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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TANYA FITZPATRICK, an individual, on behalf
of herself and all others similarly situated,

Plaintiff,

vs.

CAPITAL ONE FINANCIAL CORPORATION,

Defendant.

No.

CLASS ACTION COMPLAINT
JURY TRIAL DEMANDED

1 Plaintiff Tanya Fitzpatrick, on behalf of herself and all persons similarly situated, alleges the
2 following:

3 **INTRODUCTION**

4 1. The COVID-19 pandemic devastated the economy and placed millions of people in
5 financial distress.¹ Among those who suffered were credit card customers, many of whom were drawn
6 into a cycle of high interest and late fees that further threatened their well-being.

7 2. For example, if a customer does not make a credit card payment by the due date set by
8 Defendant Capital One Financial Corporation (“Capital One”), or pays an amount that is below the
9 minimum payment required by Capital One, Capital One charges late fees of up to \$40 and interest on
10 any balances—including interest on those late fees—carried over to the next month.

11 3. Through the imposition of these and other fees and penalties, Capital One makes
12 billions of dollars. Capital One’s profits remained high throughout the global pandemic, due in no
13 small part to these punitive fees. In 2020, Capital One raked in \$1.243 *billion* in service and other
14 consumer charges, including late fees.²

15 4. In its contracts of adhesion with its credit card customers, Capital One retains
16 discretion to charge, waive, or refund late fees and interest on unpaid balances. In the face of public
17 pressure³ and in a bid to obtain good publicity and attract more business and investors, Capital One
18 exploited this discretion during the COVID-19 crisis by repeatedly promising its credit card customers
19 that it was “here to help” with the financial distress caused by the pandemic and promising to use that
20 discretion to give its customers a lifeline. It promised “assistance” in the form of “waiving fees,”
21 “deferring payments on credit cards,” and “minimum payment assistance.” It advertised that it would
22 forego charging interest on unpaid balances. It declared that “all customers will be eligible for
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25 ¹ E.g., Ctr. on Budget & Policy Priorities, *Tracking the COVID-19 Recession’s Effects on Food, Housing, and*
26 *Employment Hardships* (last updated Aug. 9, 2021), <https://www.cbpp.org/sites/default/files/8-13-20pov.pdf>.

27 ² Capital One, *2020 Annual Report* at 53 (2021), <https://investor.capitalone.com/static-files/1364d634-a3d5-464d-8505-ddf46eda928d>.

28 ³ See *infra* at ¶¶ 24-26.

1 assistance.” And it repeatedly encouraged its credit card customers to “reach out to discuss and find a
2 solution for you.”⁴

3 5. But these public promises by Capital One were illusory. Even after widely publicizing
4 its promises to exercise its discretion to waive or refund late fees and interest charges due to the
5 COVID-19 pandemic, Capital One systematically denied requests for such help from its credit card
6 customers, reaping enormous profits as a result. It earned these profits to the detriment of customers
7 who could not make the minimum payment on their credit cards during extreme financial vulnerability.

8 6. Plaintiff Tanya Fitzpatrick is one such customer. She has a Capital One Platinum
9 Mastercard. Her card is high interest (24.74%), and she must pay a \$95 yearly “membership fee” to
10 keep the account open if she maintains a balance. During the pandemic, Ms. Fitzpatrick incurred late
11 fees and interest charges on this card after the pandemic reduced the number of hours she could work.

12 7. Hoping for some relief, she contacted Capital One (just as it encouraged its customers
13 to do) multiple times to ask for a waiver of these late fees, which were running up already daunting
14 minimum payment amounts.

15 8. But Capital One did not keep its public promises. Its representatives repeatedly told
16 them her there was nothing they could do, and Capital One continued to charge late fees and interest
17 on her unpaid balances. It never exercised the discretion it retained, refusing to even *consider* waiving or
18 refunding late fees or interest to give her a much-needed respite. As a result, the burden of making her
19 minimum payments continued to grow.

20 9. Accordingly, Plaintiff brings this action on behalf of herself and a class of all similarly
21 situated consumers against Capital One for breach of the implied covenant of good faith and fair
22 dealing, unjust enrichment, and violation of the consumer protection laws of California.

23 10. It is a breach of the covenant of good faith and fair dealing for Capital One to (1)
24 provide itself discretion as to whether to charge or waive late fees and interest; (2) dishonestly promise
25 customers that it would waive late fees and interest and provide other financial assistance during the
26 deadly COVID-19 pandemic; and (3) consistently exercise its discretion in its own favor, thereby

27 _____
28 ⁴ See *infra* at ¶¶ 27-34.

1 denying in bad faith its most vulnerable customers the full benefit of the contract that Capital One
2 wrote.

3 11. Additionally, Capital One was and is unjustly enriched as a result of these practices.
4 Capital One sought to use its widely publicized offers to help its customers who were struggling during
5 the pandemic to curry favor with the press, the public, investors, and lawmakers. But to maximize the
6 profits it was raking in from late fees and interest on unpaid credit card balances, Capital One
7 systematically denied requests for assistance in its behind-the-scenes interactions with its customers.
8 This double-dealing was unfair, unconscionable, and oppressive.

9 12. Further, by explicitly promising that it would waive late fees and interest, Capital One
10 misled its customers and other members of the public, including Ms. Fitzpatrick. Plaintiff and other
11 Class members relied on and suffered financial harm from these promises because they would have
12 taken action to avoid these punitive practices had they known that Capital One was going to continue
13 to engage in them during this time of extraordinary financial hardship. Accordingly, these deceptive,
14 unfair, and unconscionable practices violated the California Unfair Competition Law.

15 13. Plaintiff and other Class members have been injured by Capital One's practices. On
16 behalf of herself and the Class, Plaintiff seeks damages, restitution, disgorgement, and injunctive relief
17 for Capital One's unlawful course of conduct.

18 **JURISDICTION AND VENUE**

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

23 15. This Court has jurisdiction over Capital One because Capital One regularly conducts
24 and/or solicits business in, engages in other persistent courses of conduct in, and/or derives substantial
25 revenue from products and/or services provided to persons in this District and in this State.

26 16. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Capital One is
27 subject to personal jurisdiction here and regularly conducts business in the District, and because a
28

1 substantial part of the events or omissions giving rise to the claims asserted herein occurred in this
2 District.

3 **PARTIES**

4 17. Ms. Fitzpatrick is a citizen and resident of North Highlands, California. She maintains a
5 Platinum Mastercard credit card account with Capital One. At all times relevant, Ms. Fitzpatrick resided
6 in and received statements for that account at her residence in North Highlands, California.

7 18. Capital One is a national bank with its headquarters and principal place of business
8 located in Mclean, Virginia. Among other things, Capital One is engaged in the business of providing
9 consumer credit cards to customers. It provides credit cards to consumers, and thus conducts business,
10 throughout the State of California, including within this District and Division.

11 **FACTUAL BACKGROUND AND GENERAL ALLEGATIONS**

12 **I. In its contracts, Capital One retains discretion to waive late fees and interest on overdue**
13 **balances.**

14 19. Transactions involving consumer credit cards at Capital One are governed by the Credit
15 Card Agreement, an adhesion contract drafted by Capital One. The Credit Card Agreement is attached
16 to this Complaint as Exhibit A and incorporated herein.

17 20. According to the Credit Card Agreement, Capital One has the discretion as to whether
18 to charge late fees: “Late Payment Fee: **We may charge you this Fee** if we do not receive your
19 payment as instructed on your Statement by the payment due date.” (Emphasis added).

20 21. Capital One also reserves the discretion as to whether to charge interest on overdue
21 credit card balances. The Credit Card Agreement states that if a customer does not make “any payment
22 when it is due,” Capital One “**may take certain actions**” with respect to the customer’s account,
23 including “**continue to charge you *Interest Charges and Fees*** as long as your balance remains
24 outstanding.” (Emphases in bold added).

25 22. Elsewhere, the Credit Card Agreement discusses Capital One’s discretion to remove
26 fees and interest charges:

1 **Interest Charges and Fees**

2 We will charge Interest Charges and Fees to your Account as disclosed on your Statement and
3 other Truth-in-Lending Disclosures.

4 ***

5 From time to time, **we may give you offers that allow you to pay less than the total
6 balance and avoid Interest Charges on new purchase Segment transactions.**

(Emphases added).⁵

7 23. Against this contractual backdrop, Capital One advertised its purported “assistance”
8 programs to credit card customers during the COVID-19 pandemic.

9 **II. Capital One faces public pressure to use its discretion to help its customers during the
10 pandemics.**

11 24. Regulators and the public alike called for banks to put a stop to predatory late fees
12 during the pandemic. For example, a November 2020 United States Federal Reserve study reported
13 that, in the midst of the pandemic, “[a]s millions of Americans experienced a sudden loss of income,
14 consumers increasingly relied on sources of short-term liquidity, such as savings and credit cards” to
15 make ends meet.⁶ And, the study found, in the early days of the pandemic, consumers who “recently
16 experienced a loss of income and [were] under financial stress” complained frequently about “late
17 fees for credit cards.”⁷ Indeed, consumers complained about these credit cards more often than any
18 other financial product in May, June, and July 2020.⁸

19 25. Federal regulators also pushed banks to help their customers. On March 13, 2020, the
20 Office of the Controller of the Currency issued guidance encouraging banks to “take steps to meet
21 the financial services needs of customers adversely affected by COVID-19-related issues,” and
22 specifically asked that they waive late payment fees on credit cards.⁹ The guidance explained that such

23 ⁵ “Segments” are defined as the “different parts of your Account we may establish that are subject to
24 unique APRs, pricing, or other terms.” Segments include “purchases, Balance Transfers, Cash
25 Advances, and Special Transfers.”

26 ⁶ Bd. of Governors, U.S. Fed. Reserve Sys., *The Pandemic’s Early Effects on Consumers and Communities*, 2
27 Consumer & Community Context 18 (Nov. 2020),
28 <https://www.federalreserve.gov/publications/files/consumer-community-context-20201118.pdf>.

⁷ *Id.* at 19.

⁸ *Id.* at 17 (Fig. 1).

⁹ U.S. Office of the Controller of the Currency, *OCC Bulletin 2020-15, Pandemic Planning: Working With
Customers Affected by Coronavirus and Regulatory Assistance* (Mar. 13, 2020), <https://www.occ.gov/news-issuances/bulletins/2020/bulletin-2020-15.html>.

1 relief measures “serve the long-term interests of communities and the financial system” and “are
2 consistent with safe and sound banking practices and applicable laws.”¹⁰

3 26. State officials also asked banks to provide relief from these fees. For example, in March
4 2020, New York’s governor issued an executive order instructing the state’s Department of Financial
5 Services to require state-chartered banks to waive late fees and other credit card fees to help lessen
6 the financial hardship of the pandemic on New Yorkers.¹¹ That same month, the Secretary of
7 California’s Business, Consumer Services & Housing Agency and its Commissioner of Business
8 Oversight jointly issued guidance to financial institutions in the state whose customers “may be
9 suffering from loss of income or other financial hardship as a result of the COVID-19 pandemic.”¹²
10 They specifically encouraged banks to waive payment fees on credit cards during the state of
11 emergency.¹³ And also that same month, the Illinois Department of Financial and Professional
12 Regulation “strongly urge[d] banks and credit unions to respond to borrowers affected by the current
13 economic environment” by waiving fees for “late payments on credit cards.”¹⁴

14 **III. Capital One promises to exercise its contractual discretion to help customers impacted**
15 **by COVID-19.**

16 27. In light of this ongoing public pressure and the threat of legislative action, Capital One
17 promised that it would help its most vulnerable customers, including by waiving late fees and interest
18 on unpaid balances.

19 28. In March 2020, as governments and companies throughout the United States adopted
20 shutdown measures to fight the spread of COVID-19, Capital One’s CEO touted the availability of
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22 ¹⁰ *Id.*

23 ¹¹ Press Release, N.Y. Dep’t Fin. Servs., Governor Cuomo Signs Executive Order Mandating
24 Businesses That Require In-Office Personnel to Decrease In-Office Workforce by 75 Percent (Mar. 19,
2020), https://www.dfs.ny.gov/reports_and_publications/press_releases/pr20203191.

25 ¹² Lourdes Castro Ramirez, Sec’y, Cal. Bus., Consumer Servs. & Housing Agency & Manuel P. Alvarez,
26 Comm’r, Cal. Bus. Oversight, *Guidance to Financial Institutions During the COVID-19 Pandemic* 1 (Mar. 22,
2020), https://www.bcsb.ca.gov/coronavirus19/dbo_banks.pdf.

27 ¹³ *Id.* at 2.

28 ¹⁴ Press Release, Ill. Dep’t Fin. & Prof’l Regulation, Illinois Department of Financial and Professional
Regulation Announces Help for Consumers Struggling to Make Payments on their Debts Due to the
COVID-19 Crisis and Guidance for its Regulated Financial Sectors 1 (Mar. 30, 2020),
<https://www.idfpr.com/News/2020/2020%2003%2030%20IDFPR%20financial%20guidance.pdf>.

1 its “assistance” to credit card customers and promised that its agents stood ready to help. In a letter
2 published on Capital One’s website, he stated:

3 We have a range of policies and programs to accommodate customer hardships. For
4 customers who let us know they are being impacted, we are here to support and work
5 with them. We are offering assistance to consumers and small business owners,
6 **including waiving fees or deferring payments on credit cards** or auto loans. **Our
7 frontline associates are well-trained and well-prepared to serve customers in
8 times of financial stress or hardship**¹⁵

9 29. During this same timeframe, a Capital One spokesperson stated that the relief offered
10 could “include fee suppression, minimum payment assistance and deferred loan payments.”¹⁶ The
11 spokesperson declared, “Capital One encourages customers who may be impacted by the coronavirus
12 to contact customer service for a solution.”¹⁷

13 30. Capital One also advertised to customers that it would allow its customers to skip card
14 payments without incurring interest charges (although, as one reporter observed, consumer
15 complaints suggested that that purported assistance “didn’t last long”).¹⁸

16 31. Capital One told Forbes that “**all customers will be eligible for assistance**, which
17 will vary on the type of product they have and their individual needs.”¹⁹

18 32. Capital One proudly declared on its website that the company was “here to help”
19 customers facing financial hardship as a result of the pandemic.²⁰

20 33. Capital One actively encouraged customers to reach out for help, stating: “We also
21 understand that there may be instances where customers find themselves facing financial difficulties.

22 ¹⁵ Press Release, *A Message from Rich Fairbank*, Capital One (Mar. 27, 2020),
<https://www.capitalone.com/about/newsroom/a-message-from-rich-fairbank/> (emphasis added).

23 ¹⁶ Alexandria White, *Capital One cardholders may receive fee suppression and minimum payment assistance if affected
24 by coronavirus*, CNBC (Mar. 23, 2020), <https://www.cnbc.com/select/capital-one-coronavirus-assistance/>.

25 ¹⁷ *Id.*

26 ¹⁸ Ron Lieber, *In Financial Trouble? Track Everything Companies Tell You*, N.Y. Times (May 16, 2020),
<https://www.nytimes.com/2020/05/16/business/coronavirus-financial-help.html>.

27 ¹⁹ Kelly Anne Smith, *List Of Banks Offering Relief To Customers Affected By Coronavirus (COVID-19)*, Forbes
(Apr. 3, 2020), <https://www.forbes.com/sites/advisor/2020/04/03/list-of-banks-offering-relief-to-customers-affected-by-coronavirus-covid-19/?sh=1874aafe4efa> (emphasis added).

28 ²⁰ Capital One, *Supporting Our Customers* (last visited Feb. 15, 2022),
<https://www.capitalone.com/updates/coronavirus/>.

1 Capital One is here to help, and we encourage customers who may be impacted or need assistance to
2 reach out to discuss and find a solution for you.”²¹

3 34. In its 2020 Annual Report to investors, Capital One patted itself on the back for its
4 pandemic response, claiming: “In our Card and Auto businesses, we implemented forbearance
5 programs, which allowed customers to skip payments with no late fees.”²²

6 35. Capital One’s claims of its willingness to help struggling customers spread far and wide
7 and garnered positive coverage in the media and on the Internet. For example, Capital One was
8 included (and still is) in numerous media-published lists of banks offering assistance to customers
9 suffering from financial hardship caused by the pandemic.²³ These reports repeated Capital One’s
10 misleading representations, claiming for example that for those facing financial difficulties, a Capital
11 One representative would “work with you to come up with a suitable solution,”²⁴ that Capital One
12 was “offering waived fees and deferred payments on credit cards for some cardholders,”²⁵ and that
13 “Capital One is also including waived interest and fees in its assistance program for both personal and
14 business cardholders.”²⁶

15 36. In an online article glowingly titled *America’s Banks Are Here to Help*, the American
16 Bankers Association (of which Capital One is a member) proclaimed that Capital One is “[o]ffering a
17 number of different concessions to help customers, contingent on the product they have, including
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19 ²¹ Capital One, *Assistance for Customers Impacted by the COVID-19 Virus Situation* (Apr. 4, 2020),
20 <https://web.archive.org/web/20200404013537/https://www.capitalone.com/updates/coronavirus/overview/>.

21 ²² 2020 Annual Report, *supra* note 2, at 6.

22 ²³ See, e.g., Kailey Hagen, *Credit Card Relief During Coronavirus*, Motley Fool (Jan. 5, 2021),
23 <https://www.fool.com/the-ascent/credit-cards/credit-card-relief-during-coronavirus/> (“You can reach
24 out to Capital One if you are facing financial difficulties. A representative will work with you to come
25 up with a suitable solution.”); Susan Ladika & Caitlin Mims, *Credit card issuers offer cardholders relief amid
26 coronavirus outbreak*, Creditcards.com (Jan. 11, 2021), [https://www.creditcards.com/credit-card-
27 news/credit-card-issuers-relief-coronavirus/](https://www.creditcards.com/credit-card-news/credit-card-issuers-relief-coronavirus/) (“In a March 26, 2020 update, Chairman and CEO Rich
28 Fairbank confirmed that they are offering waived fees and deferred payments on credit cards for some
cardholders.”); Alexandria White, *Here’s our most up-to-date list of credit card financial assistance programs during
coronavirus*, CNBC (last updated July 8, 2021), [https://www.cnbc.com/select/credit-card-issuers-offer-
customer-assistance-amid-coronavirus-financial-hardship/](https://www.cnbc.com/select/credit-card-issuers-offer-customer-assistance-amid-coronavirus-financial-hardship/) (“Capital One is also including waived
interest and fees in its assistance program for both personal and business cardholders.”).

²⁴ Hagen, *Credit Card Relief During Coronavirus*, *supra* note 23.

²⁵ Ladika & Mims, *Credit card issuers offer cardholders relief amid coronavirus outbreak*, *supra* note 23.

²⁶ White, *Here’s our most up-to-date list of credit card financial assistance programs during coronavirus*, *supra* note 23.

1 minimum payment assistance, deferred loan assistance, and fee suppression.”²⁷ And NBC News
2 reported that Capital One was one of a handful of banks “offering to do more” than most by
3 “working with consumers” to offer “steps that can be taken” such as “fee suppression, minimum
4 payment assistance and deferred loan payments.”²⁸

5 **IV. Capital One breaks those promises.**

6 37. Unfortunately, Capital One’s public promises did not match its actions. Despite its
7 proclamations, the bank denied customers’ requests for help on late fees and interest without making
8 a good-faith effort to consider their requests for assistance.

9 38. Ms. Fitzpatrick works as a merchandiser. She is a longtime customer of Capital One.
10 Prior to the COVID-19 pandemic, she incurred only one or two late fees.

11 39. When the pandemic hit, business shutdowns caused a dramatic reduction in her work
12 hours because closed stores did not need merchandise stocked and restocked. This made it difficult
13 for her to keep up with her bills. On several occasions, she had to use her credit cards, including her
14 Capital One card, to obtain cash advances or to pay for necessities because of the financial distress
15 she faced.

16 40. In May 2020, June 2020, and May 2021, she paid the minimum payment after the due
17 date. In each of these months, Capital One assessed a \$25 late fee and then charged interest on the
18 balance that included the late fee.

19 41. During the pandemic, Ms. Fitzpatrick heard reports on television and on the radio that
20 Capital One was promising relief from credit card late fees to customers suffering from financial
21 hardship. This influenced the way she used her credit card and prompted her to seek relief from these
22 fees. Each month that Capital One assessed a late fee, Ms. Fitzpatrick called Capital One to ask for a
23 waiver of the fee (just as it encouraged customers to do). She spoke to three different customer
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26 ²⁷ Am. Bankers Assoc., *America’s Banks Are Here to Help* (last visited Feb. 15, 2022),
<https://www.aba.com/about-us/press-room/industry-response-coronavirus#AlphaC>.

27 ²⁸ Herb Weisbaum, *Millions of Americans will soon run out of money. Here’s how to deal with bills you can’t pay.*,
NBC News (Mar. 19, 2020), <https://www.nbcnews.com/better/lifestyle/coronavirus-collateral-damage-what-do-you-do-when-paycheck-stops-ncna1163671>.
28

1 service representatives. She told each representative to whom she spoke that she missed the payment
2 due date as a result of the financial hardships caused by the COVID-19 pandemic.

3 42. Despite the public promise by Capital One’s CEO that the bank’s “frontline associates
4 are well-trained and well-prepared to serve customers in times of financial stress or hardship,”²⁹ each
5 Capital One representative denied her request without any further investigation, and each told her
6 that there was nothing they could do.

7 43. The statements by each of these Capital One representatives led Ms. Fitzpatrick to
8 believe that Capital One had no process or program for considering or granting relief for its credit
9 card customers during the pandemic, despite the explicit promises Capital One had made.

10 44. Had Ms. Fitzpatrick known that Capital One did not intend to keep its promises to use
11 its discretion to grant customers relief from credit card late fees during the pandemic, she would have
12 used another card to try to ensure that she would avoid such fees. But because of Capital One’s
13 promises to help, she did not believe that using another card was necessary.

14 45. Capital One’s course of conduct toward Ms. Fitzpatrick during the pandemic flouted
15 the discretion in the Credit Card Agreement and directly contradicted its representations in the media
16 and online. Capital One exercised the contractual discretion to waive late fees and interest it retained
17 in the Credit Card Agreement in bad faith because it never meaningfully *considered* her request for
18 assistance at all. Despite Capital One’s widely publicized promise that “all customers” would be
19 eligible for relief, Capital One’s representatives told her that she was “ineligible” for help because
20 there was nothing that they could do. And despite Capital One’s oft-repeated claim that its
21 representatives would “work” with customers to come up with a “suitable solution,” none of the
22 representatives with whom she spoke made any effort to work with her.

23 46. Experiences like Ms. Fitzpatrick’s demonstrate that Capital One’s claims of willingness
24 to help its credit card was a publicity play. In practice, the bank continued to place profits over
25 people, rejecting customers’ requests for assistance without ever actually considering those requests or
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27 ²⁹ Press Release, *A Message from Rich Fairbank*, Capital One (Mar. 27, 2020),
28 <https://www.capitalone.com/about/newsroom/a-message-from-rich-fairbank/>.

1 exercising the discretion it gave itself to provide the promised assistance with late fees and interest.
2 Because Capital One failed to refund fees upon request and did not set up a system that would allow
3 customer service representatives to do so, these promises were likely to deceive reasonable customers
4 into believing that they could get their account fees refunded during the COVID-19 pandemic.

5 **CLASS ALLEGATIONS**

6 47. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiff brings this action
7 on behalf of herself and all others similarly situated. This action satisfies the numerosity,
8 commonality, typicality, adequacy, predominance and superiority requirements of Rule 23.

9 48. The proposed classes are defined as follows:

10 **Nationwide class:** All Capital One credit card holders in the United
11 States who, after March 23, 2020, requested assistance from Capital
12 One but were subsequently charged late fees or interest on unpaid
13 credit card balances.

14 **Alternative California-only class:** All Capital One credit card holders in
15 California who, after March 23, 2020, requested assistance from Capital
16 One but were subsequently charged late fees or interest on unpaid credit
17 card balances.

18 49. Plaintiff reserves the right to modify or amend the definition of the proposed Classes
19 before the Court determines whether certification is appropriate.

20 50. Excluded from the Class are Capital One, its parents, subsidiaries, affiliates, officers and
21 directors, any entity in which Capital One has a controlling interest, all customers who make a timely
22 election to be excluded, governmental entities, and all judges assigned to hear any aspect of this
23 litigation, as well as their immediate family members.

24 51. The members of the Class are so numerous that joinder is impractical. The Class
25 consists of thousands of members, the identity of whom is within the knowledge of and can be
26 ascertained only by resort to Capital One's records.

27 52. Plaintiff's claims are typical of the claims of other Class members. They are governed by
28 the same contractual terms and arise out of the same promises by Capital One to provide assistance
and the same subsequent wrongful policies and practices of denying assistance. Plaintiff has suffered
the harm alleged and has no interests antagonistic to the interests of any other Class member.

1 53. Plaintiff, like all Class members, was denied the benefit of her contract with Capital
2 One when it promised to exercise its discretion to charge or waive late fees and interest on unpaid
3 balances during the COVID-19 pandemic, and then refused to even consider requests to waive or
4 refund such fees or interest amounts. Plaintiff, like all Class members, has been damaged by Capital
5 One's misconduct in that she has been denied the benefit of her contract with Capital One through
6 the unfair imposition of late fees and interest, to Capital One's profitable benefit, despite the promise
7 to exercise discretion in the choice to charge or waive such fees and interest. Furthermore, the factual
8 basis of Capital One's misconduct is common to all Class members and represents a common thread
9 of refusal to exercise its discretion fairly, resulting in injury to all members of the Classes.

10 54. Plaintiff's claims are also typical in that Capital One made misrepresentations to her and
11 to all members of the Classes when it promised to consider requests for assistance with late fees and
12 interest on unpaid balances, and then refused to do so. Plaintiff, like all class members, has been
13 harmed by these wrongful business practices.

14 55. There are numerous questions of law and fact common to the Classes and those
15 common questions predominate over any questions affecting only individual Class members.

16 56. Among the questions of law and fact common to the Classes are:

- 17 a. Whether Capital One breached its covenant of good faith and fair dealing with
18 Plaintiff and other members of the Classes through its policies and practices;
- 19 b. Whether Capital One was unjustly enriched through its policies and practices;
- 20 c. Whether Capital One violated the California Unfair Competition Law through
21 its fraudulent misrepresentations;
- 22 d. The proper method or methods by which to measure damages; and
- 23 e. Whether the Classes are entitled to declaratory and injunctive relief.

24 57. Plaintiff is committed to the vigorous prosecution of this action and has retained
25 competent counsel experienced in the prosecution of class actions and, in particular, class actions on
26 behalf of consumers and against financial institutions. Accordingly, she is an adequate representative
27 and will fairly and adequately protect the interests of the Classes.

1 and abusing the power to specify terms constitute examples of bad faith in the performance of
2 contracts.

3 64. A party to a contract violates the obligation of good faith in performance by exercising
4 discretion reserved to it solely in its own favor, and contrary to the benefit of the other party,
5 exercising it with a bad motive, exercising it dishonestly, or otherwise exercising it in bad faith. Doing
6 so exploits the discretion to their benefit, particularly when, as here, the party exercising the discretion
7 drafted the contract—thus reserving the discretion to itself—and exercises that discretion consistently
8 against the benefit of a less powerful, less sophisticated consumer. Bad faith may be overt or may
9 consist of inaction, and fair dealing may require more than honesty. Examples of bad faith are evasion
10 of the spirit of the bargain and abuse of the power to specify terms.

11 65. Capital One has breached the covenant of good faith and fair dealing in the Credit Card
12 Agreement through its late fee and interest policies and practices as alleged herein, because it failed to
13 exercise the discretion it retained for itself in its contracts of adhesion to the benefit of its customers.

14 66. Capital One's Credit Card Agreement states that Capital One "may charge" a late
15 payment fee "if we do not receive your payment as instructed on your Statement by the payment due
16 date" and "may take certain actions," including continuing to charge interest and fees, if an account
17 "balance remains outstanding." The Credit Card Agreement also states elsewhere that Capital One
18 "may give you offers that allow you to pay less than the total balance and avoid Interest Charges on
19 new purchase Segment transactions." These provisions give Capital One discretion to assess or waive
20 late fees and interest.

21 67. Rather than use this discretion to provide relief to customers suffering from financial
22 hardship during the pandemic as promised, Capital One instead exercised its discretion in its own
23 favor. In doing so, Capital One has unfairly interfered with Ms. Fitzpatrick's and the Classes' right to
24 receive the benefits of the contract.

25 68. Plaintiff and members of the Classes have performed all, or substantially all, of the
26 obligations imposed on them under the Credit Card Agreement.

1 constructive trust should be imposed upon all wrongful or inequitable sums received by Capital One
2 traceable to Plaintiff and the members of the Classes.

3 78. Plaintiff and members of the Classes have no adequate remedy at law.

4 **COUNT III**

5 **California Unfair Competition Law Business and Professions Code § 17200**
6 **(On Behalf of the California Class)**

7 79. Plaintiff repeats paragraphs 1 through 78 above.

8 80. Capital One's conduct described herein violates the Unfair Competition Law (the
9 "UCL"), codified at California Business and Professions Code section 17200, *et seq.*

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

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

18 83. Ms. Fitzpatrick and the California Class bring this claim under the third prong, that of
19 "fraudulent business act or practice."

20 84. Capital One committed fraudulent business acts and practices in violation of Cal. Bus.
21 & Prof. Code § 17200, *et seq.*, when affirmatively and knowingly misrepresenting that it would waive
22 credit card late fees and interest on unpaid balances. Such representations are likely to mislead the
23 public.

24 85. As a direct and proximate result of Capital One's violations of the UCL's "deceptive"
25 prong, Ms. Fitzpatrick and members of the California Class have been, and will continue to be
26 charged excessive late fees and interest, and thereby have suffered and will continue to suffer actual
27 damages.

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**pro hac vice application forthcoming*