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14 **UNITED STATES DISTRICT COURT**

15 **SOUTHERN DISTRICT OF CALIFORNIA**

16
17 JACOB FIGUEROA, on Behalf of Himself
and All Others Similarly Situated,

18 Plaintiff,

19 vs.

20 CAPITAL ONE, N.A., and Does 1-100,
21 inclusive,

22 Defendants.

Case No.

CLASS ACTION COMPLAINT

[DEMAND FOR JURY TRIAL]

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Case No.

CLASS ACTION COMPLAINT

1. **CLASS ACTION COMPLAINT**

2 Plaintiff Jacob Figueroa ("Plaintiff"), on behalf of himself and all persons similarly
3 situated, alleges the following based on personal knowledge as to allegations regarding
4 the Plaintiff and on information and belief as to other allegations.

5 **INTRODUCTION**

6 1. Plaintiff brings this action on behalf of himself and a class of all similarly
7 situated consumers against Defendant Capital One, N.A. ("Capital One" or "Bank"),
8 arising from a) its unfair and unconscionable assessment of ATM fees on balance
9 inquiries undertaken at its own, in-network ATMs, which it promises will be entirely fee-
10 free; and b) its deceptive, unfair and unconscionable assessment of *two* out-of-network
11 ATM fees ("OON Fees"), when an accountholder conducts a balance inquiry that
12 precedes a cash withdrawal at out-of-network ATMs.

13 2. ATM fee revenue for Capital One has risen dramatically in recent years and
14 become one of the primary drivers of the Bank's fee income. Capital One assesses OON
15 Fees on its accountholders who perform transactions on ATMs not owned by Capital One,
16 and it assesses ATM fees for nothing more than a balance inquiry at its own ATMs,
17 despite contractual promises not to do so.

18 3. Capital One's contract documents plainly and expressly promise its
19 accountholders that they will not incur fees for use of in-network ATMs. Yet Capital One
20 does charge its accountholders for balance inquiries undertaken at its own ATMs.

21 4. When Capital One accountholders use a non-Capital One ATM, ATM fees
22 add up very quickly—to accountholders' surprise. Not only does the non-Capital One
23 ATM operator charge the consumer a fee for use of its ATM, a charge which now
24 averages \$3, but Capital One charges a OON Fee for a cash withdrawal as well—a
25 punishing double-fee on accountholders that can rise to a total of several dollars for
26 simply accessing their own money. With most withdrawals below \$100, the ratio of the
27 ATM fees to the withdrawn amount can often be higher than a year's worth of interest.
28 Capital One never adequately informs consumers they will be charged two separate fees

1 for each non-bank ATM withdrawal, and never once tells consumers the total amount of
2 that double-fee.

3 5. Capital One does not stop there, however. On some out-of-network ATM
4 withdrawals, Capital One accountholders pay a *third* fee for withdrawing funds at an out-
5 of-network ATM—one fee to the ATM operator and *two* OON Fees to Capital One.
6 Specifically, when Capital One accountholders accept the ATM prompt and check their
7 account balance prior to withdrawing funds at an out-of-network ATM, Capital One
8 charges its accountholder two OON Fees—one *for the balance inquiry* and *one for the*
9 *withdrawal*.

10 6. For a simple out-of-network ATM withdrawal, for example, Plaintiff paid a
11 total of \$6.50 for three separate fees, including \$4 for two separate fees to Capital One.

12 7. Plaintiff, and other Capital One customers, have been injured by Capital
13 One's improper practices. On behalf of himself and the class, Plaintiff seeks damages,
14 restitution, and injunctive relief for Capital One's breach of contract and violation of
15 California consumer protection statutes.

16 **JURISDICTION AND VENUE**

17 8. This Court has original jurisdiction of this action under the Class Action
18 Fairness Act of 2005. Pursuant to 28 U.S.C. §§ 1332(d)(2) and (6), this Court has original
19 jurisdiction because the aggregate claims of the putative class members exceed \$5 million,
20 exclusive of interest and costs, and at least one of the members of the proposed classes is
21 a citizen of a different state than Capital One.

22 9. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Capital
23 One is subject to personal jurisdiction here and regularly conducts business in this
24 District, and because the Plaintiff resides in this District.

25 **PARTIES**

26 10. Plaintiff is a citizen of California.

27 11. Defendant Capital One is a national bank with its headquarters and principal
28 place of business located in McLean, Virginia. Capital One has hundreds of affiliates,

1 such as Capital One Financial and Capital One Bank, N.A. Among other things, Capital
2 One is engaged in the business of providing retail banking services to consumers,
3 including Plaintiff and members of the putative classes, which includes the issuance of
4 debit cards for use by its customers in conjunction with their checking accounts. Capital
5 One operates banking centers, and thus conducts business, throughout the State of
6 California.

7 FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

9 I. CAPITAL ONE CHARGES ATM FEES FOR BALANCE INQUIRIES 10 UNDERTAKEN AT ITS OWN ATMS, IN VIOLATION OF ITS CONTRACT

11 12. Pursuant to Capital One's EFTA Agreement in effect at the time of the
12 relevant transactions:

13 **Charges for ATM/Debit Card Transactions:** You may...be charged a fee by us,
14 as disclosed in our then current Schedule of Fees and Charges, for each cash withdrawal,
15 funds transfer or balance inquiry that you may make using a non-Capital One Bank
16 branded ATM. **You will not be charged this fee at most ATMs owned and operated by**
17 **Capital One Bank**, except at certain gaming establishments and other non-branch
18 locations, where we may charge a fee for each cash withdrawal. The amount of fees
19 charged at such ATMs at non-branch locations varies. Any fee charged will be displayed
20 on the ATM screen and you will be given an opportunity to cancel the transaction before
21 the fee is imposed. Please refer to our then current Schedule of Fees and Charges for the
22 amount of this fee.

23 See EFTA Agreement, p. 3 (emphasis added) (Exhibit A hereto).

24 13. The Fee Schedule in effect during the relevant time simply provided that
25 there is no fee "[w]hen you use a Capital One-branded ATM" for a "withdrawal, funds
26 transfer or balance inquiry."

27 14. In short, Capital One states no ATM fees whatsoever will be charged for in-
28 network Capital One ATM transactions, except in rare circumstances not applicable here.

1 15. In the rare exception when fees may be charged for using a Capital One
2 ATM for any purpose, Capital One promises that “[a]ny fee charged will be displayed on
3 the ATM screen and you will be given an opportunity to cancel the transaction before the
4 fee is imposed.”

5 16. Capital One never states that a balance inquiry undertaken at a Capital One
6 ATM will incur a fee—either in the EFTA Agreement, the Fee Schedule, or on its ATM
7 screens at the time of the balance inquiry.

8 17. Yet Capital One does in fact charge \$2 fees for balance inquiries undertaken
9 at its own ATMs.

10 18. On June 15, 2015, Plaintiff withdrew \$60 from a Capital One in-network
11 ATM. Despite contractual promises to the contrary, Capital One charged Plaintiff a fee
12 for checking his balance prior to withdrawing the cash. Plaintiff would not have checked
13 his balance had he been warned that he would be charged a fee for doing so.

14 19. Plaintiff was shocked to discover at a later date that he was charged a fee by
15 Capital One for his in-network balance inquiry, especially because he was not warned that
16 the balance inquiry would incur any fee at all.

17 20. In violation of its contractual promise to do so, Capital One failed to display
18 this balance inquiry fee on the ATM screen and did not give Plaintiff an opportunity to
19 cancel the transaction before imposing this fee.

20 **II. CAPITAL ONE CHARGES TWO OON FEES FOR CERTAIN OUT OF**
21 **NETWORK ATM TRANSACTIONS IN VIOLATION OF ITS CONTRACT**

22 **A. Out-of-Network ATM Withdrawals**

23 21. When consumers use ATMs not owned by their own bank, federal law
24 requires the owners of those out of network ATMs to inform users of the amount of the
25 usage fees charged by the ATM owner.

26 22. Thus, it is standard at ATMs in the United States that when a consumer uses
27 an ATM not owned by his home bank, a message is displayed on the screen stating that
28 usage of the ATM will cost a specified amount to proceed with a withdrawal of funds, and

1 that such a fee is in addition to a fee that may be assessed by a consumer's financial
2 institution for use of the ATM.

3 23. That message appears only after a user has decided to perform a cash
4 withdrawal and entered the amount of cash he or she would like to withdraw.

5 24. Through repeated exposure to such fee warning messages, consumers are
6 accustomed to being warned of fee assessments at out of network ATMs, and to being
7 provided with the opportunity to decide whether the fees charged are reasonable—before
8 proceeding with their cash withdrawal.

9 25. Capital One knows this—that consumers expect a fair fee disclosure at the
10 ATM—and has designed a scheme to assess OON Fees on balance inquiries and exploit
11 consumers' reasonable expectation that they will be provided an opportunity to cancel
12 actions before being assessed a fee. That scheme involves assessing fees for the mere act
13 of checking a balance before proceeding with a cash withdrawal.

14 26. In the US, most ATM display screens immediately ask consumers if they
15 would like to "check their account balance" before proceeding with their transaction.

16 27. The ATM screen does not disclose that a balance inquiry alone will incur a
17 usage fee, and indeed ATM owners in the United States in general do not charge usage
18 fees for balance inquiries.

19 28. Repeated exposure to such messages is partly responsible for building the
20 reasonable consumer understanding that a balance inquiry is a common lead-in to a
21 withdrawal, a mere first step to the real business at hand, an informational exercise
22 offered by the ATM to help inform the cash withdrawal.

23 29. Reasonable consumers like Plaintiff do not, in sum, understand a balance
24 inquiry to be an independent transaction worthy of a separate fee.

25 30. Capital One knows this—that consumers expect a balance inquiry fee to be
26 an included part of a cash withdrawal—and has designed a scheme to assess OON Fees on
27 those balance inquiries. The Bank preys on the common sense that a balance inquiry
28 preceded by a cash withdrawal is not an independent basis for a fee.

1 31. Thus, in most circumstances, there is simply no warning at the ATM that a
2 balance inquiry alone could incur a fee.

3 32. As a result, consumers have zero expectation that their home bank will
4 charge a separate fee for a balance inquiry, especially one that precedes a cash withdrawal
5 at the same ATM.

6 33. If a bank is going to charge such a conscience-shocking fee, it must fully and
7 fairly disclose such a fee in its account documentation. Capital One did the opposite—
8 providing express and implied indications that balance inquires would not incur OON
9 Fees.

10 **B. Capital One's Account Contract**

11 34. Plaintiff has a Capital One checking account, which is governed by Capital
12 One's standardized account agreement.

13 35. Capital One issues debit cards to its checking account customers, including
14 Plaintiff, which allows its customers to have electronic access to their checking accounts
15 for purchases, payments, and ATM withdrawals at both Capital One and non-Capital One
16 ATMs.

17 36. Against the backdrop of the reasonable consumer expectations and federal
18 law above, Capital One's disclosures deceive consumers and reinforce the reasonable
19 understanding that no fee will be assessed for a balance inquiry—especially if ATM users
20 are not warned beforehand.

21 37. Capital One's disclosures also reinforce the common sense presumption that
22 there can be no balance inquiry fee when such an inquiry is in conjunction with a cash
23 withdrawal at the same ATM.

24 38. Pursuant to Capital One's EFTA Agreement in effect at the time of the
25 relevant transactions:

26 **Charges for ATM/Debit Card Transactions:** When you use your
27 ATM/Debit Card at a non-Capital One Bank branded ATM, the ATM
28 owner/operator may charge you a fee for your use of their ATM, and you
may be charged a fee for a balance inquiry even if you do not complete a

1 transaction. The fee charged should be disclosed to you on the ATM, and
2 you should be given an opportunity to cancel the transaction before the fee is
3 imposed. You may also be charged a fee by us, as disclosed in our then
4 current Schedule of Fees and Charges, for each cash withdrawal, funds
5 transfer or balance inquiry that you may make using a non-Capital One Bank
6 branded ATM.

7
8 See EFTA Agreement, p. 3 (Exhibit A hereto).

9 39. The Fee Schedule referenced by Capital One in the EFTA Agreement, which
10 Capital One states will clarify precisely what fees will be charged “by us,” has just one
11 relevant line, stating that \$2 will be charged per “transaction.”

12 40. First, the contract plainly promises that ATM owners will not assess fees for
13 balance inquiries unless they inform consumers of the amount of the fee beforehand. In
14 general, and in Plaintiff’s case here, the ATM owner does not warn the user that there is a
15 separate charge for a balance inquiry, and in fact the ATM owner does not charge a
16 separate fee to the user for a balance inquiry. Therefore, the user can have no reasonable
17 expectation that his home bank will assess a fee for an action that the ATM owner does
18 not charge or warn about.

19 41. Second, even by Capital One’s own terms, a balance inquiry is not a
20 transaction: “you may be charged a balance inquiry even if you do not complete a
21 *transaction*.” By simple logic, this means a balance inquiry cannot itself be a
22 “transaction.” And since Capital One has promised only “transactions” will incur a OON
23 Fee, it violates its contract when it charges OON Fees on balance inquiries.

24 42. Moreover, accountholders using a non-Capital One ATM are never warned
25 that they will receive **two separate fees** from Capital One—plus another one from the
26 ATM owner—when they check their balance before proceeding with a cash withdrawal at
27 the same ATM. But that is exactly what happens.

1 43. As discussed *supra*, ATMs immediately prompt consumers to check their
2 balance, and never warn that such a balance inquiry will be the basis for a fee, either from
3 the ATM owner or from the consumer's own bank. Capital One's disclosures do nothing
4 to disabuse consumers of the reasonable understanding that a balance inquiry will not
5 incur a separate fee when it precedes a cash withdrawal at the same ATM, and never state
6 outright that such a fee will be assessed. Again, the Fee Schedule says nothing more than
7 "\$2.50 per transaction."

8 44. Moreover, reasonable consumers like Plaintiff do not understand—and are
9 never warned—that a mere balance inquiry (in which no funds are transferred in any way)
10 counts on its own as a separate "transaction" that could be the basis for an independent
11 OON Fee.

12 45. Merriam-Webster defines "transaction" to mean
13 "something transacted; *especially* : an exchange or transfer of goods, services, or funds."
14 There is no exchange or transfer involved in a balance inquiry; a balance inquiry is merely
15 a precursor to the actual "transaction"—the cash withdrawal.

16 46. Further, Capital One's disclosure that the ATM owner may charge a fee for a
17 balance inquiry "even if you do not complete a transaction" is problematic for several
18 reasons.

19 47. First, as is the case here, owners generally do not charge such fees (and
20 therefore do not disclose such fees). There can thus be no reasonable expectation that
21 Capital One will do so.

22 48. Second, even if ATM owners did charge such fees, the "even if you do not
23 complete a transaction" phrase indicates that a consumer will not be charged a separate
24 OON Fee for a balance inquiry if he does complete a cash withdrawal (and therefore does
25 pay an OON Fee for that cash withdrawal)—especially where, as here, the ATM owner
26 does not charge separate fees for balance inquiries and never provides an on-screen
27 warning that either it or the consumer's bank will do so.
28

49. The reasonable consumer understanding that a balance inquiry is not itself an independent transaction or basis for a fee is the very reason the “even if you do not complete a transaction” is necessary. *Indeed, the warning would be nonsensical if it was generally understood that the balance inquiry was an independent transaction worthy of a fee.*

50. In other words, if the balance inquiry and the transaction (withdrawal) were not linked and intrinsic to each other in the minds of reasonable consumers—there would be no need to disclose the special case of when they are de-linked.

51. At the very least, by the repeated use of “may,” Capital One provides itself discretion as to when it will assess OON Fees, and it uses that discretion in bad faith when it assesses an OON Fee on both a balance inquiry and a cash withdrawal at the same ATM.

C. Plaintiff's Out of Network ATM Withdrawals

52. On April 28, 2015, Plaintiff withdrew \$20 in cash from an out of network ATM in New York, New York. Prior to withdrawing the cash, Plaintiff was prompted to check his balance, and he did so. He received no warning that doing so would incur a fee from the ATM owner or from his own bank. The ATM owner charged Plaintiff \$3 for the cash withdrawal, but did not charge a fee for the balance inquiry. Later, Capital One charged Plaintiff two OON Fees – one for the balance inquiry and one for the cash withdrawal – of \$2 each. Plaintiff would not have proceeded with the balance inquiry or the cash withdrawal if he had been notified by the ATM owner or by Capital One that he would be charged three separate fees, totaling \$7, for his \$20 cash withdrawal.

53. Plaintiff was shocked to discover that he was charged these two OON Fees by Capital One, in addition to the ATM owner's fee for the cash withdrawal, especially because he was not warned that the balance inquiry would incur any fee at all.

CLASS ALLEGATIONS

54. Plaintiff brings this action on behalf of himself and all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. This action satisfies

1 the numerosity, commonality, typicality, adequacy, predominance, and superiority
2 requirements of Rule 23.

3 55. The proposed classes are defined as:

- 4 • All Capital One checking account holders in the United States who within the
5 applicable statute of limitations were assessed an ATM fee for a balance inquiry at
6 in-network ATM (the "In-Network Class").
- 7 • All Capital One checking account holders in California who within the applicable
8 statute of limitations were assessed an ATM fee for a balance inquiry at in-network
9 ATM (the "California In-Network Sub-Class").
- 10 • All Capital One checking account holders in New York who within the applicable
11 statute of limitations were assessed an ATM fee for a balance inquiry at in-network
12 ATM (the "New York In-Network Sub-Class").
- 13 • All Capital One checking account holders in the United States who within the
14 applicable statute of limitations were assessed two OON Fees when they performed
15 a balance inquiry prior to withdrawing cash at an out-of-network ATM (the
16 "National Balance Inquiry Fee Class").
- 17 • All Capital One checking account holders in California who within the applicable
18 statute of limitations were assessed two OON Fees when they performed a balance
19 inquiry prior to withdrawing cash at an out-of-network ATM (the "California OON
20 Fee Sub-Class").
- 21 • All Capital One checking account holders in New York who within the applicable
22 statute of limitations were assessed two OON Fees when they performed a balance
23 inquiry prior to withdrawing cash at an out-of-network ATM (the "New York OON
24 Fee Sub-Class").

25 The National Classes and the California and New York Subclasses are collectively
26 referred to as the "Classes."

27 56. Plaintiff reserves the right to modify or amend the definition of the proposed
28 Classes before the Court determines whether certification is appropriate.

1 57. Excluded from the Classes are Capital One, its parents, subsidiaries,
2 affiliates, officers, and directors; any entity in which Capital One has a controlling
3 interest; all customers who make a timely election to be excluded; governmental entities;
4 and all judges assigned to hear any aspect of this litigation, as well as their immediate
5 family members.

6 58. The members of the Classes are so numerous that joinder is impractical. The
7 Classes consist of thousands of members, the identity of whom is within the knowledge of
8 and can be ascertained only by resort to Capital One's records.

9 59. The claims of the representative Plaintiff are typical of the claims of the
10 Classes in that the representative Plaintiff, like all Class members, was charged for a
11 balance inquiry at an in-network ATM; was charged two OON Fees when he checked his
12 balance prior to withdrawing cash at an out of network ATM; was charged OON Fees for
13 transactions at an out-of-network ATM without the Fee charged by Capital One being
14 displayed on the ATM screen and being given an opportunity to cancel the transaction
15 before the fee was imposed. The representative Plaintiff, like all Class members, has been
16 damaged by Capital One's misconduct in that he was assessed unfair and unconscionable
17 fees. Furthermore, the factual basis of Capital One's misconduct is common to all Class
18 members, and represents a common thread of unfair and unconscionable conduct resulting
19 in injury to all members of the Classes.

20 60. There are numerous questions of law and fact common to the Classes and
21 those common questions predominate over any questions affecting only individual Class
22 members.

23 61. Among the questions of law and fact common to the Classes are whether
24 Capital One:

- 25 a. Deceived consumers;
- 26 b. Breached its contract;
- 27 c. Breached its covenant of good faith and fair dealing with Plaintiff and
28 other members of the Classes through its overdraft policies and practices;

1 d. Converted money belonging to Plaintiff and other members of the
2 Classes through its OON Fee policies and practices;

3 e. Was unjustly enriched through its OON Fee policies and practices; and

4 f. Violated the consumer protection acts of certain states through its
5 OON Fee policies and practices.

6 62. Other questions of law and fact common to the Classes include:

7 a. The proper method or methods by which to measure damages, and

8 b. The declaratory relief to which the Classes are entitled.

9 63. Plaintiff's claims are typical of the claims of other Class members, in that
10 they arise out of the same wrongful overdraft policies and practices of Capital One's
11 Account Agreement and other related documents. Plaintiff has suffered the harm alleged
12 and has no interests antagonistic to the interests of any other Class member.

13 64. Plaintiff is committed to the vigorous prosecution of this action and has
14 retained competent counsel experienced in the prosecution of class actions and, in
15 particular, class actions on behalf of consumers and against financial institutions.
16 Accordingly, Plaintiff is an adequate representative and will fairly and adequately protect
17 the interests of the Classes.

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

24 66. Even if Class members themselves could afford such individual litigation, the
25 court system could not. Given the complex legal and factual issues involved,
26 individualized litigation would significantly increase the delay and expense to all parties
27 and to the Court. Individualized litigation would also create the potential for inconsistent
28 or contradictory rulings. By contrast, a class action presents far fewer management

1 difficulties, allows claims to be heard which might otherwise go unheard because of the
2 relative expense of bringing individual lawsuits, and provides the benefits of adjudication,
3 economies of scale and comprehensive supervision by a single court.

4 **FIRST CLAIM FOR RELIEF**

5 **Breach of Contract**

6 **(On Behalf of the National Classes)**

7 67. Plaintiff repeats paragraphs 1 through 66 above.

8 68. Plaintiff and Capital One have contracted for bank account deposit, checking,
9 ATM, and debit card services, as embodied in Capital One's EFTA Agreement, Schedule
10 of Fees and Charges, and related documentation.

11 69. No contract provision authorizes Capital One to charge a fee for a balance
12 inquiry at an in-network ATM, especially when, in violation of its contractual promise to
13 do so, Capital One failed to display this balance inquiry fee on the ATM screen and did
14 not give Plaintiff an opportunity to cancel the transaction before imposing this fee.

15 70. Therefore, Capital One breached the terms of its EFTA Agreement by
16 charging such fees on a transaction at an in- network ATM.

17 71. No contractual provision authorizes Capital One to assess an OON Fee for a
18 transaction at an out-of-network ATM, without the Fee charged by Capital One being
19 displayed on the ATM screen and being given an opportunity to cancel the transaction
20 before the fee is imposed.

21 72. Therefore, Capital One breached the terms of its EFTA Agreement by
22 charging OON Fees for such transactions at an out-of-network ATM.

23 73. Plaintiff and members of the National Classes have performed all, or
24 substantially all, of the obligations imposed on them under the EFTA Agreement.

1 74. Plaintiff and members of the National Classes have sustained damages as a
2 result of Capital One's breach of the EFTA Agreement.

3 **SECOND CLAIM FOR RELIEF**

4 **Breach of the Covenant of Good Faith and Fair Dealing**

5 **(On Behalf of the National Classes)**

6 75. Plaintiff repeats paragraphs 1 through 74 above.

7 76. Plaintiff and Capital One have contracted for bank account deposit, checking,
8 ATM, and debit card services, as embodied in Capital One's EFTA Agreement and
9 related documentation.

10 77. Under the laws of the states where Capital One does business, good faith is
11 an element of every contract. Whether by common law or statute, all such contracts
12 impose upon each party a duty of good faith and fair dealing. Good faith and fair dealing,
13 in connection with executing contracts and discharging performance and other duties
14 according to their terms, means preserving the spirit – not merely the letter – of the
15 bargain. Put differently, the parties to a contract are mutually obligated to comply with
16 the substance of their contract in addition to its form. Evading the spirit of the bargain
17 and abusing the power to specify terms constitute examples of bad faith in the
18 performance of contracts.

19 78. Subterfuge and evasion violate the obligation of good faith in performance,
20 even when an actor believes their conduct to be justified. Bad faith may be overt or may
21 consist of inaction, and fair dealing may require more than honesty. Examples of bad
22 faith are evasion of the spirit of the bargain, willful rendering of imperfect performance,
23 abuse of a power to specify terms, and interference with or failure to cooperate in the
24 other party's performance.

25 79. Capital One has breached the covenant of good faith and fair dealing in the
26 EFTA Agreement through its ATM Fee policies and practices as alleged herein.

27 80. Plaintiff and members of the National Classes have performed all, or
28 substantially all, of the obligations imposed on them under the EFTA Agreement.

1 81. Plaintiff and members of the National Classes have sustained damages as a
2 result of Capital One's breach of the covenant of good faith and fair dealing.

3 **THIRD CLAIM FOR RELIEF**

4 **Conversion**

5 **(On Behalf of the National Classes)**

6 82. Plaintiff repeats paragraphs 1 through 81 above.

7 83. Capital One had and continues to have a duty to maintain and preserve its
8 customers' checking accounts and to prevent their diminishment through its own wrongful
9 acts.

10 84. Capital One has wrongfully collected overdraft fees from Plaintiff and the
11 members of the National Classes, and has taken specific and readily identifiable funds
12 from their accounts in payment of these fees in order to satisfy them.

13 85. Capital One has, without proper authorization, assumed and exercised the
14 right of ownership over these funds, in hostility to the rights of Plaintiff and the members
15 of the National Classes, without legal justification.

16 86. Capital One continues to retain these funds unlawfully without the consent of
17 Plaintiff or members of the National Classes.

18 87. Capital One intends to permanently deprive Plaintiff and the members of the
19 National Classes of these funds.

20 88. These funds are properly owned by Plaintiff and the members of the National
21 Classes, not Capital One, which now claims that it is entitled to their ownership, contrary
22 to the rights of Plaintiff and the members of the National Classes.

23 89. Plaintiff and the members of the National Classes are entitled to the
24 immediate possession of these funds.

25 90. Capital One has wrongfully converted these specific and readily identifiable
26 funds.

27 91. Capital One's wrongful conduct is continuing.

28 92. As a direct and proximate result of this wrongful conversion, Plaintiff and the

1 members of the National Classes have suffered and continue to suffer damages.

2 93. By reason of the foregoing, Plaintiff and the members of the National Classes
3 are entitled to recover from Capital One all damages and costs permitted by law, including
4 all amounts that Capital One has wrongfully converted.

5 **FOURTH CLAIM FOR RELIEF**

6 **Unjust Enrichment**

7 **(On Behalf of the National Classes)**

8 94. Plaintiff repeats paragraphs 1 through 93 above.

9 95. Plaintiff, on behalf of himself and the National Classes, assert a common law
10 claim for unjust enrichment.

11 96. By means of Capital One's wrongful conduct alleged herein, Capital One
12 knowingly provided banking services to Plaintiff and members of the National Classes
13 that was unfair, unconscionable, and oppressive.

14 97. Capital One knowingly received and retained wrongful benefits and funds
15 from Plaintiff and members of the National Classes. In so doing, Capital One acted with
16 conscious disregard for the rights of Plaintiff and members of the National Classes.

17 98. As a result of Capital One's wrongful conduct as alleged herein, Capital One
18 has been unjustly enriched at the expense of, and to the detriment of, Plaintiff and
19 members of the National Classes.

20 99. Capital One's unjust enrichment is traceable to, and resulted directly and
21 proximately from, the conduct alleged herein.

22 100. Under the common law doctrine of unjust enrichment, it is inequitable for
23 Capital One to be permitted to retain the benefits it received, and is still receiving, without
24 justification, from the imposition of overdraft fees on Plaintiff and members of the
25 National Classes in an unfair, unconscionable, and oppressive manner. Capital One's
26 retention of such funds under circumstances making it inequitable to do so constitutes
27 unjust enrichment.

28 101. The financial benefits derived by Capital One rightfully belong to Plaintiff

1 and members of the National Classes. Capital One should be compelled to disgorge in a
2 common fund for the benefit of Plaintiff and members of the National Classes all
3 wrongful or inequitable proceeds received by them. A constructive trust should be
4 imposed upon all wrongful or inequitable sums received by Capital One traceable to
5 Plaintiff and the members of the National Classes.

6 102. Plaintiff and members of the National Classes have no adequate remedy at
7 law.

8 **FOURTH CLAIM FOR RELIEF**

9 **Violation of California Unfair Competition Law, Unfair Prong**

10 **Business and Professions Code § 17200**

11 **(On Behalf of the California Subclasses)**

12 103. Plaintiff repeats paragraphs 1 through 102 above.

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

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

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

23 107. Defendant's conduct violates the UCL's "unfair" prong insofar as Defendant
24 charged OON Fees for a cash withdrawal preceded by a balance inquiry at the same out of
25 network ATM.

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

1 justifications, or motives.

2 109. The harm to Plaintiff and Class Members arising from Defendant's unfair
3 practices relating to the imposition of OON Fees outweighs the utility, if any, of those
4 practices.

5 110. Defendant's unfair business practices relating to OON Fees as alleged herein
6 are immoral, unethical, oppressive, unscrupulous, unconscionable and/or substantially
7 injurious to Plaintiff and members of the Class.

8 111. Defendant's conduct was substantially injurious to consumers in that they
9 have been forced to pay OON Fees, which are not disclosed in their contract with
10 CAPITAL ONE.

11 112. As a result of Defendant's violations of the UCL's "unfair" prong, Plaintiff
12 and members of the Class have paid, and/or will continue to pay OON Fees and thereby
13 have suffered and will continue to suffer actual damages.

14 **FIFTH CLAIM FOR RELIEF**

15 **Violation of California Unfair Competition Law, Fraudulent Prong**

16 **Business and Professions Code § 17200**

17 **(On Behalf of the California Subclasses)**

18 113. Plaintiff repeats paragraphs 1 through 112 above.

19 114. Defendant's conduct described herein violates the Unfair Competition Law
20 (the "UCL"), codified at California Business and Professions Code section 17200, et seq.

21 115. The UCL prohibits, and provides civil remedies for, unfair competition. Its
22 purpose is to protect both consumers and competitors by promoting fair competition in
23 commercial markets for goods and services. In service of that purpose, the Legislature
24 framed the UCL's substantive provisions in broad, sweeping language.

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

1 117. Defendant committed fraudulent business acts and practices in violation of
2 Cal. Bus. & Prof. Code § 17200, et seq., when it affirmatively and knowingly
3 misrepresented its OON Fee practices. Such representations misled the Plaintiff and are
4 likely to mislead the public.

5 118. In addition, Defendant committed fraudulent business acts and practices in
6 violation of Cal. Bus. & Prof. Code § 17200, et seq., when it affirmatively and knowingly
7 omitted the total price of out of network ATM transactions and failed to inform
8 consumers they would be charged two fees for a cash withdrawal preceded by a balance
9 inquiry at the same out of network ATM. Such omissions misled the Plaintiff and are
10 likely to mislead the public.

11 119. As a result of Defendant's violations of the UCL's "fraudulent" prong,
12 Plaintiff and members of the Class have paid, and/or will continue to pay, unreasonably
13 excessive amounts of money for banking services and thereby have suffered and will
14 continue to suffer actual damages.

15 **FIFTH CLAIM FOR RELIEF**

16 **NY GBL § 350**

17 **(On Behalf of the Classes)**

18 120. Plaintiff repeats paragraphs 1 through 119 above.

19 121. The New York Consumer Protection Act (N.Y. Gen. Bus. Law §§ 349, 350
20 (Consol.)) was enacted by the New York legislature to protect consumers from unfair,
21 unconscionable and deceptive business practices.

22 122. Certain of Defendant's policies and/or practices described in this Complaint
23 constitute unfair, unconscionable or deceptive trade or business practices. Defendant
24 engages in such conduct as a general business practice, uniformly and as a matter of
25 policy assessing and collecting overdraft fees where it is not legally permitted to do so.

26 123. In addition, Defendant has done so through substantially aggravating
27 circumstances in which it intentionally and knowingly engaged in this unlawful practice
28 that was targeted and directed at the poorest and most financially vulnerable customers.

1 As a result of the unlawful collection of overdraft fees, Plaintiffs and the class have been
2 harmed and Defendant has been improperly and unjustly enriched.

3 124. These violations have directly, foreseeably, and proximately caused damages
4 to Plaintiffs and the proposed Classes in amounts yet to be determined. They have also
5 unjustly enriched Defendant by an amount yet to be determined.

6 125. As a result of Defendant's violations of the New York Consumer Protection
7 Act prohibiting unfair and deceptive acts and practices, Plaintiff and members of the
8 proposed Classes have suffered actual damages for which Defendant is liable in an
9 amount up to and equal to threefold damages. Plaintiff and the Classes are likewise
10 entitled to recover by disgorgement an amount sufficient to restore to Plaintiff and the
11 Classes all monies improperly taken from them. In addition, Plaintiffs and the Classes are
12 entitled to injunctive relief to prevent Defendant from continuing to harm them through its
13 wrongful actions and conduct.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff prays on behalf of himself and all others similarly
16 situated, for judgment against Defendant as follows:

17 126. Certifying the Classes as requested herein, appointing Plaintiff as Class
18 Representative, and appointing his counsel as Class Counsel;

19 127. Declaring Capital One's overdraft fee policies and practices to be wrongful,
20 unfair, and unconscionable;

21 128. Restitution of all overdraft fees paid to Capital One by Plaintiff and the
22 Classes, as a result of the wrongs alleged herein in an amount to be determined at trial;

23 129. Disgorgement of the ill-gotten gains derived by Capital One from its
24 misconduct;

25 130. Actual damages in an amount according to proof;

26 131. Punitive and exemplary damages;

27 132. Pre-judgment interest at the maximum rate permitted by applicable law;

28 133. Costs and disbursements assessed by Plaintiff in connection with this action,

1 including reasonable attorneys' fees pursuant to applicable law; and

2 134. Such other relief as this Court deems just and proper.

3 **DEMAND FOR JURY TRIAL**

4 Plaintiff hereby demands a jury trial for all of the claims so triable.

5 Dated: April 6, 2018

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