragraph 1, except Capital One admits that the Complaint purports to bring a class action lawsuit as described in paragraph 1.
2. To the extent the allegations in paragraph 2 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 2 (including the allegations in footnote 1), except Capital One admits that footnote 1 purports to identify the defendants in certain other actions.
3. Capital One denies the allegations in paragraph 3, except Capital One admits that the terms and conditions of its cardholder agreements were lawfully amended to include arbitration clauses, and that Capital One is entitled to enforce its arbitration agreements.
4. Capital One denies the allegations in paragraph 4.
5. To the extent the allegations in paragraph 5 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 5, except Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence in paragraph 5.
6. Capital One denies the allegations in paragraph 6.
7. Capital One admits that the Complaint purports to join the National Arbitration Forum ("NAF") as a defendant. Capital One denies that it was a party to any

“collusive scheme” and further denies that it participated in an organization “to impose arbitration clauses that ban class actions.” Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 7.

8. To the extent the allegations in paragraph 8 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 8, except Capital One admits that the Complaint purports to seek injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, and purports to seek to recover costs of suit, including reasonable attorneys’ fees, expert fees, and out of pocket expenses, but Capital One denies that plaintiffs are entitled to any relief.

9. To the extent the allegations in paragraph 9 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One admits that the Complaint purports to confer jurisdiction on this Court under 28 U.S.C. §§ 1331 and 1337 and under Section 16 of the Clayton Act, 15 U.S.C. § 26.

10. To the extent the allegations in paragraph 10 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One admits that the Complaint purports to establish venue in the Southern District of New York under 15 U.S.C. § 26 and 28 U.S.C. §§ 1391(b), (c), and (d).

11. To the extent the allegations in paragraph 11 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11, except Capital One admits that it transacts business in the territory covered by the Southern District of New York, and admits that the plaintiffs violated the protective order in the MDL proceeding

and relied on discovery in that proceeding to bring this Complaint, but denies that such discovery constitutes information that supports the allegations in the Complaint.

12. To the extent the allegations in paragraph 12 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12.

13. To the extent the allegations in paragraph 13 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 13.

14. To the extent the allegations in paragraph 14 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

15. To the extent the allegations in paragraph 15 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

16. To the extent the allegations in paragraph 16 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16.

17. To the extent the allegations in paragraph 17 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

18. To the extent the allegations in paragraph 18 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18.

19. To the extent the allegations in paragraph 19 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

20. To the extent the allegations in paragraph 20 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20, except Capital One admits that Bank of America, N.A. (USA) is named as a defendant in the Complaint.

21. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22.

23. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. To the extent that paragraph 25 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "MBNA America" to refer to MBNA America Bank, N.A. but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25.

26. To the extent that paragraph 26 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "MBNA Delaware" to refer to MBNA America (Delaware), N.A. but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26.

27. To the extent that paragraph 27 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "FIA" to refer to FIA Card Services, N.A. but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27.

28. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28.

29. To the extent that paragraph 29 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "Bank of America" to refer to FIA and all of its predecessors, affiliates, and subsidiaries, and to use the term "MBNA" to refer to MBNA America, MBNA Delaware, and all of their predecessors, affiliates, and subsidiaries, prior to their acquisition by Bank of America and name change to FIA. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 29.

30. To the extent the allegations in paragraph 30 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One admits the allegations in the first and second sentences in paragraph 30, except Capital One denies that Capital One, N.A. issues credit cards. Capital One denies the allegations in the third sentence in paragraph 30, except Capital One admits that Capital One Bank (USA), N.A., and Capital One, N.A. are named as defendants in the Complaint.

31. To the extent the allegations in paragraph 31 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One admits that Capital One Bank was a Virginia state chartered bank with its principal place of business in Glen Allen, Virginia prior to being converted to a National Association on March 1, 2008, and Capital One,

F.S.B. was a federally chartered savings bank with its principal place of business in McLean, Virginia until it was merged into Capital One, N.A., effective July 1, 2007. Capital One denies the remaining allegations in paragraph 31, if any.

32. To the extent that paragraph 32 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "Capital One" to refer to the entities indicated in paragraph 32. Capital One denies the remaining allegations in paragraph 32, if any.

33. Capital One denies the allegations in paragraph 33, except Capital One admits that certain subsidiaries of Capital One Financial Corporation issued credit cards in 2008.

34. To the extent the allegations in paragraph 34 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34, except Capital One admits that J.P. Morgan Chase is named as a defendant in the Complaint.

35. To the extent the allegations in paragraph 35 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35.

36. To the extent the allegations in paragraph 36 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. To the extent the allegations in paragraph 37 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37, except

Capital One denies the existence of the conspiracies alleged in the Complaint and admits that Chase Bank USA, N.A. is named as a defendant in the Complaint.

38. To the extent the allegations in paragraph 38 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

39. To the extent the allegations in paragraph 39 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

40. To the extent that paragraph 40 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the terms "Bank One/First USA" or "First USA" to refer to the entities indicated in paragraph 40 but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

41. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

42. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 42.

43. To the extent that paragraph 43 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the terms "J.P. Morgan Chase," "Chase," and "Providian" to refer to the entities indicated in paragraph 43 but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 43.

44. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 44.

45. To the extent the allegations in paragraph 45 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45, except Capital One admits that Citigroup, Inc. is named as a defendant in the Complaint.

46. To the extent the allegations in paragraph 46 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 46, except Capital One admits that Citigroup (South Dakota) N.A. is named as a defendant in the Complaint.

47. To the extent the allegations in paragraph 47 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47, except Capital One admits that Universal Bank, N.A. is named as a defendant in the Complaint.

48. To the extent the allegations in paragraph 48 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48, except Capital One admits that Universal Financial Corp. is named as a defendant in the Complaint.

49. To the extent that paragraph 49 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "Citibank" to refer to the entities indicated in paragraph 49 but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49.

50. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 50.

51. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 51.

52. To the extent the allegations in paragraph 52 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52, except Capital One admits that Citicorp Diners Club, Inc. is named as a defendant in the Complaint.

53. To the extent the allegations in paragraph 53 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53, except Capital One admits that Citibank USA, N.A. is named as a defendant in the Complaint and, to the extent that the final sentence in paragraph 53 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "Diners Club" to refer to the entities indicated in the final sentence in paragraph 53.

54. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54.

55. To the extent the allegations in paragraph 55 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 55, except Capital One denies the existence of the conspiracies alleged in the final sentence in paragraph 55 and admits that DFS Services LLC, Discover Financial Services, and Discover Bank are named as defendants in the Complaint. To the extent that paragraph 55 merely purports to characterize

the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "Discover" to refer to the entities indicated in paragraph 55.

56. To the extent the allegations in paragraph 56 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 56.

57. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

58. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 58.

59. To the extent the allegations in paragraph 59 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

60. To the extent the allegations in paragraph 60 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60.

61. To the extent the allegations in paragraph 61 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 61, except Capital One admits that HSBC Finance Corporation is named as a defendant in the Complaint.

62. To the extent the allegations in paragraph 62 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 62, except Capital One admits that HSBC Bank, Nevada, N.A. is named as a defendant in the Complaint.

63. To the extent the allegations in paragraph 63 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63.

64. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 64.

65. To the extent that paragraph 65 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "Household" to refer to the entities indicated in paragraph 65 but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 65.

66. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

67. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 67, except Capital One admits that the National Arbitration Forum is named as a defendant in the Complaint, that plaintiffs purportedly seek to use the term "NAF" to refer to the National Arbitration Forum, and that, on information and belief, the NAF collects fees for the arbitration services it administers.

68. Capital One admits that the NAF has served as an arbitration administrator in proceedings to which Capital One is a party, but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the first sentence in paragraph 68. Capital One admits that its cardholder agreements have listed the NAF and other organizations as arbitration administrators, but denies that Capital One was a party to any conspiracy, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the second sentence in paragraph 68.

69. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 69, except that, to the extent that paragraph 69 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term “American Express” to refer to the entities indicated in the final sentence in paragraph 69.

70. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70.

71. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71.

72. Capital One denies the allegations in paragraph 72, except Capital One admits on information and belief that American Express is a defendant in the case of *Ross v. American Express Co.*, No. 04-CV-05723 (S.D.N.Y.) (“*Ross v. American Express*”), but, to the extent that the allegations in paragraph 72 rely upon the complaint filed in *Ross v. American Express*, to which Capital One is not a party, Capital One respectfully refers the Court to that complaint for a complete and accurate recitation of its contents and states that Capital One is not a party to *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (S.D.N.Y.).

73. To the extent the allegations in paragraph 73 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 73.

74. To the extent the allegations in paragraph 74 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 74.

75. To the extent that paragraph 75 merely purports to characterize the Complaint, Capital One admits that plaintiffs purportedly seek to use the term "Wells Fargo" to refer to the entities indicated in paragraph 75 but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 75.

76. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 76.

77. To the extent the allegations in paragraph 77 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in the first sentence in paragraph 77 and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 77.

78. Capital One denies the allegations in paragraph 78 as to itself. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 78.

79. To the extent that paragraph 79 purports to provide conventions for the use of terms used in the Complaint, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 79, except Capital One admits that, for purposes of the Complaint, plaintiffs purport to use the conventions provided in paragraph 79 and Capital One denies that the conventions asserted in paragraph 79 are necessary, accurate, or comprehensible.

80. To the extent the allegations in paragraph 80 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 80.

81. To the extent the allegations in paragraph 81 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 81, except Capital One admits that Capital One Bank issued payment cards prior to its conversion to Capital One Bank (USA), N.A., and Capital One, F.S.B. issued payment cards prior to its merger into Capital One, N.A., and Capital One Bank (USA), N.A. presently issues payment cards throughout the United States pursuant to valid and effective cardholder agreements, and admits that use of these credit cards and the related processes and communications, including customer billing, cross state lines and national borders.

82. To the extent the allegations in paragraph 82 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 82.

83. To the extent the allegations in paragraph 83 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 83.

84. To the extent that paragraph 84 purports to quote from or summarize the opinion in *United States v. Visa U.S.A., Inc., et al.*, 344 F.3d 229 (2d Cir. 2003), to which Capital One was not a party, Capital One respectfully refers the Court to that opinion for a complete and accurate recitation of its contents. Capital One denies that plaintiffs have correctly alleged the existence of relevant markets, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 84.

85. To the extent the allegations in paragraph 85 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 85.

86. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 86.

87. Capital One denies the allegations in paragraph 87, as the description of general purpose cards is not accurate or complete, except Capital One admits that general purpose cards are one type of payment device.

88. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 88, except Capital One admits on information and belief that Visa, MasterCard, American Express, Discover, and Diners Club operate payment card networks.

89. To the extent the allegations in paragraph 89 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One admits that Capital One Bank (USA), N.A. issues credit cards to cardholders in accordance with agreements with Visa and MasterCard. Capital One denies that Visa and MasterCard are associations or joint ventures and denies on information and belief that American Express and Discover are closed networks. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 89.

90. Capital One denies that the descriptions of general purpose card networks and card issuance set forth in paragraph 90 are either accurate or complete. Capital One admits on information and belief that Visa and MasterCard operate payment card networks and that banks and financial institutions issue payment cards or provide acquiring services to merchants. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 90.

91. Capital One denies that the descriptions of Visa and MasterCard set forth in paragraph 91 are either accurate or complete. Capital One admits on information and belief that Visa and MasterCard operate payment card networks and that banks and financial institutions issue payment cards or provide acquiring services to merchants. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 91.

92. Capital One denies that the allegations in paragraph 92 provide an accurate or complete description of every general purpose card transaction or activity associated with that transaction. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 92.

93. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 93. To the extent that footnote 2 purports to quote from or summarize the contents of *United States v. Visa U.S.A., Inc., et al.*, 344 F.3d 229 (2d Cir. 2003), to which Capital One was not a party, Capital One respectfully refers the Court to that opinion for a complete and accurate recitation of its contents.

94. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 94.

95. Capital One admits that it competes with American Express and Discover and admits on information and belief that Visa and MasterCard compete with other networks like American Express and Discover. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 95.

96. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 96, except Capital One denies the existence of the conspiracies alleged in paragraph 96.

97. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 97, except Capital One denies the existence of the conspiracies alleged in paragraph 97.

98. Capital One admits that a Capital One employee may have attended a meeting that took place on or about May 25, 1999, at the Washington, DC offices of Wilmer Cutler & Pickering. Capital One denies the existence of the conspiracies alleged in paragraph 98. To the extent that paragraph 98 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 98.

99. Capital One admits that it had not incorporated an arbitration provision in its cardholder agreements as of May 25, 1999. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 99.

100. Capital One denies the allegations in paragraph 100 as to itself. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 100.

101. To the extent that paragraph 101 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the allegations in paragraph 101 as to

itself and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 101.

102. To the extent that paragraph 102 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the existence of the conspiracy alleged in paragraph 102 and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 102.

103. To the extent that paragraph 103 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the remaining allegations in paragraph 103 as to itself but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 103.

104. To the extent that paragraph 104 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the allegations in the first sentence in paragraph 104 as to itself and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 104.

105. To the extent that paragraph 105 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the allegations in the first sentence in paragraph 105 as to itself and lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence in paragraph 105 as to other defendants. Capital One

lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences in paragraph 105.

106. To the extent that paragraph 106 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 106, except Capital One denies the existence of the conspiracies alleged in the Complaint.

107. To the extent that paragraph 107 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 107, except Capital One denies the existence of the conspiracies alleged in the Complaint.

108. Capital One denies the allegations in the first sentence in paragraph 108 as to itself and lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence in paragraph 108 as to the other defendants. Capital One denies the allegations in the second and third sentences in paragraph 108.

109. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 109, except Capital One admits that its cardholder agreements have listed the NAF and other organizations as arbitration administrators, and Capital One respectfully refers this Court to those agreements for their full terms and legal effects.

110. To the extent the allegations in paragraph 110 and footnote 3 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One

denies the allegations in the first sentence in paragraph 110 as to itself and lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence in paragraph 110 as to other defendants, and Capital One denies the remaining allegations in paragraph 110 and footnote 3.

111. To the extent that paragraph 111 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the allegations in paragraph 111 as to itself and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 111.

112. To the extent that paragraph 112 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first, second, and third sentences in paragraph 112. Capital One admits that it had not incorporated an arbitration provision into its cardholder agreements as of January 12, 2000, and lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the fourth sentence in paragraph 112 as to the other defendants.

113. Capital One denies the allegations in the first sentence in paragraph 113, except Capital One admits that one or more Capital One employees attended or called in to meetings relating to the law of arbitration on or about one or more of the dates listed in paragraph 113. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence in paragraph 113 as to the other defendants. Capital One denies the allegations in the second sentence in paragraph 113 as to itself and lacks

knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence in paragraph 113 as to the other defendants.

114. Capital One denies the allegations in paragraph 114 as to itself, except Capital One admits that one or more Capital One employees attended or called in to at least one meeting relating to the law and public policy aspects of class actions. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 114.

115. Capital One denies the allegations in paragraph 115 as to itself, except Capital One admits that one or more Capital One employees attended a meeting on or about February 14, 2001, concerning the law of class actions and class action abuses. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 115.

116. Capital One denies the allegations in paragraph 116 as to itself, except Capital One admits that one or more Capital One employees attended a meeting on or about May 30, 2001, concerning the law of class actions and class action abuses. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 116.

117. Capital One denies the allegations in paragraph 117 as to itself, except Capital One admits that one or more Capital One employees participated in at least one telephone call with in-house counsel at other financial services institutions to discuss developments in the law, case decisions, and recommendations for outside counsel. Capital One denies the existence of the conspiracies alleged in paragraph 117 and lacks knowledge or

information sufficient to form a belief as to the truth of the remaining allegations in paragraph 117.

118. To the extent that paragraph 118 purports to summarize or quote documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the allegations in the first and last sentences in paragraph 118 as to itself and lacks information or knowledge sufficient to form a belief as to the truth of the remaining allegations in paragraph 118.

119. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence in paragraph 119 and denies the allegations in the second sentence in paragraph 119.

120. Capital One denies the allegations in the first, third, fourth, and fifth sentences in paragraph 120 as to itself, except Capital One admits that its cardholder agreements specify and have specified arbitration administrators. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 120.

121. Capital One denies the allegations in the first sentence in paragraph 121. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 121, except Capital One admits that arbitration provisions in Capital One cardholder agreements have listed the NAF as an arbitration administrator, and Capital One respectfully refers the Court to those agreements for their full terms and legal effects. To the extent that paragraph 121 purports to summarize or quote from a document, Capital One respectfully refers the Court to the entire document for a complete and accurate recitation of its contents.

122. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 122.

123. To the extent that paragraph 123 purports to quote from or summarize a document, Capital One respectfully refers the Court to that document for a complete and accurate recitation of its contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 123.

124. To the extent that paragraph 124 purports to quote from or summarize a document, Capital One respectfully refers the Court to that document for a complete and accurate recitation of its contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 124.

125. To the extent that paragraph 125 purports to quote from or summarize a document, Capital One respectfully refers the Court to that document for a complete and accurate recitation of its contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 125.

126. To the extent that paragraph 126 purports to quote from or summarize documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 126.

127. Capital One denies that it “pressured” JAMS to revise its practices. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 127, except Capital One admits that arbitration provisions in Capital One cardholder agreements have listed JAMS as an arbitration administrator.

128. To the extent the allegations in paragraph 128 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 128.

129. To the extent the allegations in paragraph 129 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 129, except Capital One admits that the arbitration provisions of credit card customer agreements, like credit card customer agreements in general, are often not signed by the parties.

130. To the extent the allegations in paragraph 130 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 130 as to itself, except Capital One admits that when it validly incorporated an arbitration provision into cardholder agreements by way of Change in Terms notices mailed to cardholders, it permitted its cardholders to opt out of the arbitration provision and retain their accounts. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 130.

131. To the extent the allegations in paragraph 131 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 131.

132. To the extent that paragraph 132 purports to quote from or summarize the contents of the article cited in footnote 4, Capital One respectfully refers the Court to the language of that article for a complete and accurate recitation of its contents. Capital One otherwise denies the allegations in paragraph 132 as to itself, except Capital One admits that certain arbitration procedures differ from court procedures. Capital One lacks knowledge or

information sufficient to form a belief as to the truth of the remaining allegations in paragraph 132.

133. To the extent that paragraph 133 purports to quote from or summarize the opinion in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63 (Cal. 2005), to which Capital One was not a party, Capital One respectfully refers the Court to that opinion for a complete and accurate recitation of its contents. Capital One otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 133.

134. To the extent that paragraph 134 purports to summarize the contents of the rules of the three arbitration administrators referred to in paragraph 134, Capital One respectfully refers the Court to the language of those rules for a complete and accurate recitation of their contents. Capital One otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 134, except that Capital One denies the third sentence in paragraph 134.

135. To the extent the allegations in paragraph 135 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 135.

136. To the extent that paragraph 136 purports to quote from or summarize documents, Capital One respectfully refers the Court to those documents for a complete and accurate recitation of their contents. Capital One denies the allegations in the first sentence in paragraph 136. Capital One denies the allegations in the third, fourth and fifth sentences in paragraph 136 as to itself. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 136.

137. Capital One denies the allegations in paragraph 137.

138. Capital One denies that it participated in a “conspiracy to impose class-barring arbitration clauses” and denies that its arbitration clauses have diminished the overall value of its general purpose card services to cardholders. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in the first sentence in paragraph 138. Capital One denies the remaining allegations in paragraph 138.

139. Capital One denies that its arbitration clauses were “collusively imposed” and denies that its general purpose cards with arbitration clauses “are less valuable to cardholders.” Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence in paragraph 139 as to the other defendants. Capital One denies the remaining allegations in paragraph 139.

140. Capital One denies the allegations in paragraph 140.

141. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence in paragraph 141. Capital One admits that arbitration administrators assess certain fees for their services, but denies the remaining allegations in paragraph 141.

142. To the extent that paragraph 142 purports to quote from or summarize statements, Capital One respectfully refers the Court to the entirety of those statements for a complete and accurate recitation of their contents. Capital One denies the remaining allegations in paragraph 142 as to itself and otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 142.

143. Capital One denies the allegations in paragraph 143 as to itself and lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 143 as to the other defendants.

144. To the extent the allegations in paragraph 144 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 144, except Capital One admits that plaintiffs purport to bring this case as representatives on behalf of themselves and others under Federal Rule of Civil Procedure 23(b)(2).

145. To the extent the allegations in paragraph 145 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 145, except Capital One admits that plaintiffs purport to define the class as set forth in paragraph 145.

146. To the extent the allegations in paragraph 146 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 146, except Capital One admits that plaintiffs purport to bring this case as representatives on behalf of a putative subclass as described in paragraph 146.

147. To the extent the allegations in paragraph 147 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 147.

148. To the extent the allegations in paragraph 148 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 148.

149. To the extent the allegations in paragraph 149 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 149.

150. To the extent the allegations in paragraph 150 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 150, including its subparts.

151. To the extent the allegations in paragraph 151 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 151.

152. To the extent the allegations in paragraph 152 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 152.

153. To the extent the allegations in paragraph 153 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies that it violated the antitrust laws, was a party to a conspiracy, or concealed any conspiracy, but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 153.

154. To the extent the allegations in paragraph 154 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 154.

155. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 155, except Capital One denies the existence of the conspiracies alleged in paragraph 155 and states that Capital One is not a party to *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (S.D.N.Y.).

156. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 156, except Capital One denies the existence of the

conspiracies alleged in paragraph 156 and states that Capital One is not a party to *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (S.D.N.Y.).

157. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence in paragraph 157, except Capital One denies the existence of the “coordinated conduct concerning arbitration” alleged in paragraph 157 and states that Capital One is not a party to *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (S.D.N.Y.). Capital One denies the allegations in the second sentence in paragraph 157.

158. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 158, except Capital One states that Capital One is not a party to *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (S.D.N.Y.).

159. To the extent the allegations in paragraph 159 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 159 as to itself, except Capital One admits that its cardholder agreements include an arbitration provision. Capital One lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 159.

160. Capital One repeats and re-alleges each and every response to the allegations in the foregoing paragraphs with the same force and effect as if fully set forth here.

161. Capital One denies the allegations in paragraph 161.

162. Capital One denies the allegations in paragraph 162, including each of its subparts.

163. Capital One denies the allegations in paragraph 163.

164. Capital One denies the allegations in paragraph 164.

165. Capital One denies the allegations in paragraph 165.

166. To the extent the allegations in paragraph 166 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 166.

167. Capital One denies the allegations in paragraph 167.

168. Capital One repeats and re-alleges each and every response to the allegations in the foregoing paragraphs with the same force and effect as if fully set forth here.

169. Capital One denies the allegations in paragraph 169.

170. Capital One denies the allegations in paragraph 170.

171. Capital One denies the allegations in paragraph 171.

172. To the extent the allegations in paragraph 172 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 172.

173. To the extent the allegations in paragraph 173 constitute conclusions of law, no answer is required. To the extent an answer is required, Capital One denies the allegations in paragraph 173.

174. Capital One denies the allegations in paragraph 174.

JURY DEMAND

Capital One admits that plaintiffs purport to make a demand for a jury trial on page 47, but denies that plaintiffs are entitled to any jury trial in this action.

AFFIRMATIVE AND OTHER DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief can be granted, including, but not limited to, plaintiffs who had the opportunity to opt out of Capital One's arbitration

provision but did not do so.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred because plaintiffs have no standing under Article III of the U.S. Constitution.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred because plaintiffs lack standing under the antitrust laws to assert their claims and, thus, have not suffered antitrust injury within the meaning of 15 U.S.C. § 26.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of waiver and estoppel because, among other things, plaintiffs (i) participated in arbitration without challenging the enforceability of defendants' arbitration provisions; (ii) used defendants' credit cards subject to their cardholder agreements, including the arbitration provisions, without challenging the enforceability of those arbitration provisions; and (iii) had an opportunity to opt out of defendants' arbitration provisions but chose not to opt out.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, on the ground of plaintiffs' ratification of, or acquiescence, agreement or consent to the conduct of Capital One because, among other things, plaintiffs (i) participated in arbitration without challenging the enforceability of defendants' arbitration provisions; (ii) used defendants' credit cards subject to their cardholder agreements, including the arbitration provisions, without challenging the enforceability of those arbitration provisions; and (iii) had an opportunity to opt out of defendants' arbitration provisions but chose not to opt out.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by accord and satisfaction because, among other things, plaintiffs (i) used defendants' credit cards subject to their cardholder agreements, including the arbitration provisions, without challenging the enforceability of those arbitration provisions; and (ii) had an opportunity to opt out of defendants' arbitration provisions but chose not to opt out.

SEVENTH AFFIRMATIVE DEFENSE

Because Capital One offered plaintiffs the right to opt out of arbitration without forfeiting any of their Capital One cardholder rights or privileges, plaintiffs' request for injunctive relief is moot as to those plaintiffs who did not exercise that right.

EIGHTH AFFIRMATIVE DEFENSE

Capital One incorporates by reference, as if fully set forth herein, all other affirmative defenses asserted by other defendants to this action.

PRAYER FOR RELIEF

WHEREFORE, Capital One respectfully requests that the Court dismiss the Complaint in its entirety with prejudice, enter judgment in its favor and against the plaintiffs, and award Capital One its costs and disbursements, including attorneys' fees, incurred in defending this action together with such other relief as the Court deems just and proper.

Dated: October 23, 2009
New York, New York

Respectfully submitted,

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