

MEMORANDUM OF SETTLEMENT WITH CAPITAL ONE

WHEREAS, Capital One Bank (USA), N.A. and Capital One, N.A. (collectively “Capital One”), on the one hand, and Robert Ross, Andrea Kune, Woodrow Clark, Herve Senequier, Byron Balbach, Jr., Matthew Grabell, Richard Mandell, and Paul Impellezzeri (together, the “Plaintiffs”), on the other hand, are parties to *Ross, et al. v. Bank of America, N.A. (USA), et al.*, S.D.N.Y. Case No. 05 CV 7116 (WHP) (THK) (the “Litigation”);

WHEREAS, the United States District Court for the Southern District of New York (the “Court”) certified a Class and Subclass in the Litigation pursuant to an Order dated October 6, 2009;

WHEREAS, Capital One denies all liability with respect to the claims alleged by the Plaintiffs in the Litigation; and

WHEREAS, Capital One and Plaintiffs wish to enter into a compromise and settlement to avoid the uncertainty and expense of litigation and to achieve a fair and reasonable resolution of the Litigation with respect to Capital One;

NOW THEREFORE, Plaintiffs, on behalf of themselves and the Class and Subclass (the “Settlement Class”), enter into the following Memorandum of Settlement (“Settlement”) with Capital One:

1. Capital One will remove all terms and conditions requiring the arbitration of disputes (an “Arbitration Clause”) and waiving the right to bring class action lawsuits (a “Class Action Waiver Clause”) from its consumer credit card agreements by mailing new agreements or change in terms notices (“Mailings”) to all of its consumer credit card holders. Such Mailings will be substantially completed within sixty (60) days following January 15, 2010. Capital One will not restore or otherwise insert into its consumer credit card agreements either an Arbitration Clause or a Class Action Waiver Clause within three and one half (3.5) years following January 1, 2010; *provided*, however, that if Capital One fails to substantially complete the required Mailings within 60 days of January 15, 2010, the Settlement will remain effective, but the three and one half year period shall be extended by the same amount of time by which Capital One is late in substantially completing the Mailings.

2. (a) Capital One will not seek to enforce an Arbitration Clause or Class Action Waiver Clause against a member of the Settlement Class based on currently existing or pre-existing consumer credit card agreements except that Capital One reserves the right to seek enforcement of the Arbitration Clauses and Class Action Waiver Clauses:

(i) in the actions styled *Whitman v. Capital One Bank (USA), N.A.*, Civil Action No. WMN-09-1737 (D. Md.) (Nickerson, J.); *Lee v. Capital One Bank*, No. 3:07-CV-04599-MHP (N.D. Cal.) (Patel, J.); and *McAtee v. Capital One, F.S.B.*, No. 04CC08544 (Super. Ct. Orange Co. Cal.) (Sundvold, J.);

(ii) as against a member of the Settlement Class who, after being offered the choice in writing by Capital One, opts in writing for a credit-card related arbitration to continue in arbitration rather than being refiled in court; and

(iii) as provided in paragraph 4(d) below.

(b) For the avoidance of doubt, to the extent that Capital One has, prior to the execution hereof, obtained any arbitration awards, judgments, or court rulings based in whole or in part on an Arbitration Clause or Class Action Waiver Clause in any matter, Capital One is not precluded from seeking to enforce or uphold such awards, judgments or court rulings.

(c) With respect to any Capital One cardholder agreement, account or obligation that Capital One transfers or assigns to a third party after April 1, 2010, said third party will abide by the provisions of this paragraph 2.

3. Capital One will not contract, combine, or conspire with any other credit card issuer regarding the re-imposition or re-adoption of an Arbitration Clause or Class Action Waiver Clause. Nothing herein will be construed or deemed to be an admission or evidence of any violation of any statute, law or legal principle, or of any liability or wrongdoing, by Capital One or anyone acting on Capital One's behalf.

4. (a) All members of the Settlement Class release and forever discharge Capital One, together with its officers, directors, employees, agents, attorneys, predecessors, successors, and affiliates, from any and all Released Claims, except for the Carved Out Claims as described in paragraph 4(c) below.

(b) "Released Claims" means any and all actual or potential claims, actions, causes of action, liabilities, damages (whether actual, nominal, punitive, exemplary, or otherwise), injunctive relief, costs, fees, attorneys' fees, or penalties of any kind (i) which arise in whole or in part out of the adoption or inclusion of an arbitration clause or class action waiver in a consumer credit card agreement, or (ii) which are, have been, or could have been asserted within the scope of the facts asserted in the Litigation. Notwithstanding the foregoing, "Released Claims" do not include claims arising from acts or omissions occurring on or after (x) the date on which class notice is published, or (y) the date on which Capital One's cardholder agreements are amended pursuant to paragraph 1 of this Settlement, whichever occurs first.

(c) "Carved Out Claims" are claims for monetary relief arising from any alleged damage or injury allegedly experienced by a member of the Settlement Class as a result of Capital One's invocation or enforcement of an Arbitration Clause or Class Action Waiver Clause against that Settlement Class member. Carved Out Claims include but are not limited to any and all claims relating to (i) the use of NAF arbitration proceedings to seek the collection of actual or alleged cardholder debts, and (ii) any act or omission undertaken in anticipation of, in connection with, incident to, referencing the fact or possibility of, or to enforce the results of such NAF proceedings. Notwithstanding the foregoing, Carved Out Claims do not include (x) the claims of individuals who did not experience the invocation or enforcement of an Arbitration Clause or Class Action Waiver Clause as a named party in litigation or arbitration (e.g., a claim

that an individual experienced the enforcement of an Arbitration Clause solely as an absent class member is not a Carved Out Claim), and (y) claims of the named Plaintiffs.

(d) Capital One reserves any and all rights, defenses and counterclaims that it may have with respect to any Carved Out Claims asserted against Capital One or its representatives or affiliates, including, without limitation, the right to seek to compel the arbitration of Carved Out Claims, the right to assert a Class Action Waiver Clause with respect to Carved Out Claims, and the right to contend that Carved Out Claims are barred or precluded by prior arbitration awards, rulings or judgments, including awards, rulings and judgments predicated on an Arbitration Clause or Class Action Waiver Clause. Subject to the limitations stated in ¶ 2(c) above, the foregoing reservation of rights includes, without limitation, the right to assert and seek enforcement of Arbitration Clauses, Class Action Waiver Clauses, arbitration awards, judgments, and court rulings with respect to any and all claims relating to (i) the use of NAF arbitration proceedings to seek the collection of actual or alleged cardholder debts, and (ii) any act or omission undertaken in anticipation of, in connection with, incident to, referencing the fact or possibility of, or to enforce the results of such NAF proceedings.

5. This Settlement shall not supersede or reduce any protections conferred on cardholders by legislation or regulation with respect to arbitration clauses or class action waivers.

6. Subject to court approval, and upon final approval of the Settlement, Capital One will pay Class Counsel six hundred and fifty thousand dollars (\$650,000) in attorneys' fees, costs, and expenses. Other than as expressly provided in this Settlement, Plaintiffs and Capital One (as amongst each other) will bear their own fees, costs and expenses in the Litigation.

7. Capital One, Plaintiffs, and Class Counsel (collectively, the "Parties") agree that publication notice is sufficient to satisfy the requirements of due process and Fed. R. Civ. P. 23. Capital One shall advance and bear the cost of such notice in the first instance, up to a maximum of one hundred thousand dollars (\$100,000), but all sums expended on notice by Capital One shall be credited against the payment of attorneys' fees, costs, and expenses due to Class Counsel under paragraph 6 of this Settlement. If, as a condition of approval of this Settlement, the Court or a reviewing court requires individual notice of the Settlement, or requires publication notice costing more than one hundred thousand dollars (\$100,000), then Capital One, Class Counsel and Plaintiffs each will have the option to void this Settlement *ab initio* within twenty one (21) days of such ruling. In the event that the Settlement is not approved or does not become effective following the publication of notice to the Class, Capital One will not seek to recover the costs of such notice from Plaintiffs or Class Counsel.

8. This Settlement and all of the commitments and obligations it imposes on the Parties are contingent on preliminary and final approval of the Settlement by the Court and any reviewing courts in a manner satisfactory to Capital One and Plaintiffs. Such final court approval shall include the dismissal with prejudice of the Litigation as against Capital One. If satisfactory approval of the Settlement does not occur, or if the Settlement is voided under paragraph 7 hereof, then the Settlement shall be void *ab initio*, shall have no force and effect, and shall impose no obligations on the Parties, except that the Settlement and all settlement discussions between the Parties will remain inadmissible, undiscoverable, and strictly confidential to the maximum extent permitted by law.

9. The commitments made by the Parties and on behalf of the Settlement Class in this Settlement are enforceable by the Court as a matter of contract. In the absence of a judicial finding that Capital One has violated the Settlement, the Settlement will not be enforced against Capital One by injunction, and no injunction will be entered against Capital One as part of judicial approval of the Settlement. The Court will retain jurisdiction for purposes of enforcement of this Settlement.

10. Capital One and Plaintiffs will cooperate with each other in good faith regarding (a) discovery requests from Plaintiffs relating to the Litigation and (b) limiting the burden that such discovery requests impose on Capital One. Such cooperation shall extend to cooperation regarding the resolution of privilege disputes regarding Capital One documents, but shall not require Capital One to waive valid claims of privilege or work product. With respect to making witnesses available for deposition or trial in connection with the Litigation, Capital One will make available, to the best of its ability, up to eight witnesses currently or formerly employed by Capital One or a Capital One predecessor institution (a "Capital One-Affiliated Witness"). A Capital One-Affiliated Witness who appears for deposition will not also be required to appear at trial unless Plaintiffs are unable to enter into evidence the relevant portions of the deposition transcript relating to that witness. Plaintiffs will not seek the deposition or appearance at trial of more than the eight Capital One-Affiliated Witnesses contemplated in this paragraph.

11. The Parties waive the application of any applicable law, regulation, holding or rule of construction providing that ambiguities in an agreement shall be construed against the party drafting such agreement.

12. Any consumer credit card portfolios that Capital One acquires after the date of execution of this Settlement will be conformed to the terms of this Settlement within a reasonable period of time.

13. The Parties will cooperate with respect to any public statements regarding this Settlement.

14. Each of the undersigned representatives of the Parties represents that he/she is fully authorized to enter into, and to execute, this Settlement on behalf of that Party or Parties.

15. This Settlement is binding and effective as of the date that it has been executed by each of the representatives of the Parties for whom a signature line is provided below, even if this Settlement is never superseded by a more detailed settlement agreement. Plaintiffs, Defendants, and Class Counsel will, however, use their best efforts to agree upon and execute (a) a more detailed superseding settlement agreement within sixty (60) days after the date this Settlement is signed, and (b) such other documentation as may be required in order to effectuate this Settlement, and to thereafter obtain court approval of the Settlement.

16. Except for (a) Capital One's obligations under paragraph 1 of this Settlement, the duration of which are addressed in paragraph 1, (b) Capital One's obligations under paragraphs 6 and 7, which are intended to be permanent, and (c) Capital One's obligations under paragraph 10, which expire at the conclusion of the Litigation, Capital One's obligations under this Settlement will expire five years after the date of execution of this Settlement.

17. This Settlement may be signed in any number of counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same instrument.

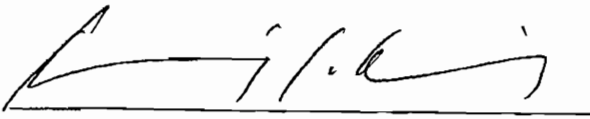
For Capital One Bank (USA), N.A.
and Capital One, N.A.:



Dated 12/17/09

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For Plaintiffs, the Class and Subclass:



Dated 12/17/2009

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