

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

**BERNARD MENSAH**, individually, and on  
behalf of all others similarly situated,

Plaintiff,

v.

**CAPITAL ONE, N.A.**,

Defendant.

Case No.: \_\_\_\_\_

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

Plaintiff Bernard Mensah, individually and on behalf of all others similarly situated, hereby brings this Class Action Complaint against Defendant Capital One, N.A. (“Capital One,” “Bank,” or “Defendant”) and alleges as follows:

**INTRODUCTION**

1. This lawsuit is brought as a class action on behalf of Plaintiff and thousands of similarly situated customers of Capital One who have signed up for the Zelle money transfer service and who: have been the victim of fraud on the Zelle service; who have incurred losses due to that fraud that have not been reimbursed by Capital One; and who were entitled by the marketing representations of Capital One regarding the Zelle service and by the Capital One’s contract promises to a full reimbursement of losses caused by fraud on the Zelle service.

2. Zelle is a payment transfer service wholly owned and operated by seven of the largest banks in the U.S.

3. There are approximately 1,500 member banks and credit unions who participate in the Zelle service. Those members engage in their own significant marketing efforts to encourage their accountholders to sign up for the Zelle service by marketing Zelle as a fast, safe and secure way for consumers to send money. This is false. In fact, there are huge, undisclosed security risks

of using the service that Capital One omitted from its marketing push to get its accountholders to sign up for Zelle.

4. Capital One prominently touts Zelle to its accountholders as a secure, free and convenient way to make money transfers. However, it misrepresents and omits a key fact about the service that is unknown to accountholders: that there is virtually no recourse for consumers to recoup losses due to fraud. Indeed, unlike virtually every other payment method commonly used by American consumers—debit cards, credit cards, and checks—there is no protection for accountholders who are victims of fraud, and virtually no recourse for accountholders attempting to recoup losses due to fraud.

5. The unique, misrepresented, and undisclosed architecture of the Zelle payment system means—again, unlike other payment options commonly used by American consumers—that virtually any money transferred for any reason via Zelle is gone forever, without recourse, reimbursement or protection.

6. Worse, Capital One misrepresents and omits the truth about a secret policy it has adopted: it does not and will not reimburse its accountholders for losses via Zelle due to fraud, even where those losses are timely reported by accountholders.

7. Capital One was required not to misrepresent the unique and dangerous features of the Zelle service in its marketing about it and in contractual representations. But it failed to do so.

8. As a result, users like Plaintiff sign up for and use the Zelle service without the benefit of accurate information regarding that service, and later end up with huge, unreimbursed losses due to fraud. Such users never would have signed up for Zelle in the first place if they had known the extreme risks of signing up for and using the service.

9. As a member of the Zelle network, the risks are well known to Capital One but are omitted from all of its marketing regarding Zelle.

10. As a recent New York Times investigation showed, fraud on the Zelle network is a widespread scourge of which bank is well aware. Quoting an industry expert, the *Times* reported:

“Organized crime is rampant,” said John Buzzard, Javelin’s lead fraud analyst. “A couple years ago, we were just starting to talk about it” on apps like Zelle and Venmo, Mr. Buzzard said. “Now, it’s common and everywhere.”

The banks are aware of the widespread fraud on Zelle. When Mr. Faunce called [his bank] to report the crime, the customer service representative told him, “A lot of people are getting scammed on Zelle this way.” Getting ripped off for \$500 was “actually really good,” Mr. Faunce said the rep told him, because “many people were getting hit for thousands of dollars.”

<https://www.nytimes.com/2022/03/06/business/payments-fraud-zelle-banks.html> (last accessed March 28, 2022).

11. Had Plaintiff and the Class members known of the true operation and risks of the Zelle service—risks Capital One alone was aware of and actively misrepresented—they would not have signed up for and used the Zelle service.

12. Plaintiff and the Class members have been injured by signing up for and using the Zelle service on Capital One’s mobile application and website. Plaintiff brings this action on behalf of himself, the putative Class, and the general public. Plaintiff seeks actual damages, punitive damages, restitution, and an injunction on behalf of the general public to prevent Capital One and Zelle from continuing to engage in its illegal practices as described herein.

### **PARTIES**

13. Plaintiff Bernard Mensah is a citizen and resident of Miami-Dade County, Florida.

14. Defendant Capital One, N.A. is a federally chartered bank with its principal place of business in McLean, Virginia. Capital One operates and conducts business, throughout, the State of Florida.

### **JURISDICTION AND VENUE**

15. This Court has subject matter jurisdiction pursuant to Florida Rule of Civil Procedure 1.220 and Fla. Stat. § 26.012(2). The matter in controversy exceeds the sum or value of \$30,000 exclusive of interest, costs, and attorney's fees.

16. Defendant is subject to personal jurisdiction in Florida because this suit arises out of and relates to Defendant's contacts with this state. Defendant is authorized to do business in the State of Florida and maintains a network of retail branches doing business in Florida that operates, conducts, engages in, and/or carries on business and business activities in Florida and engages in substantial and not isolated activity in Florida.

17. Venue for this action is proper in this Court pursuant to Fla. Stat. §47.011 and §47.051 because Defendant has an agent or other representative and a substantial part of the events and omissions giving rise to this action occurred in Miami-Dade County, Florida.

### **FACTUAL ALLEGATIONS**

#### **A. Overview**

18. It is free to sign up with Zelle, and in fact Zelle is integrated into the websites and mobile apps of Capital One. In marketing and within the website and app itself, Capital One encourages its accountholders to sign up for the Zelle service—a sign up that occurs quickly within the Capital One website or mobile app. During that sign-up process, a user provides basic information to Zelle to link into the Zelle network.

19. While Zelle provides a link to what it calls a “User Agreement” on its website, at no time during the sign-up process on the bank’s website or app did Plaintiff agree to be bound by that document.

20. Sign up for the Zelle service allows the fast transfer of account funds to other Zelle users.

21. Created in 2017 by the largest banks in the U.S. to enable instant digital money transfers, Zelle is by far the country’s most widely used money transfer service. Last year, people sent \$490 billion in immediate payment transfers through Zelle.

22. The Zelle network is operated by Early Warning Services, a company created and owned by seven banks, including Defendant: Bank of America, Capital One, JPMorgan Chase, PNC, Truist, U.S. Bank and Wells Fargo.

23. The Zelle service is very popular, but it also has a massive fraud problem—in no small part because of the immediacy with which money transfers are made on the service. If a fraudster removes money from a Zelle user’s bank account, either directly or by fooling the Zelle user to transfer money, those funds are unrecoverable to the consumer.

24. Nearly 18 million Americans were defrauded through scams involving person-to-person payment apps like Zelle in 2020 alone, according to Javelin Strategy & Research, an industry consultant.

25. Organized crime is rampant on Zelle and other similar person-to-person transfer services.

26. The 1500 banks and credit unions who are members of the Zelle network, including Capital One, know full well that they have a widespread fraud problem on their hands, but have

misrepresented and failed to take steps to warn their accountholders of these risks—or protect their accountholders who fall prey to fraud.

27. For example, a common scam involves a scammer impersonating a bank employee and requesting that the accountholder transfer money to a different bank account for testing purposes. Unsuspecting Zelle users, tricked into making a fraudulent transfer, in many cases send hundreds or thousands of dollars to fraudsters.

28. In another very common scheme, a Zelle user's phone is stolen and Zelle transfers are made from the stolen phone to the fraudster.

29. In short, and unbeknownst to average Zelle users, the Zelle network has become a preferred tool for fraudsters like romance scammers, cryptocurrency con artists and those who use social media sites to advertise fake concert tickets and purebred puppies.

30. Scams like these are rampant on the Zelle network precisely because of the design and architecture of the network, specifically that money transfer is instantaneous and unrecoverable. Indeed, there is virtually no recourse for consumers to recoup losses due to fraud, unlike other payment methods commonly used by American consumers—debit cards, credit cards, and checks. Zelle provides no protection for accountholders who are victims of fraud, and Capital One provides virtually no recourse for accountholders attempting to recoup losses due to fraud.

31. The unique, misrepresented, and undisclosed architecture of the Zelle payment system and Capital One's own fraud policies means—again, unlike other payment options commonly used by American consumers—that virtually any money transferred for any reason via Zelle is gone forever, without recourse, reimbursement or protection for victimized accountholders.

**B. Capital One Falsely Markets Zelle as a Safe and Secure Way to Transfer Money, Omits Information Regarding the Extreme Risks of**

**Signing Up for and Using the Service, and Misrepresents Fraud Protections Regarding Zelle in its Account Contract**

32. In its marketing about Zelle and during the Zelle signup process within the Bank's mobile app or website, the Bank makes repeated promises that Zelle is a "fast, **safe** and easy way to send and receive money" (emphasis added).

33. It promises: "Move money in the moment. Simply and **securely** – with lots of people you know." (emphasis added).

34. It also promises: "With Zelle, money payments and requests are simple, **safe**—and free—using the Capital One Mobile app." (emphasis added).

35. At no time in its marketing or during the sign-up process does Capital One warn potential users of the true security risks of using the Zelle service—including the risk of fraud and the risk that fraudulent losses will never be reimbursed by Capital One.

36. Zelle's services can cause unsuspecting consumers like Plaintiff to incur massive losses on their linked bank accounts.

37. Capital One misrepresents (and omits facts about) the true nature, benefits, and risks of the Zelle service, functioning of which means that users are at extreme and undisclosed risk of fraud when using Zelle. Had Plaintiff been adequately informed of these risks, he would not have signed up for or used Zelle.

38. The Bank's marketing representations about Zelle—including within its app and website—misrepresent and never disclose these risks and material facts, instead luring accountholders to sign up for and use the service with promises of ease, safety and security.

39. These representations—which all users view during the sign-up process—are false and contain material omissions.

40. Capital One misrepresents the true nature, benefits and risks of the service, which burden users with an extreme and undisclosed risk of Zelle causing losses due to fraud. Plaintiff would not have used Zelle if he had been adequately informed of the risks.

41. The Bank's misrepresentations and omissions are especially pernicious because Capital One alone knows a crucial fact regarding Zelle transfers that occur on its accountholders' accounts: as a matter of secret bank policy, fraud-induced Zelle transfers will almost never be reimbursed to accountholders.

42. Indeed, upon information and belief, Capital One maintains secret policy whereby it refuses to reimburse fraud losses incurred via Zelle, even where its accountholders timely inform Capital One of the fraud.

43. It misrepresents and fails to disclose this secret policy.

44. Further, Capital One's Account Disclosures applicable to consumer accounts repeatedly promises users that, if they timely report fraud, such fraud will be fairly investigated and accountholders will not be liable for fraudulent transfers:

**13. Liability for Unauthorized Transfers on Consumer Accounts Only:**

A. Notify us immediately ... if you believe that an electronic fund transfer has been made without your permission. Telephoning is the best way of keeping your possible losses down. You could lose all the money in your designated accounts (plus any available revolving line of credit, if applicable).

[...]

C. If you think that a transfer or withdrawal shown on your periodic statement is incorrect, or if you believe an unauthorized transfer or withdrawal has taken place, including those made by your ATM/Debit Card, code, or other means, contact us at once. We must be notified within sixty (60) days after the first statement we mailed to you on which the suspected problem appeared. If you do not contact us within this sixty (60) day time period, you could be held responsible for all unauthorized transfers and withdrawals that occurred between the end of the sixty (60) day period and the time you actually notified us if the transaction could have been prevented if we had been notified.



D. If a good reason (such as a long trip or a hospital stay) kept you from telling us, we may extend the above time periods.

E. If you believe ... that someone has transferred or may transfer money from your account without your permission, you may:

Call us at: 1-800-655-2265

Write us at:  
Capital One, N.A.  
7933 Preston Rd.  
Plano, TX 75024  
Attn: Customer Service Center

45. These provisions are and were reasonably understood by Plaintiff to mean that Plaintiff would not be liable for electronic funds transfers effectuated by fraud.

**C. Plaintiff's Experience**

46. When Plaintiff signed up for Zelle he was not informed that Zelle's service had a significant "catch" and that significant monetary losses could result from signing up for the service—or that those losses almost never are reimbursed by users' banks or credit unions.

47. For example, on August 31, 2021, a fraudster transferred \$2,000.00 from Plaintiff's personal bank account using the Zelle service.

48. In August 2021, Plaintiff relocated to Miami, Florida and was searching for rental apartments online. Plaintiff believed he found a potential unit to lease on apartments.com, so he reached out to the purported landlord, who in reality was a fraudster, to express his interest in the apartment.

49. Before signing a lease, however, Plaintiff wanted to tour the property in-person. The fraudster happily agreed and scheduled a time for the two to meet and view the apartment.

50. After touring the apartment, Plaintiff negotiated terms of the "lease" with the fraudster, reached an agreement, and signed the "lease."

51. Upon signing, Plaintiff transferred \$2,000.00 via Zelle to the fraudster for his deposit of first and last month's rent.

52. Later that day, Plaintiff received an email from a different person with the same property, same description, and same rental application, but it was listed on realtors.com.

53. At this point, Plaintiff determined he fell victim to fraud and immediately notified Capital One who assured him it would issue a stop payment on the pending Zelle transfer.

54. The next day, however, Plaintiff called Capital One for an update and was informed that Capital One could not issue a stop payment and only Zelle had the authority to do so.

55. Despite Plaintiff timely alerting Capital One of the fraud, Capital One refused to reimburse him for the losses.

### **CLASS ALLEGATIONS**

56. Pursuant to Florida Rule of Civil Procedure 1.220(b)(2) and (b)(3), Plaintiff brings this action individually and as representatives of all those similarly situated, on behalf of the below-defined Classes:

All persons with a Capital One account who signed up for the Zelle Service and incurred unreimbursed losses due to fraud (the "Class").

All Florida persons with a Capital One account who signed up for the Zelle Service and incurred unreimbursed losses due to fraud (the "Florida Subclass").

57. Excluded from the Classes are Defendant and its affiliates, parents, subsidiaries, employees, officers, agents, and directors. Also excluded are any judicial officers presiding over this matter and the members of their immediate families and judicial staffs.

58. This case is appropriate for class treatment because Plaintiff can prove the elements of their claims on a class wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

59. **Numerosity:** The members of the Classes are so numerous that joinder of all members would be unfeasible and impracticable. The precise membership of the Classes is unknown to Plaintiff at this time; however, it is estimated that the Classes are greater than one hundred individuals. The identity of such membership is readily ascertainable via inspection of Defendant's books and records or other approved methods. Class members may be notified of the pendency of this action by mail, email, internet postings, and/or publication.

60. **Common Questions of Law or Fact:** There are common questions of law and fact as to Plaintiff and all other similarly situated persons, which predominate over questions affecting only individual Class members, including, without limitation:

- a) Whether Defendant's representations and omissions about the Zelle service are false, misleading, deceptive, or likely to deceive;
- b) Whether Defendant failed to disclose the risks of using the Zelle service;
- c) Whether Plaintiff and the Class members were damaged by Defendant's conduct;
- d) Whether Defendant's actions or inactions violated the consumer protection statute invoked herein; and
- e) Whether Plaintiff is entitled to a preliminary and permanent injunction enjoining Defendant's conduct.

61. **Predominance of Common Questions:** Common questions of law and fact predominate over questions that affect only individual members of the Classes. The common questions of law set forth above are numerous and substantial and stem from Defendant's uniform practices applicable to each individual Class member. As such, these common questions predominate over individual questions concerning each Class member's showing as to his or her eligibility for recovery or as to the amount of his or her damages.

62. **Typicality:** Plaintiff's claims are typical of the claims of the other members of the Classes because, among other things, Plaintiff and all Class members were similarly injured through Defendant's uniform misconduct as alleged above. As alleged herein, Plaintiff, like the members of the Classes, were deprived of monies that rightfully belonged to them. Further, there are no defenses available to Defendant that are unique to Plaintiff.

63. **Adequacy of Representation:** Plaintiff is an adequate class representative because they are fully prepared to take all necessary steps to represent fairly and adequately the interests of the members of the Classes, and because their interests do not conflict with the interests of the other Class members they seek to represent. Moreover, Plaintiff's attorneys are ready, willing, and able to fully and adequately represent Plaintiff and the members of the Classes. Plaintiff's attorneys are experienced in complex class action litigation, and they will prosecute this action vigorously.

64. **Superiority:** The nature of this action and the claims available to Plaintiff and members of the Classes make the class action format a particularly efficient and appropriate procedure to redress the violations alleged herein. If each Class member were required to file an individual lawsuit, Defendant would necessarily gain an unconscionable advantage since it would be able to exploit and overwhelm the limited resources of each individual Plaintiff with its vastly superior financial and legal resources. Moreover, the prosecution of separate actions by individual Class members, even if possible, would create a substantial risk of inconsistent or varying verdicts or adjudications with respect to the individual Class members against Defendant, and which would establish potentially incompatible standards of conduct for Defendant and/or legal determinations with respect to individual Class members which would, as a practical matter, be dispositive of the interests of the other Class members not parties to adjudications or which would substantially impair or impede the ability of the Class members to protect their interests. Further, the claims of

the individual members of the Classes are not sufficiently large to warrant vigorous individual prosecution considering all of the concomitant costs and expenses attending thereto.

**FIRST CAUSE OF ACTION**

**Violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”)**

**Fla. Stat. § 501.201, et seq, *et seq.***

**(Asserted on Behalf of the Classes)**

59. Plaintiff repeats and realleges the above allegations as if fully set forth herein.

60. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, *et seq.* The stated purpose of the FDUTPA is to “protect the consuming public ... from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” Fla. Stat. § 501.202(2).

61. Plaintiff and members of the class are “consumers” as defined by Fla. Stat. § 501.203(7).

62. Defendant engaged in “trade or commerce” as defined by Fla. Stat. § 501.203(8) by offering the Zelle money transfer services through its website and mobile app.

59. As described herein, Capital One’s misrepresentations that it provides safe, secure, Zelle money transfer services through its website and mobile app constitutes an unconscionable, unfair and/or deceptive act in trade or commerce in violation of Fla. Stat. § 501.201.

60. As described herein, Capital One’s misrepresentations that it will protect accountholders who incur fraud losses via Zelle, even where its accountholders timely inform Capital One of the fraud, constitutes an unconscionable, unfair and/or deceptive act in trade or commerce in violation of Fla. Stat. § 501.201.

61. Capital One’s deceptive omissions of the material security risks of using the Zelle service, including the risk of fraud and the risk that fraudulent losses will never be reimbursed by

Capital One as a matter of secret policy, is a practice that is likely to mislead a consumer acting reasonably under the circumstances, to the consumer's detriment.

62. Defendant's practices, as described herein, constitute deceptive and/or fraudulent business practices in violation of the FDUTPA because, among other things, they are likely to deceive reasonable consumers, who expect their bank to fully investigate and protect fraudulent losses incurred using the Zelle service. Moreover, Defendant concealed the security risks of using the Zelle service, including the risk of fraud and the risk that fraudulent losses will never be reimbursed by Capital One as a matter of secret policy, is a practice that is likely to deceive a consumer acting reasonably under the circumstances, to the consumer's detriment.

#### **SECOND CAUSE OF ACTION**

##### **Breach of Contract Including Breach of the Covenant of Good Faith and Fair Dealing (Asserted on Behalf of the Classes)**

63. Plaintiff repeats and realleges the above allegations as if fully set forth herein.

64. Plaintiff and members of the Classes contracted with Capital One for checking account services, as embodied in the Account Disclosures.

65. Capital One breached the terms of its contract with consumers when as described herein, Capital One failed to fairly investigate reported fraudulent transactions on the Zelle money transfer service and failed to reimburse accountholders for fraud-induced losses incurred using the Zelle service.

66. Further, under the law of each of the states where Capital One does business, an implied covenant of good faith and fair dealing governs every contract. The covenant of good faith and fair dealing constrains Defendant's discretion to abuse self-granted contractual powers.

67. This good faith requirement extends to the manner in which a party employs discretion conferred by a contract.

68. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

69. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes his conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Other examples of violations of good faith and fair dealing are willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

70. Defendant breached the covenant of good faith and fair dealing when it failed to fairly investigate reported fraudulent transactions on the Zelle money transfer service and failed to reimburse accountholders for fraud-induced losses incurred using the Zelle service.

71. Each of Defendant's actions was done in bad faith and was arbitrary and capricious.

72. Plaintiff and members of the Classes have performed all of the obligations imposed on them under the contract.

73. Plaintiff and members of the Classes have sustained monetary damages as a result of Capital One's breaches of the contract and covenant of good faith and fair dealing.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of the Classes, demands a jury trial on all claims so triable and judgment as follows:

A. Certifying the proposed Classes, appointing Plaintiff as representative of the Classes, and appointing counsel for Plaintiff as lead counsel for the respective Classes;

B. Declaring that Defendant's policies and practices as described herein constitute a breach of contract, and a breach of the covenant of good faith and fair dealing or unjust enrichment, and violation of Florida's Deceptive and Unfair Trade Practices Act.

C. Enjoining Defendant from the wrongful conduct as described herein;

D. Awarding restitution of all fees at issue paid to Defendant by Plaintiff and the Classes as a result of the wrongs alleged herein in an amount to be determined at trial;

E. Compelling disgorgement of the ill-gotten gains derived by Defendant from its misconduct;

F. Awarding actual and/or compensatory damages in an amount according to proof;

G. Punitive and exemplary damages;

H. Awarding pre-judgment interest at the maximum rate permitted by applicable law;

I. Reimbursing all costs, expenses, and disbursements accrued by Plaintiff in connection with this action, including reasonable attorneys' fees, costs, and expenses, pursuant to applicable law and any other basis; and

J. Awarding such other relief as this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff and all others similarly situated hereby demand trial by jury on all issues in this Class Action Complaint that are so triable.

Dated: May 2, 2022

Respectfully Submitted,



**SHAMIS & GENTILE, P.A.**

By: /s/ Andrew J. Shamis  
Andrew J. Shamis, Esq.  
Florida Bar No. 101754  
ashamis@shamisgentile.com  
Edwin E. Elliott, Esq.  
Florida Bar No. 1024900  
edwine@shamisgentile.com  
14 NE 1st Avenue, Suite 705  
Miami, Florida 33132  
(t) (305) 479-2299

**EDELSBERG LAW, P.A.**

Scott Edelsberg, Esq.  
Florida Bar No. 0100537  
Christopher Gold, Esq.  
Florida Bar No. 088733  
scott@edelsberglaw.com  
chris@edelsberglaw.com  
20900 NE 30th Ave., Suite 417  
Aventura, FL 33180  
Office: (786) 289-9471  
Direct: (305) 975-3320  
Fax: (786) 623-0915

*Counsel for Plaintiff and Proposed Class*