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AMERICAN BANKERS MANAGEMENT COMPANY, INC.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

AMERICAN BANKERS MANAGEMENT  
COMPANY, INC.,

Plaintiff,

vs.

ERIC L. HERYFORD, in his official capacity  
as DISTRICT ATTORNEY, TRINITY  
COUNTY,

Defendant.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF FOR:**

**1) VIOLATION OF DUE PROCESS  
UNDER THE FOURTEENTH  
AMENDMENT TO THE UNITED  
STATES CONSTITUTION; AND**

**(2) VIOLATION OF DUE PROCESS  
UNDER 42 U.S.C. § 1983**

1 Plaintiff American Bankers Management Company, Inc. (“American Bankers”) brings  
2 suit against defendant Eric L. Heryford, in his official capacity as District Attorney for Trinity  
3 County, California (“the District Attorney”), and, in support thereof, alleges the following:

4 **JURISDICTION AND VENUE**

5 1. This suit arises under the Fourteenth Amendment of the United States  
6 Constitution, as well as 42 U.S.C. § 1983. Because the suit concerns civil rights, this Court has  
7 subject-matter jurisdiction under both 28 U.S.C. §§ 1331 and 1343.

8 2. Venue is proper under 28 U.S.C. §§ 84(b) and 1391(a)(1) because the sole  
9 defendant resides in this District, and under § 1391(a)(2) because a substantial part of the events  
10 or omissions giving rise to the claims occurred within this District.

11 3. Pursuant to L.R. 120 and the Court’s Automated Case Assignment Plan, because  
12 this civil action arises in Trinity County, it should be commenced in the United States District  
13 Court sitting in Sacramento.

14 **PRELIMINARY STATEMENT**

15 4. On September 4, 2015, the District Attorney, represented by for-profit,  
16 contingency-fee private counsel, filed suit on behalf of the People of the State of California  
17 against Discover Financial Services, Discover Bank, DFS Services, LLC, and American Bankers  
18 Management Company, Inc. (collectively, “the Companies”), alleging violations of the  
19 “fraudulent,” “unlawful,” and “unfair” prongs of California’s Unfair Competition Law (“UCL”),  
20 Bus. & Prof. Code § 17200 *et seq.*

21 5. The District Attorney’s suit is pending in the Superior Court of the State of  
22 California, Trinity County, styled as *The People of the State of California ex rel. Eric L.*  
23 *Heryford, District Attorney, Trinity County v. Discover Financial Services*, No. 15CV079 (“the  
24 UCL Suit”). In it, the District Attorney alleges that the Companies engaged in deceptive  
25 marketing and sales practices in connection with so-called “ancillary products” offered in  
26 connection with Discover-issued credit cards. For this alleged conduct, the UCL Suit demands  
27 injunctive and declaratory relief, restitution, civil penalties, attorneys’ fees and costs, and  
28 prejudgment interest.



**FACTS COMMON TO CAUSES OF ACTION**

**I. The District Attorney's Retention Of For-Profit Private Counsel.**

15. Under Bus. & Prof. Code § 16759, “[a]ll those powers granted to the Attorney General as head of a department ... shall be granted to the district attorney of any county when that district attorney reasonably believes that there may have been a violation of ... Chapter 5 (commencing with Section 17200) of this part[.]” Under Bus. & Prof. Code § 17204, “[a]ctions for relief pursuant to [Chapter 5] shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney ... in the name of the people of the State of California upon their own complaint[.]”

16. The UCL Suit is a law enforcement action commenced pursuant to these statutes. A true and correct copy of the UCL Suit's operative complaint is attached hereto as Exhibit A.

17. Neither the District Attorney nor his office are actually prosecuting the UCL Suit. Instead, on or about August 28, 2015, the District Attorney executed a contingency-fee retainer agreement (entitled “Contract for Services Agreement”) with multiple private law firms, including Baron & Budd, P.C., Carter Wolden Curtis, LLP, and Golomb & Honik, P.C. (collectively, “the Law Firms”). A true and correct copy of the District Attorney's contingency-fee agreement is attached hereto as Exhibit B.

18. Paragraph 9.B of the contingency-fee agreement provides that, “if there is a recovery as a result of the Action,” *i.e.*, the UCL Suit, then “the Law Firms’ will be paid a contingency fee of 30% of the Net Recovery, which shall include damages, restitution, disgorgement, civil and/or statutory fines or penalties, *cy pres* or the value of injunctive relief.”

19. Paragraph 4.A of the agreement denominates the Law Firms “Independent Contractors” with “the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement,” subject to the District Attorney's “general right” to “inspect work in progress to determine whether, in the District Attorney's opinion, the services are being performed by the Law Firms in compliance with this Agreement.” Paragraph 4.B of the agreement further specifies that the Law Firms and the Law Firms' employees and agents “are not by reason of this Agreement, agents or employees of



1 Trinity County for any purpose.”

2 20. The District Attorney’s participation in the UCL Suit is significantly diminished  
3 or nonexistent as a result of his bargain with the Law Firms. During the October 20, 2015  
4 meeting of the Trinity County Board of Supervisors, the District Attorney emphasized that he  
5 and his office would not be materially involved in the UCL Suit’s management, which could  
6 yield great financial rewards for Trinity County – what the District Attorney bluntly  
7 characterized as “a lot of upside with not a lot of downside.”

8 21. According to a video-recording of the meeting, the District Attorney stated:

- 9 • “I just wanted to report to the county that the D.A.’s office has retained firms for  
10 civil litigation. This litigation has potential for national and state media attention,  
11 as well as possible financial benefit to the county at some point. I’ve retained  
12 these firms on a contingency basis, so there is no cost to the county. The  
13 attorneys will be taking care of the legal fees and the expert fees that may be  
14 involved as these cases progress.”
- 15 • “What the code section allows under that chapter is civil penalties of \$2,500 for  
16 each violation. So there is the potential for potentially significant civil penalties  
17 for that conduct. It’s also possible the attorney general’s office may have some  
18 interest in these cases at some point. They could intervene and we would work  
19 with them. To me, part of the benefit is that it gives the county a big seat at the  
20 table at these cases. So when it comes time to resolve them, talk about that.”
- 21 • “And just so you know, one of the benefits is we retain these firms, it’s minimal,  
22 you know, it’s not going to be additional work for my staff basically. As D.A.,  
23 I’ll have final say on where these cases go and how they proceed but these firms,  
24 they’re going to handle the litigation side of things. To me, there’s a lot of upside  
25 with not a lot of downside for my office or the county.”

26 22. While claiming that he will have oversight of the UCL Suit and other for-profit  
27 lawsuits managed by the Law Firms, the District Attorney also has publicly represented to the  
28 local newspaper that, because of his contingency-fee agreement, prosecution of those lawsuits  
will not “interfere” with his caseload, and that the suits will not cost Trinity County or his office  
any money because they are being handled by the Law Firms. At the same time, the District  
Attorney emphasized that there is “potential for substantial benefit for the county” and that as  
“the case moves forward it gives our county a seat at the table.” A true and correct copy of the  
Trinity Journal article dated October 28, 2015 is attached hereto as Exhibit C.

23. The minimization of the District Attorney’s role in the UCL Suit is precisely the

1 result the Law Firms desire. For example, in touting its representation of “public entity” clients,  
2 the Baron & Budd law firm’s website (<https://baronandbudd.com/public-entities/>) claims that its  
3 attorneys “operate alongside” and “at the direction of” the client, nonetheless boasting:

4 An important benefit of this unique and close relationship is that it minimizes the  
5 burden of litigation on the employees and staff of Public Entities. Bolstered by  
6 our superior team members and resources, we are able to perform most of the  
7 day-to-day litigation tasks, thus helping you stay focused on your important work,  
8 free from the demands of litigation. It is our intention to do whatever is required  
9 – from the mundane gathering and copying of documents to the complex work of  
10 full briefings, oral arguments, and trial. *Our focus is fully managing the litigation*  
11 *so that you, the Public Entity, can carry on the critical business of representing*  
12 *your community without distractions. Even when a case is resolved, whether*  
13 *through settlement, ADR, or trial, Baron & Budd’s support remains steadfast. We*  
14 *are there to provide assistance in writing press releases, advising you in regard to*  
15 *community notification and directing you to the right vehicles for disbursement of*  
16 *any funds obtained from a positive result in the case.*

17 (Emphasis added.)

18 24. As stated on their website, through “the continued representation of Public  
19 Entities in deceptive trade practices concerning credit card payment protection plans,” Baron &  
20 Budd attorneys believe they are “sending a message” to the Companies.

## 21 **II. The Use Of For-Profit Private Counsel Violates Basic Tenets Of Due Process.**

22 25. The exercise of police powers is a core function of sovereign governments. The  
23 District Attorney has no authority to delegate his police powers or to permit financially interested  
24 persons to exercise those powers.

25 26. In prosecuting a UCL law enforcement action, private counsel acting on behalf of  
26 a public entity such as the District Attorney are entrusted with the unique coercive power of the  
27 government and must refrain from abusing that power by failing to act in an evenhanded manner.

28 27. It is a bedrock principle of due process that an attorney prosecuting a public  
action on behalf of the government must not be motivated solely by a desire to win a case, but  
instead owes a duty to the public to ensure that justice will be done. Critical discretionary  
decisions may not be delegated to private counsel possessing an interest in the case, but instead  
must be made by neutral government attorneys.

29 28. A heightened standard of neutrality is required for private counsel prosecuting

UCL law enforcement actions on behalf of the government. A lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if the Law Firms are performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, they must adhere to those standards.

29. Under the California Supreme Court's decisions in *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010), and *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985), for purposes of evaluating the propriety of a contingency-fee agreement between a public entity and private counsel, the neutrality rules applicable to criminal prosecutors are equally applicable to public attorneys. Because public attorneys prosecuting noncriminal matters are subject to the same ethical conflict-of-interest rules applicable to public attorneys prosecuting criminal matters, outside the context of *ordinary* civil litigation, there is a class of civil actions that demands the representative of the government to be absolutely neutral.

30. Although not necessarily so in *every* law enforcement action involving private counsel, in the particular circumstances of *this* UCL Suit, that requirement precludes the use of a contingency-fee agreement. Contingency-fee agreements between public prosecutors and private counsel can violate the duty of neutrality because the public prosecutors, who represent the interest of the general public, may compromise their neutrality by possessing a financial stake in the outcome of cases where they are only paid if they "win." "As any lawyer knows, under a contingency-fee arrangement an attorney effectively bets everything on attainment of victory in litigation." Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 79-80 (2010).

31. By linking an attorney's financial recovery to the success of the litigation, contingency-fee agreements provide an incentive for private counsel to seek maximum penalties and restitution rather than what justice actually requires. As the California District Attorneys Association articulated in an *amicus curiae* brief filed with the California Supreme Court:

Acting as investors in a for-profit venture, they have invested untold dollars and hours in this commercial enterprise which could all be for naught if this lawsuit fails. It would be illogical to suggest that the contingent fee outside counsel, who

1 have been hired because of their competence, experience, expertise, *and* their  
 2 financial resources, have not placed themselves in positions where they are able to  
 3 exercise substantial influence over the decisions made by the government. Such  
 4 influence extends not just to the ordinary and mundane (although, in the  
 5 aggregate, very significant) aspects of the litigation but also to critical,  
 6 fundamental strategic and tactical matters regarding substantive issues. It would  
 7 be contrary to human nature to believe that the positions taken by the contingent  
 8 fee attorneys regarding these key issues when advocating for the adoption of their  
 9 views by the government attorneys are completely unaffected by the direct,  
 10 personal, and substantial pecuniary interests they, and they alone on the plaintiffs'  
 11 team, have gambled on a successful outcome of this litigation. Their economic  
 12 interests color everything they do in connection with this litigation.

13 Brief of *Amicus Curiae* California District Attorneys Association at 21-22, *County of Santa*  
 14 *Clara v. Superior Court* (2010) 50 Cal. 4th 35 (No. S163681), 2009 WL 1541982, at \*21-22.

15 32. This is especially problematic in a UCL law enforcement action. The California  
 16 District Attorneys Association concluded that “it is impossible to understate the importance to  
 17 CDAA and prosecutors of maintaining public confidence in the fair and impartial enforcement of  
 18 key civil law enforcement statutes such as the UCL and the FAL. CDAA believes that court  
 19 approval of contingent fee agreements in civil law enforcement cases giving contingent fee  
 20 outside counsel direct, personal, and substantial financial stakes in the outcome of commercial  
 21 cases will greatly undermine public confidence in the fair and equitable use of those statutes with  
 22 disastrous consequences.” *Id.* at 36.

23 33. In *Santa Clara*, a non-UCL public-nuisance abatement action, the California  
 24 Supreme Court “recognized that the interests invoked in [*Clancy*] were akin to the vital interests  
 25 implicated in a criminal prosecution, and thus invocation of the disqualification rules applicable  
 26 to criminal prosecutors was justified.” 50 Cal. 4th at 51-52. It further recognized that “if those  
 27 rules are found to be equally applicable in the case now before us, disqualification of the private  
 28 attorneys hired to assist the public entities similarly would be required.” *Id.* at 52. The *Santa*  
*Clara* court found that the case before it involved “a qualitatively different set of interests –  
 interests that are not substantially similar to the fundamental rights at stake in a criminal  
 prosecution,” a “distinguishing circumstance” the court found “to be dispositive.” *Id.* at 54; *see*  
*also id.* at 56 (“this case is closer on the spectrum to an ordinary civil case than it is to a criminal  
 prosecution”); *id.* at 51 (distinguishing *Clancy*, which “was guided, in large part, by the

1 circumstances that the public-nuisance action pursued by Corona implicated interests akin to  
2 those inherent in a criminal prosecution”).

3 34. That is precisely the “dispositive” question here: if the interests implicated in the  
4 UCL Suit are “akin to the vital interests implicated in a criminal prosecution,” then  
5 considerations of due process require the Law Firms’ disqualification. If the Court finds that the  
6 UCL Suit, although civil in nature, is sufficiently akin to a criminal prosecution initiated to  
7 penalize the Companies – *viz.*, is a “quasi-criminal enforcement action” – then the Court must  
8 find a violation of the Companies’ due process rights under the framework established in *Santa*  
9 *Clara* and *Clancy*. After all, the *Santa Clara* court recognized, it is “beyond dispute that due  
10 process would not allow for a criminal prosecutor to employ private cocounsel pursuant to a  
11 contingent-fee arrangement that conditioned the private attorney’s compensation on the outcome  
12 of the criminal prosecution.” *Id.* at 51 n.7. In that circumstance, “such a method of  
13 compensation would be categorically barred.” *Id.* at 51.

14 35. In multiple key respects, the UCL Suit is wholly unlike ordinary civil litigation. It  
15 is much closer on the spectrum of civil litigation to the “quasi-criminal enforcement action”  
16 prosecuted in *Clancy* than it is to the “ordinary civil case” prosecuted in *Santa Clara*. Indeed, a  
17 public civil action brought pursuant to the UCL is “fundamentally a law enforcement action  
18 designed to protect the public.” *People v. Pacific Land Research Co.*, 20 Cal.3d 10, 17 (1977).

19 36. **First**, the District Attorney’s private counsel are appearing as representatives of  
20 the public and not as counsel for the government acting as an ordinary party in a civil lawsuit.  
21 “There can be no question, therefore, that the present case is being prosecuted on behalf of the  
22 public, and that accordingly the concerns ... identified in *Clancy* as being inherent in a public  
23 prosecution are, indeed, implicated in the case now before us.” *Santa Clara*, 50 Cal. 4th at 55.

24 37. **Second**, the UCL Suit is unlike ordinary civil litigation because it seeks civil  
25 penalties under Bus. & Prof. Code §§ 17206 and 17206.1. Such penalties are not available to the  
26 ordinary civil litigant, only a public prosecutor. Because UCL civil penalties “penalize a  
27 defendant for past illegal conduct” and have a “public, penal objective,” there is no discernable  
28 difference in a UCL law enforcement action “between the [public prosecutor’s] seeking criminal

1 penalties or civil penalties.” *State v. Altus Fin., S.A.*, 36 Cal. 4th 1284, 1308 (2005).

2 38. Civil penalties under the UCL may not trigger many of the heightened legal  
3 protections applicable to criminal proceedings, but that does not mean they are any less “quasi-  
4 criminal” in nature. The same could be said, for example, of punitive damages, which are  
5 indisputably “quasi-criminal.”

6 39. Compensation to the Law Firms for their efforts in the UCL Suit will depend  
7 directly on the amount of restitution paid by and civil penalties levied against the Companies.  
8 The contingency-fee arrangement thus creates a powerful incentive for the Law Firms to fixate  
9 on maximizing the penalties recovered from the Companies. Moreover, because of their  
10 financial stake in the UCL Suit, the Law Firms will be disinclined to exercise restraint, such as  
11 by limiting the scope of the Suit if it would advance justice or the public interest to do so.

12 40. As one commentator explained:

13 Imagine a coercive civil action – *i.e.*, an action to impose civil penalties – brought  
14 by the state against a private actor, where full time state attorneys who are paid  
15 solely on a contingent fee basis represent the state. Here, the constitutional  
16 implications may not be as readily obvious as they are in the context of a criminal  
17 prosecution. Nevertheless, the two situations should be treated similarly, for a  
18 number of reasons. Civil coercive actions trigger most of the same political and  
19 constitutional concerns implicated by criminal prosecutions. True, civil actions  
20 do not implicate the array of special constitutional protections traditionally  
21 associated with criminal prosecutions, such as the right to confront accusers or the  
22 requirement of proof beyond a reasonable doubt. The fact remains, however, that  
23 the potential loss of property, as much as the loss of liberty, triggers the  
24 protections of procedural due process. When the state acts coercively against its  
25 citizens through the judicial process, its obligations to act in good faith in pursuit  
26 of the public interest, rather than out of potentially distorting personal  
27 motivations, the dictates of due process would seem to be equally applicable.

28 Redish, *supra*, 18 Sup. Ct. Econ. Rev. at 104.

41. **Third**, the same is true of the injunctive relief the UCL Suit requests. When a  
public prosecutor “seeks an injunction that will protect the public and prevent defendants from  
committing future unlawful acts, he is fulfilling primarily a law enforcement function.” *Altus  
Fin.*, 36 Cal. 4th at 1308. The UCL Suit is unlike ordinary civil litigation because it is a  
government lawsuit seeking to, by the use of prospective injunctive relief, curtail the Companies’  
free speech right under the First Amendment of the United States Constitution to market and sell



1 “ancillary products” to cardholders as the Companies see fit.

2 42. The First Amendment forbids a public official to attempt to suppress the protected  
3 speech of private persons by threatening that legal sanctions will at his urging be imposed unless  
4 there is compliance with the official’s demands. The First Amendment requires heightened  
5 scrutiny whenever the government creates a regulation of speech because of disagreement with  
6 the message it conveys. Commercial speech is no exception.

7 43. That is especially true where, as here, the District Attorney seeks to suppress the  
8 very forms of speech the Consumer Financial Protection Bureau has determined to be  
9 nonfraudulent, lawful, and fair. The UCL Suit’s allegations were long-ago resolved by, among  
10 other settlements, a consent order jointly issued in September 2012 by the Consumer Financial  
11 Protection Bureau and Federal Deposit Insurance Corporation (“Consent Order”). A true and  
12 correct copy of the Consent Order is attached hereto as Exhibit D.

13 44. Like the UCL Suit, the federal agencies alleged that the marketing, sales, and  
14 operation of the “ancillary products” was designed to deceive cardholders. In addition to  
15 ordering restitution and civil penalties, the agencies required comprehensive prospective relief  
16 designed to ensure that the allegedly deceptive conduct – the identical conduct alleged in the  
17 UCL Suit – would not recur. The Consent Order implemented a carefully reticulated scheme of  
18 corrective actions, created new compliance management and internal control systems,  
19 established a compliance audit program and oversight committee, mandated progress reports and  
20 recordkeeping, and made its provisions enforceable by the agencies. Much of the Consent Order  
21 regulates the forms of speech used in connection with the marketing of the “ancillary products.”

22 45. In July 2015, the Consent Order was terminated by another order (“Termination  
23 Order”) determining “that Discover fulfilled its obligations under the CONSENT ORDER.” A  
24 true and correct copy of the Termination Order is attached hereto as Exhibit E.

25 46. ***Fourth***, the District Attorney’s use of the Law Firms to prosecute the UCL Suit is  
26 illegal, as it violates California’s Government Code. That Code forbids a “state officer” like the  
27 District Attorney from employing any legal counsel other than the Attorney General in any  
28 matter in which the state officer is interested or a party as a result of office or official duties,

1 unless the Attorney General has given his prior written consent to the employment. *See* Gov't  
2 Code §§ 11040, 11042.

3 47. These provisions constitute “a significant check on the power of state agencies to  
4 employ outside counsel, even in urgent situations ..., in the form of what is, in effect, the  
5 Attorney General’s veto by withholding written consent. The importance of the Attorney  
6 General’s veto power should not be minimized. The power gives the Attorney General the  
7 means to prevent abuses which might otherwise take place.” *People ex rel. Dep’t of Fish &*  
8 *Game v. Attransco, Inc.*, 50 Cal. App. 4th 1926, 1937 (1996).

9 48. On information and belief, the Attorney General has never consented to the UCL  
10 Suit’s prosecution by the Law Firms.

### 11 **FIRST CAUSE OF ACTION**

#### 12 **Declaratory Judgment and Injunctive Relief — Violation Of Due Process Under the** 13 **Fourteenth Amendment to the United States Constitution**

14 49. Each of the allegations of the preceding paragraphs are realleged and incorporated  
15 by reference, as if set forth fully herein.

16 50. The Due Process Clause of the Fourteenth Amendment to the United States  
17 Constitution, amend. XIV, § 1, provides that states shall not “deprive any person of life, liberty,  
18 or property, without due process of law.”

19 51. American Bankers enjoys a constitutional guarantee of due process of law under  
20 the Fourteenth Amendment.

21 52. Principles of due process apply to law enforcement actions like the UCL Suit.

22 53. A fair and impartial trial in a fair tribunal is a basic requirement of due process. It  
23 is the obligation of the public prosecutor to respect this mandate.

24 54. The District Attorney, in his official capacity as District Attorney for Trinity  
25 County and acting under color of state law, has entered into or otherwise approved an illegal  
26 contingency-fee agreement by hiring for-profit private counsel to prosecute the UCL Suit.

27 55. In addition, or in the alternative, the District Attorney has improperly ceded  
28 management of and effective control over prosecution of the UCL Suit to the Law Firms.



56. As a direct and proximate result of the District Attorney's actions, prosecutorial authority and discretion have been unfairly and unlawfully delegated to private counsel having an improper, clear, direct, and substantial financial stake in the UCL Suit's outcome.

57. As a direct and proximate result of the District Attorney's actions, the UCL Suit's fairness has been compromised and the right to due process has been infringed.

58. The ongoing violation of the right to due process has caused actual and irreparable harm and will continue causing additional harm unless and until this Court grants the relief to which American Bankers is entitled.

59. The Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202 because an actual controversy within its jurisdiction is ripe for a declaration of the parties' rights and legal obligations.

60. The Companies have no adequate remedy at law and have suffered, and will continue to suffer, irreparable injury associated with the cost of defending the unlawful UCL Suit and the risk of an inconsistent or duplicative adjudication. Constitutional violations cannot be adequately remedied through damages and therefore constitute irreparable injury.

## SECOND CAUSE OF ACTION

## 42 U.S.C. § 1983 — Violation Of Due Process

61. Each of the allegations of the preceding paragraphs are realleged and incorporated by reference, as if set forth fully herein.

62. The District Attorney, in his official capacity as District Attorney for Trinity County and acting under color of state law, has entered into or otherwise approved an improper contingency-fee agreement by hiring for-profit private counsel to prosecute the UCL Suit.

63. In addition, or in the alternative, the District Attorney has improperly ceded management of and effective control over prosecution of the UCL Suit to the Law Firms.

64. As a direct and proximate result of the District Attorney's actions, prosecutorial authority and discretion have been unfairly and improperly delegated to private counsel having a clear, direct, and substantial financial stake in the UCL Suit's outcome.

65. As a direct and proximate result of the District Attorney's actions, the UCL Suit's

1 fairness has been compromised and the right to due process has been infringed.

2 66. The ongoing violation of the right to due process has caused actual and  
3 irreparable harm and will continue causing additional harm unless and until this Court grants the  
4 relief to which American Bankers is entitled.

5 67. This Court is authorized to issue a declaratory judgment pursuant to 28 U.S.C. §§  
6 2201 and 2202 because an actual controversy within its jurisdiction is ripe for a declaration of  
7 the parties' rights and legal obligations.

8 68. The Companies have no adequate remedy at law and have suffered, and will  
9 continue to suffer, irreparable injury associated with the cost of defending the unlawful UCL Suit  
10 and the risk of an inconsistent or duplicative adjudication. Constitutional violations cannot be  
11 adequately remedied through damages and therefore constitute irreparable injury.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, American Bankers prays that the Court:

14 a) Enter a judgment declaring that the District Attorney, in his official capacity and  
15 acting under color of state law, has violated American Bankers' right to due process under the  
16 Fourteenth Amendment of the United States Constitution by delegating the coercive power of the  
17 government to private counsel having an improper, clear, direct, and substantial financial stake in  
18 the UCL Suit's outcome.

19 b) Enter preliminary and permanent injunctive relief allowing the UCL Suit to  
20 proceed in the state court but prohibiting the District Attorney from employing the Law Firms to  
21 prosecute the UCL Suit under their existing contingency-fee agreement.

22 c) Award the costs of suit and reasonable attorneys' fees in accordance with 42  
23 U.S.C. § 1988.

24 d) Award all other relief that this Court deems just and proper.

25 Dated: February 16, 2016

CARLTON FIELDS JORDEN BURT, LLP

26 By: /s/ Meredith M. Moss

27 Meredith M. Moss

28 Attorneys for Plaintiff AMERICAN BANKERS  
MANAGEMENT COMPANY, INC.

# EXHIBIT A

COPY

# SUMMONS BY FAX (CITACION JUDICIAL)

SUM-100

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

DISCOVER FINANCIAL SERVICES; DISCOVER BANK; DFS SERVICES, L.L.C. ASSURANT, INC.; AMERICAN BANKERS MANAGEMENT COMPANY, INC., AND DOES 1-XX  
YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL., ERIC L. HERYFORD, DISTRICT ATTORNEY, TRINITY COUNTY

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

# FILED

SEP - 4 2015

CLERK OF THE SUPERIOR COURT  
COUNTY OF TRINITY  
BY: MARJE WATKINS, DEPUTY CLERK

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos extras por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:

(El nombre y dirección de la corte es):

Superior Court of California, County of Trinity  
11 Court Street

Weaverville, California 96093

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is: Kirk J. Wolden, Esq.

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

CARTER WOLDEN CURTIS LLP

1111 Exposition Blvd. Suite 602, Sacramento, CA 95815

DATE: 9-4-15  
(Fecha)

Clerk, by  
(Secretario)

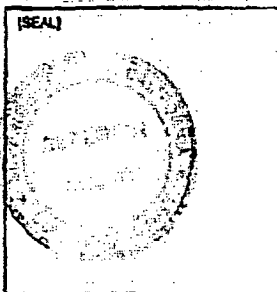
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Deputy  
(Adjunto)

916-567-1111

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



## NOTICE TO THE PERSON SERVED: You are served

- ☐ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):

- ☒ on behalf of (specify): Assurant, Inc.

- |        |  |   |
|--------|--|---|
| under: | <input checked="" type="checkbox"/> CCP 418.10 (corporation)         | <input type="checkbox"/> CCP 416.60 (minor)             |
|        | <input checked="" type="checkbox"/> CCP 418.20 (defunct corporation) | <input type="checkbox"/> CCP 416.70 (conservatee)       |
|        | <input type="checkbox"/> CCP 418.40 (association or partnership)     | <input type="checkbox"/> CCP 416.80 (authorized person) |
|        | <input type="checkbox"/> other (specify):                            |   |

- ☒ by personal delivery on (date): 10/5/15

**COPY**

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**FILED**

SEP - 4 2015

CLERK OF THE SUPERIOR COURT  
 COUNTY OF TRINITY  
 BY: MARJIE WATKINS, DEPUTY CLERK

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**CASE MANAGEMENT CONFERENCE**

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Hearing Date: 2-16-16  
 Time: 10:00am  
 Department: 1  
*A Case Management Statement must be submitted at least 15 days before the hearing.*

Attorneys for Plaintiff

THE STATE OF CALIFORNIA EX REL DISTRICT ATTORNEY, TRINITY COUNTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 COUNTY OF TRINITY**

THE PEOPLE OF THE STATE OF CALIFORNIA EX )  
 REL. ERIC L. HERYFORD, DISTRICT )  
 ATTORNEY, TRINITY COUNTY, )

Case No.: 15CV079

Plaintiff,

vs.

**COMPLAINT FOR REMEDIES UNDER  
 UNFAIR COMPETITION LAW, CAL.  
 BUS. & PROF. CODE SECTIONS 17200,  
 ET SEQ.**

DISCOVER FINANCIAL SERVICES; DISCOVER )  
 BANK; DFS SERVICES, L.L.C. ASSURANT, INC.; )  
 AMERICAN BANKERS MANAGEMENT )  
 COMPANY, INC.; AND DOES 1-XX, )

Defendants.

COMES NOW, the People of the State of California, by Plaintiff Trinity County District Attorney Eric L. Heryford ("the People" or "the State"), who brings this Complaint against Defendants Discover Financial Services, Discover Bank, DFS Services, LLC, Assurant, Inc., and American Bankers Management Company, Inc. (collectively "Defendants" or "Discover"), and alleges as follows:

**BY FAX**

## INTRODUCTION

1  
2       1. This action stems from Defendants' marketing, selling, and administering  
3 various fee-based ancillary products and services to its California credit cardholders, which are  
4 supplementary to the credit provided by the credit card(s). Specifically, Defendants have  
5 engaged in deceptive marketing and sales practices in connection with these ancillary products  
6 and services; failed to adequately disclose important terms and conditions about these ancillary  
7 products and services; failed to obtain California consumer's knowing and meaningful consent  
8 to enroll in or pay for these ancillary services; inadequately handled cancellation requests and  
9 continued to charge California consumers once they were enrolled for said ancillary products  
10 even though Defendants knew or should have known these consumers did not meaningfully  
11 consent to enroll and/or were per se ineligible or otherwise did not qualify for the products'  
12 benefits based on the products' myriad confusing and obtuse conditions, restrictions,  
13 limitations and exclusions. This misleading course of conduct which is fraudulent, unlawful  
14 and unfair under California's Unfair Competition Law ("UCL") is detrimental and  
15 substantially injurious to California consumers and to fair completion in this State.

16       2. Defendants have marketed these ancillary products as providing protection for  
17 consumers against improper or unauthorized charges on their credit cards, identity theft, lost or  
18 stolen credit cards, and/or as providing benefits during unexpected life events. Defendants  
19 have marketed and offered cardholders the ancillary products for each of the consumer's  
20 Discover credit card accounts; however, Defendants do not condition a consumer's ability to  
21 get a Discover credit card account on the consumer's agreement to purchase or sign-up for one  
22 or more of these ancillary products. Indeed, enrollment in these optional ancillary products is  
23 not related to, nor does it impact, Discover's decision to extend credit to these consumers.

24       3. Upon information and belief, when consumers have initiated contact with, or  
25 have been contacted by, Defendants about Discover's credit cards, a process has been triggered  
26 whereby a California consumer can unknowingly and unintentionally receive ancillary  
27 products. While this has happened most often after a consumer is approved for a Discover  
28



1 credit card, Defendants also have offered and sold the consumer ancillary products during  
2 subsequent communications.

3 4. Additionally, Defendants often have enrolled consumers in these ancillary  
4 products even though the consumers did not assent to pay for them. This process is referred to  
5 as "slamming." Enrollment may be based on highly deceptive and misleading telemarketing  
6 calls, forged or non-existent mailers, online applications, or nothing at all. In each instance, an  
7 unknowing consumer is charged monthly fees without his or her meaningful consent or  
8 understanding that his or her credit card will be charged for these products. Defendants are in a  
9 position to slam this consumer because, unlike a typical marketer or seller, Defendants are  
10 already the consumer's credit card company and already have his or her credit card number(s)  
11 on file.

12 5. Certain types of Defendants' ancillary products purport to pay a California  
13 consumer's required minimum monthly payment for a limited period of time under certain  
14 triggering circumstances, such as involuntary unemployment, illness, or changes in family  
15 status, thereby, preventing the account from becoming delinquent. These ancillary products  
16 have included, but are not limited to, the following: "Discover Payment Protection," "Identity  
17 Theft Protection," "Wallet Protection," "Credit Score Tracker" and other monikers that all  
18 offer similar coverage (collectively "Ancillary Plan(s)" or "Plan(s)"). Furthermore, because  
19 Defendants make no effort to determine whether consumers are eligible for the benefits  
20 associated with the Plans at the time of sale, Defendants bill California consumers for this  
21 coverage, regardless of their status at the time of enrollment.

22 6. Ancillary Plans, such as those administered by Defendants, have come under  
23 increased scrutiny by the federal government and been the subject of litigation brought by state  
24 attorney generals and private citizens alike.

25 7. Defendants engage in unfair and deceptive business practices, in violation of the  
26 California Unfair Business Practices Act (California Business & Professions Code §17200, et  
27 seq.) ("UCL"), by selling and charging a cardholder for Ancillary Plans, regardless of whether  
28

1 the consumer wanted the Plan and/or was entitled to benefits under the Plan; as well as by  
2 offering and administering a consumer's claim for benefits in an unfair and deceptive manner.

3 8. Upon information and belief, as a result of their unfair and deceptive practices,  
4 Defendants have amassed substantial sums of money from the monthly fees paid by California  
5 consumers for these Plans.

6 9. Plaintiff Eric Heryford, District Attorney for the County of Trinity, brings this  
7 action on behalf of the people of the State of California as authorized by section 17204 of the  
8 UCL against Defendants to address their use of unfair and deceptive methods, acts, conduct,  
9 and trade practices in connection with the sale of Ancillary Plans, including Discover Payment  
10 Protection.<sup>1</sup>

#### 11 PARTIES

12 10. Trinity County District Attorney Eric L. Heryford, brings this action in his  
13 sovereign and quasi-sovereign capacity on behalf of the People to protect all California  
14 consumers and the people of the State of California generally.<sup>2</sup>

15 11. Upon information and belief, Defendant Discover Financial Services ("DFS") is  
16 incorporated in Delaware, has the capacity to be sued under Delaware law, and has its principal  
17 place of business in the State of Illinois. DFS is organized as a bank holding company and  
18 financial holding company. DFS wholly-owns Defendants Discover Bank and DFS Services,  
19 L.L.C. DFS's Annual Reports, 10-K, have indicated that it is involved in marketing and  
20 selling the ancillary services discussed in this Complaint.

21 12. Upon information and belief, Defendant Discover Bank ("Discover Bank") is a  
22 Delaware state-chartered bank and a leading credit card issuer and has its principal place of  
23 business in Delaware and the capacity to be sued under Delaware law. Upon information and  
24 belief, Discover Bank is a wholly-owned subsidiary of DFS.

25 <sup>1</sup> In bringing this action, the State does *not* challenge Defendants' ability to set the price for an  
26 ancillary credit card product; however the State *does* challenge the method and manner in which  
27 Defendants marketed and administered these Plans to California residents.

28 <sup>2</sup> District Attorney Heryford is authorized to bring this action under B&F Code §§ 17204 and  
17206, as well as common law authority.



1           13.    Upon information and belief, Defendant DFS Services, L.L.C. ("DFS LLC"),  
2   formerly known as Discover Financial Services, L.L.C., is a limited liability company  
3   organized and existing under the laws of the State of Delaware, having a principal place of  
4   business in the State of Illinois, and having the capacity to be sued under Delaware law. Upon  
5   information and belief, DFS LLC is Discover Bank's service affiliate and, as such, has  
6   provided various services for Discover Bank, including without limitation marketing,  
7   application approval, transaction approval, customer service, security, billing, and the  
8   collection of delinquent accounts.

9           14.    Upon information and belief, Defendant Assurant, Inc. ("Assurant") is  
10   incorporated and organized in the State of Delaware, having a principal place of business in the  
11   State of New York, and the capacity to be sued under Delaware law. Upon information and  
12   belief, Assurant assisted with the ancillary products at issue, including Payment Protection, by  
13   managing and administering enrollment, activation of benefits, communications with  
14   customers (including sending Welcome Kits and claim responses) and plan cancellations, as  
15   well as providing administrative and sales support, including to credit cards holders within the  
16   People of California.

17           15.    Upon information and belief, Defendant American Bankers Management  
18   Company, Inc. ("ABMC") is incorporated and organized in the State of Delaware, having a  
19   principal place of business in the State of New York, and the capacity to be sued under  
20   Delaware law. Upon information and belief, ABMC assisted with the ancillary products at  
21   issue, including Payment Protection, by managing and administering enrollment, activating  
22   benefits, communicating with customers (including sending Welcome Kits and claim  
23   responses) and cancelling plans, as well as providing administrative and sales support to credit  
24   card holders within the State of California.

25           16.    At all times material herein, Defendants Discover Bank, DFS, DFS LLC,  
26   Assurant, and ABMC (collectively "Discover") have been doing business, and continue to do  
27   business, within the County of Trinity, State of California.  
28

13           18.     Individually and collectively, the defendants named herein systematically and  
14 continuously conduct business within Trinity County. Specifically, Defendants Discover  
15 Financial Services, Discover Bank, DFS Services, LLC, Assurant, Inc., and American Bankers  
16 Management Corporation, Inc. regularly advertise and promote their businesses, secure credit  
17 card and Ancillary Plan customers, and offer credit card services to businesses and individuals  
18 throughout Trinity County.

19           19.   The systematic, continuous and comprehensive business conducted by the  
20 defendants within the County of Trinity constitute such pervasive and purposeful business  
21 conduct as to subject all of the defendants named herein to the jurisdiction of this court  
22 consistent with due process.

## COMPLAINT

1 mass of claimants for plaintiffs for trial or otherwise; because the State is the only Plaintiff and  
 2 the sole claimant, any such joinder is not possible, and is independently expressly disavowed  
 3 by the State. All claims in this action are asserted on behalf of the State pursuant to Section  
 4 17200, et seq., of the UCL, which specifically authorizes this action, and are not asserted on  
 5 behalf of individual claimants or members of any proposed class. The State expressly disclaims  
 6 the existence of any class or class action; because the State does not appear as the  
 7 representative of any class action and does not plead any class action, class representation is  
 8 not possible, and is independently expressly disavowed by the State. Any claim that any  
 9 individual citizen may have in his or her own behalf is not raised herein.

10 21. Notwithstanding anything in this Complaint, Plaintiff District Attorney  
 11 Heryford on behalf of the people of the State of California is not challenging the amount of the  
 12 charges or the rate of the Ancillary Plans. The charges addressed herein should not have  
 13 appeared on the credit card bills at all. This Complaint addresses the unlawful, unfair, and  
 14 fraudulent manner in which credit card customers were enrolled in and charged for the Plans  
 15 and the fraudulent administration associated therewith, but does not challenge the rate of the  
 16 charges or Defendants' ability to set the price for any Ancillary Plan Defendants have or  
 17 continue to offer.

## 18 **FACTUAL BACKGROUND**

### 19 **I. Defendants' Ancillary Plans Are Marketed, Offered, and Sold to California** 20 **Consumers in an Unfair, Deceptive, and Unconscionable Manner.**

#### 21 **A. Defendants have generated substantial revenue from marketing, offering,** 22 **and selling Ancillary Plans products to cardholding California consumers.**

23 22. Upon information and belief, Defendants have offered, marketed, and sold  
 24 Ancillary Plans to all Discover credit card holders, but most aggressively market these  
 25 products to vulnerable California consumers who fall into the subprime credit category, who  
 26 have low credit limits because of impaired credit ratings, or who are looking to establish or re-  
 establish their credit.

27 23. Defendants' Ancillary Plans share common characteristics in that each have  
 28 been: (a) marketed to California consumers as protection from fraud or unauthorized account

1 charges; (b) marketed to California consumers as a way for them to increase their financial  
2 security; (c) considered an optional product that is not required to maintain a credit card  
3 account with Discover; and (d) tethered to each consumer's specific Discover credit card  
4 account(s). Defendants' Ancillary Plans have an associated monthly fee, which is separate and  
5 distinct from interest and other fees charged by Defendants as part of Discover's extension of  
6 credit to the consumer. Each Plan's fee is charged directly to the consumer's credit card  
7 account each month, with no separate statement, bill, or invoice provided.

8 24. Contrary to Defendants' simple representations for marketing purposes,  
9 Discover's Ancillary Plans are in fact a dense maze of limitations, exclusions, and restrictions,  
10 making it impossible for consumers to knowingly determine what these products cover.

11 25. Examples of the types of Defendants' Ancillary Plans include:

12 (a) Payment Protection – This product (called "Discover Payment Protection")  
13 allegedly safeguards consumers' credit card accounts by canceling or temporarily suspending  
14 the required minimum monthly credit card payments due in certain highly restricted  
15 circumstances, or by permanently canceling accounts in other circumstances.

16 (b) Identity Protection – In exchange for a fixed-rate monthly fee, this product  
17 (called "Identity Theft Protection") purports to monitor consumers' credit scores for indicia of  
18 identity theft and will purportedly alert the enrollees if something suspicious happens to their  
19 credit scores.

20 (c) Lost Card Protection – In exchange for a fixed-rate monthly fee, if a consumer's  
21 card is lost or stolen, Defendants will contact the issuers of all of the consumer's credit cards to  
22 cancel the lost or stolen card (called "Wallet Protection").

23 (d) Credit Score Tracker – In exchange for a fixed-rate monthly fee, this Plan with  
24 the same name provides consumers with copies of their credit reports and tools that allow them  
25 to track their credit scores on a daily basis.

26 26. Defendants' "Credit Score Tracker" Plan charges a fee to obtain a credit report  
27 for the cardholder that a consumer can receive for free under federal law. Specifically, upon  
28

1 request by a consumer, each of the three major credit reporting agencies are required by federal  
2 law to provide the consumer with one free credit report every twelve months.

3 27. Defendants have enrolled large numbers of California cardholders and charged  
4 them substantial sums of money for enrollment in Ancillary Plans. These enrollment fees, as  
5 imposed by Defendants, are separate charges for a service independent of Defendants'  
6 extension of credit to California consumers.

7 28. Defendants' extension of credit is not contingent on a cardholder's purchase of  
8 any of Discover's Ancillary Plans, including Payment Protection. Each Plan is an optional,  
9 ancillary service or product for which a separate fee is charged.

10 **B. Defendants sign up unsuspecting cardholding California consumers for**  
11 **ancillary Plans without their meaningful, knowing authorization or**  
12 **consent.**

13 **1. Defendants have marketed these Plans to California consumers in**  
14 **an unfair, deceptive and unconscionable manner.**

15 29. Defendants have enrolled consumers in Ancillary Plans using highly deceptive  
16 and misleading telemarketing calls, thereby, charging some California consumers without their  
17 meaningful consent or understanding that their credit card will be charged for these Plans.  
18 Unlike typical marketers or salespersons, Defendants are in the unique position to sign up an  
19 unsuspecting consumer for these Plans because, as the consumer's credit card company,  
20 Defendants already have his or her credit card number(s) on file.

21 30. Defendants have sold Ancillary Plans to California consumers through a  
22 number of different channels, including but not limited to:

23 (a) Online and direct mail marketing, in which Defendants may ask that consumers  
24 "check the box" to initiate the Plan. This marketing method requires an affirmative action by  
25 the consumer to enroll, such as checking a box or initialing a monthly statement, other mailer,  
26 or online form in a designated space to authorize enrollment.

27 (b) Telemarketing, where consumers may be asked to press a button on the  
28 telephone keypad or verbally agree in order to initiate one or more Plans.

1           31. Defendants have a financial motive to enroll as many California consumers as  
2 possible into these highly lucrative Ancillary Plan schemes. Additionally, upon information  
3 and belief, individual telemarketers have been incentivized to enroll as many cardholders as  
4 possible because their compensation is either commission-based, determined by the number of  
5 cardholders they enroll, or based on some other form of evaluation and compensation scheme.

6           32. Unfair, deceptive, and unconscionable practices are rife in the marketing of  
7 Defendants' Ancillary Plans.

8           33. Defendants' telemarketers and "customer service" representatives have  
9 employed an array of deceptive sales tactics to elicit cardholders into communicating some  
10 affirmative response, knowing that the cardholders do not actually understand that they are  
11 supposedly agreeing to purchase one or more Ancillary Plans.

12           34. Defendants' telemarketers may characterize the call as a courtesy to thank  
13 cardholders and remind them of the benefits they already get through their credit card  
14 agreement, e.g., cash back, airline miles, rewards, *etc.*; however, they are in fact calling to sell  
15 the consumer Ancillary Plans such as Payment Protection.

16           35. Defendants' customer service representatives may speed through, skip  
17 altogether, or alter the text of the information they are required to provide to cardholders. Upon  
18 information and belief, this is done in an effort to make these disclosures sound like confusing  
19 legalese. These telemarketers conclude by saying "OK?" or by asking if the person heard them  
20 or understood, knowing that such a question will almost always elicit an affirmative response  
21 such as "ok" or "yes." Although the cardholder believes they have just listened to a courtesy  
22 call, Defendants treat any affirmative response elicited by the telemarketer as the cardholder's  
23 agreement to enroll in Ancillary Plans. So while the cardholder may have said "ok" or "yes" at  
24 the conclusion of the call, no reasonable person listening to the recordings of these calls would  
25 conclude that the cardholder was giving his or her knowing, meaningful assent to be charged a  
26 monthly fee for enrollment in one or more Plans.

27           36. Another tactic Defendants' telemarketers use is to offer to send the cardholder a  
28 "packet of information" about the Payment Protection Plan. Defendants treat an affirmative



1 response to this inquiry as authorization for paid enrollment, even though the consumer does  
2 not understand or believe that he or she has agreed to purchase anything.

3 37. Discover has such a "packet of information" for each of the Plans offered.  
4 Although Defendants are required to provide enrollees with this information, many California  
5 consumers never receive the packets Defendants allegedly send out. Moreover, those  
6 consumers who actually receive the packet may ignore or disregard it because they do not  
7 understand that they had already been enrolled in one or more Plans. These consumers  
8 reasonably assume the information packet is just another piece of junk mail from a credit card  
9 company. And while a cardholder who accepted Defendants' offer to send information about  
10 one or more Plans may recognize what the packet relates to, the consumer reasonably assumes  
11 that he or she must take further steps before becoming enrolled in the Plan. If the slammed  
12 consumer simply throws out the packet without reading it, signing it, or conferring with  
13 Discover about it, he or she is nevertheless enrolled in the Plan as a result of Defendants'  
14 misleading practices described herein.

15 38. Defendants also have utilized the card activation process as another way to  
16 wrongfully enroll California consumers. Defendants tell each cardholder that he or she must  
17 activate the credit card by calling a specific number, provided by Defendants, from the  
18 cardholder's home phone number. Defendants have taken this opportunity to sell Ancillary  
19 Plans, like Payment Protection, to unsuspecting cardholders who may believe that the  
20 information being provided is related to the card being activated and not an additional,  
21 separately charged service.

22 39. Many California cardholders, accustomed to the legal language and fine print  
23 received from a credit card company, like Discover, become immune to the terms and  
24 conditions communicated to them; and thus, are particularly susceptible to believing that they  
25 are listening to some legal text that must be read to them rather than a "sales pitch." Because  
26 of this, a consumer often will reflexively reply "ok" but has no idea that Defendants use this  
27 general affirmative response to sign up the consumer for an Ancillary Plan. These consumers  
28

1 have no idea that they have "purchased" an additional product or service like one or more  
2 Ancillary Plans.

3 40. Upon information and belief, Defendants also have enrolled some cardholders  
4 in one or more Ancillary Plans like Payment Protection even if the consumer did not provide  
5 an affirmative response during these phone calls. In such instances, Defendants have no proof  
6 of affirmative assent because there is (a) no affirmative response on the recording; (b) a clear  
7 rejection of the offer; or (c) no record of the call. The cardholder has been "slammed," that is,  
8 involuntarily enrolled in one or more Plans without his or her knowledge or consent.

9 41. Each of the aforementioned instances is not a typical telemarketing call.  
10 Defendants' telemarketer does not need the consumer to provide his or her credit card number  
11 or any additional information to purchase the product because the telemarketer is the credit  
12 card company. As a result, Defendants can charge the consumer's account when there has  
13 been no clear and knowing consent given.

14  
15 **2. California consumers who have been "slammed" with Ancillary  
Plans receive little to no relief from Defendants.**

16 42. Defendants know that slamming frequently occurs. In fact, the "refund"  
17 process itself is set up on the assumption that consumers have been deceived and do not  
18 understand that they have been enrolled in Payment Protection. When a California consumer  
19 calls for a refund, Defendants make no effort to then determine how it came to be that the  
20 cardholder was enrolled without his or her authorization.

21 43. Many cardholders have no idea they are enrolled in an Ancillary Plan and do  
22 not notice or appreciate the meaning of the line-item charge for the Plan on their credit card  
23 bills. This is because the charge is listed as one of the cardholder's other monthly purchases.

24 44. Some cardholders have accounts that do not require close inspection of monthly  
25 statements. This may be because they (a) are not making new purchases on the account; (b)  
26 may simply be seeking to pay off the balance; (c) have taken advantage of a balance transfer  
27 offer; or (d) utilized the account to make a single purchase. Others simply do not receive a  
28 monthly bill and/or may be enrolled in autopay.



1           45. Consumers may pay this hidden charge month after month for a period of time  
2 before becoming aware of it. For online accounts, the charges for Ancillary Plans are often  
3 posted to a cardholder's account on the last day of each statement period. That statement is  
4 then archived. A cardholder may review current activity on their account regularly; yet, never  
5 see the charge billed to their account on the last day of the previous billing cycle's statement  
6 because of Defendants' "auto-archive" policy.

7           46. In addition to the obvious unfairness of enrolling cardholders without their valid  
8 authorization, Defendants reap an extra windfall because these enrollees will never invoke the  
9 supposed benefits of the Plans for which they were charged because they do not even know  
10 they may do so.

11           47. If a cardholder does not discover the additional monthly charge for Ancillary  
12 Plans before 30 days have passed from the date of his or her alleged enrollment in and  
13 purchase of one or more Plans, Defendants will not automatically refund the overpayments to  
14 the cardholder.

15           48. Cancellation and disputes about enrollment in Ancillary Plans are so widespread  
16 that Defendants use template form letters to send to slammed California consumers who  
17 complain. Moreover, instead of "coming clean" to these aggrieved consumers, Defendants  
18 make it exceedingly difficult for them to get relief, such that many California consumers give  
19 up hope of ever getting their money back after paying for a product they did not request and  
20 did not use.

21  
22 **II. Defendants Misrepresent and Fail to Disclose the True Nature of Payment  
Protection, Such that Ineligible Consumers are Enrolled.**

23           49. Defendants have marketed Payment Protection through direct mail, online, and  
24 over the phone. Discover represents Payment Protection as a product that pays the required  
25 minimum monthly payment due on the consumer's credit card account. Defendants have  
26 advised California consumers that these Plans protect you in the event of certain triggering  
27 circumstances, e.g., involuntary unemployment, illness, or changes in family status, which  
28

1 supposedly prevents the cardholder's account from becoming delinquent during these  
2 unexpected circumstances. However, benefits under the Plan are not so readily available.

3 50. Discover's marketing for this ancillary product proclaims that "Life happens.  
4 Protect your account," and claims that Payment Protection will "[d]efer payments for up to 24  
5 billing periods in the case of involuntary unemployment, hospitalization, disability or other  
6 qualifying events . . . ." See [https://www.discover.com/credit-cards/member-](https://www.discover.com/credit-cards/member-benefits/security/protection-solutions/payment-protection.html)  
7 [benefits/security/protection-solutions/payment-protection.html](https://www.discover.com/credit-cards/member-benefits/security/protection-solutions/payment-protection.html) (last viewed on July 27, 2015).

8 However, Defendants' "Life happens/Protect your account" tagline misrepresents the true  
9 nature of Payment Protection; specifically, that Discover imposes Payment Protection fees on  
10 California consumers who did not authorize the charges or who, at the time of enrollment,  
11 were not eligible for the alleged benefits provided by the Plan. Defendants misrepresent that  
12 their Ancillary Plans provide protection in a cardholder's time of need because Discover's "life  
13 happens" advertising campaign fails to disclose and misrepresents that Defendants' Payment  
14 Protection Plans have many hidden, variable, and narrow restrictions on use.

15 51. Defendants have marketed their Payment Protection Plans to individuals who do  
16 not qualify for the purported benefits of the Plans. The numerous qualifications and  
17 restrictions set forth in Defendants' fine print expose the advertised "protection" as an illusion.  
18 For example, because Defendants do not determine California consumers' eligibility for  
19 various options under the Payment Protection Plan before marketing, offering, and selling it to  
20 consumers, Defendants knowingly enroll California consumers, and charge them, for a product  
21 that the consumers can never use.

22 52. Defendants have marketed Payment Protection as a service for consumers to  
23 safeguard their credit card accounts, either suspending or crediting the required minimum  
24 monthly credit card payments due by permanently canceling the credit card account. The  
25 availability of either of these services depends on whether the cardholder has experienced a  
26 certain circumstance, as set forth and specifically defined by the terms and conditions of the  
27 Plan.

1           53. Upon information and belief, consumers are required to pay monthly interest  
2 charges or the Ancillary Plan fees for the month in which Payment Protection Plan benefits are  
3 being utilized. However, when minimum monthly payments are credited under the Plan, the  
4 monthly interest charges as well as the Payment Protection fee and other Ancillary Plan fees  
5 continue to accrue without adequate disclosure to California consumers.

6           54. The Payment Protection fee and other Ancillary Plan fees accrue and are  
7 imposed separately from monthly interest charges and independent of standard account  
8 maintenance fees. The Payment Protection fee and other Ancillary Plan fees are charges  
9 assigned to cover a particular service, not a general charge for Defendants' extension of credit.

10          55. Different versions of Discover's Payment Protection Plans contain different  
11 terms and conditions, which are complicated and varied. However, each version of the Plan  
12 provides for some form of payment suspension upon the occurrence of one of the following  
13 defined events: Involuntary Unemployment; Disability; Leave of Absence; Disaster;  
14 Hospitalization; Death of a Child, Spouse or Domestic Partner; Celebration Event; or Death  
15 Benefit. The restrictions, limitations, and exclusions associated with these benefit-triggering  
16 events are expansive and constantly evolving.

17          56. Defendants do not make a reasonable effort and do not undertake an  
18 investigation, including review of information in their possession regarding the cardholder, to  
19 determine if Payment Protection coverage would apply to the cardholder. Such information  
20 may include health status, name of last employer, and date of birth, each of which would assist  
21 Defendants in knowing whether a particular cardholder is eligible for Payment Protection  
22 benefits.

23          57. Defendants have aggressively marketed and targeted California cardholders for  
24 enrollment in Payment Protection, even when Defendants have information in their possession  
25 indicating that the particular consumer may not be eligible for benefits.

26          58. Telephone marketing scripts are incomplete, indecipherable, misleading, and  
27 use obfuscatory language. Similarly, the written materials or "information" provided to  
28

1 California consumers are incomplete, indecipherable, misleading and contain obfuscatory  
2 language.

3 59. Defendants do not adequately describe or explain the exclusions to California  
4 consumers. Because of this, California consumers are not able to determine whether they lack  
5 certain characteristics or fail to satisfy certain criteria that would allow them to be eligible for  
6 benefits under the Payment Protection Plans. Defendants' failures to disclose these conditions  
7 is material and misleading because Discover has a common practice of imposing limitations on  
8 full coverage or benefits based on the Plan's exclusions.

9 60. Exclusions found in the written materials for Defendants' Ancillary Plans,  
10 which are only provided after enrollment, include, but are not limited to, the following:

11 (a) Some Payment Protection benefits do not apply to retired persons. This most  
12 often affects "elderly" consumers;

13 (b) Payment Protection benefits do not apply to or are limited for persons employed  
14 part time or seasonally;

15 (c) Payment Protection benefits do not apply to persons employed by family  
16 members or not employed;

17 (d) Payment Protection benefits are limited as to persons who are self-employed;

18 (e) Payment Protection benefits do not apply immediately or for some period  
19 directly after unemployment or disability;

20 (f) Payment Protection benefits do not apply unless the consumer qualifies for state  
21 unemployment benefits and continues to meet qualifications;

22 (g) Payment Protection benefits do not apply unless the consumer notifies the  
23 company and provides verification within a set period of time;

24 (h) Consumers may not be able to use their credit card for new purchases while  
25 Payment Protection benefits are being provided;

26 (i) Payment Protection coverage is limited to per-calendar-year maximums; and

27 (j) Payment Protection benefits require continued treatment and verification by a  
28 physician for the duration of the disability.

1           61. Defendants fail to disclose and/or misrepresent these exclusions in their  
2 promotion and sale of their Ancillary Plans, including Payment Protection.

3           62. Retired California cardholders, many of whom are senior citizens, are charged  
4 for Defendants' Ancillary Plans even though they are categorically excluded from receiving  
5 many of the Plan's benefits. Defendants do not ask customers whether they are retired.

6           63. California consumers who are part-time workers, seasonal workers, and workers  
7 concluding an employment contract (including ending a military tour of duty) are also limited  
8 or categorically excluded from receiving benefits under the Plan. For example, to qualify for  
9 benefits, one needs to work a set number of hours a week in employment considered to be  
10 permanent. However, Defendants make no effort to investigate whether any of the California  
11 consumers they charge for Payment Protection are part-time, seasonal, or military workers.  
12 Moreover, these terms are not adequately communicated or defined in written materials.

13           64. The Plans limit benefits available to disabled persons. However, Defendants  
14 nevertheless fail to affirmatively inform these individuals of the limitations in benefits when  
15 they are enrolled. In fact, Defendants do not ask customers whether they are disabled.

16           65. Defendants do not have a process in place to maintain current and accurate  
17 consumer statuses. Thus, when consumers' statuses change, Defendants continue to charge  
18 these California consumers for Payment Protection even though they may no longer be eligible  
19 for its benefits.

20           66. If California consumers are eventually provided with written materials, the  
21 materials themselves are confusing. Based on what is provided, it is virtually impossible for  
22 the consumer to determine all of the exclusions and limitations of Payment Protection.

23           67. The premium for Payment Protection is set at a dollar amount per \$100 of the  
24 ending statement balance for each particular month. For example, upon information and belief,  
25 the monthly cost of Payment Protection is anywhere from \$0.79 to \$0.89 for every \$100 of the  
26 previous billing period's new balance. Thus, a California cardholder who charges \$1,000 a  
27 month, and even pays off his or her balance every month, pays between \$94.80 and \$106.80  
28 per year for Payment Protection. Defendants automatically add this amount directly to the

1 consumer's monthly credit card account statement. These Payment Protection monthly fees are  
2 independent of standard account maintenance charges such as interest.

3 68. Defendants' "customer service" support is set up in such a way that California  
4 consumers cannot easily cancel ancillary products or receive answers to benefit questions, nor  
5 can they easily file claims or receive benefits for filed claims.

6 69. Upon information and belief, employees at Defendants' call centers are given  
7 authority to deny claims immediately over the phone, but do not have authority to approve  
8 payment of benefits to claimants in the same manner.

9 70. Upon information and belief, when a consumer calls Discover to cancel an  
10 Ancillary Plan, Defendants' "customer service" representatives are trained to talk the consumer  
11 out of canceling by "upselling" the supposed benefits of the Plan.

12 71. When claims for Payment Protection benefits are denied, Defendants have not  
13 implemented a process through which a consumer's Payment Protection premiums are  
14 refunded, even if the consumer is deemed to be per se ineligible for Payment Protection  
15 benefits. In fact, if a California consumer is denied Payment Protection benefits, Defendants  
16 do not remove the consumer from Payment Protection enrollment going forward, nor do  
17 Defendants inform the consumer of his or her continued obligations to pay for Payment  
18 Protection, even though the consumer has been deemed to be ineligible for benefits.

19 72. Although heralded as coverage designed for a consumer's peace of mind and for  
20 use when times get tough, Payment Protection is designed to prey on the financially insecure.  
21 Payment Protection is unfair and deceptive because of the (a) practice of "slamming"; (b)  
22 numerous restrictions that are imposed; (c) exclusions of benefits; and (d) administrative and  
23 bureaucratic hurdles that are placed in the way of California consumers who attempt to secure  
24 payments from Defendants under Payment Protection coverage.

25 73. As a result of their unfair and deceptive marketing practices related to the sale  
26 of Payment Protection, Defendants have substantially increased profits. This profit is the result  
27 of Defendants' ability to charge a separate fee for their Payment Protection product that is  
28 independent of the amount of interest charged.



COUNT I

**Violation of Cal. Bus. & Prof. Code Section 17200, et seq., Unfair Competition Law**  
**("UCL")—Fraudulent, Unlawful and Unfair Business Acts and Practices**

74. Plaintiff re-states and re-alleges all prior paragraphs of this Complaint as though set forth fully herein.

75. The District Attorney for Trinity County is authorized pursuant to Cal. Bus. & Prof. Code §§ 17204 and 17206 to bring an action for violation of the UCL and the remedies sought herein.

76. Cal. Bus. & Prof. Code §17200, *et seq.*, precludes unfair competition, *i.e.*, the employment of any unlawful, unfair or fraudulent business acts or practices. This prohibition extends to any act, omission or conduct or pattern of activity engaged in within California which affects the rights of consumers within the State of California.

77. Defendants' fraudulent conduct alleged herein includes, but is not limited to: (a) unilaterally imposing upon California consumers Ancillary Plans including Payment Protection without their permission; (b) failing to disclose to California consumers that they were being enrolled in one or more Plans and could only affirmatively opt out if they did not wish to be enrolled; (c) refusing to refund the money that California consumers paid for Plans in which they were involuntarily enrolled; (d) misrepresenting to California consumers that they were eligible, would remain eligible, and would receive benefits under the Plans; (e) concealing the true nature of the benefits and exclusions of the Plans and the proof required for claims from California consumers; (f) continuing to charge and take payment for Ancillary Plans including Payment Protection for those California consumers enrolled without their effective consent and permission, and/or in a manner likely to mislead reasonable consumers; (g) continuing to charge and take payment for Payment Protection for those consumers, including "senior citizens" and "disabled persons" as defined in Cal. Bus. & Prof. Code section 17206.1, who were enrolled despite not qualifying for the purported benefits of Payment Protection; and (h) otherwise denying California consumers the promised benefits of Defendants' Ancillary Plan programs.

1           78. Defendants' fraudulent business practices have involved a pattern and practice  
2 of failing to disclose the material facts about Ancillary Plans including Payment Protection.  
3 Defendants' omissions and partial disclosures are likely to mislead reasonable consumers  
4 about the benefits, limitations and exclusions of these Plans that California consumers have  
5 been enrolled in and for which they continued thereafter to pay. Given Defendants' superior  
6 and exclusive knowledge about the Plans' terms and conditions, and their partial misleading  
7 disclosures about the Plans' benefits, limitations and exclusions, Defendants have an ongoing  
8 duty to disclose facts sufficient to allow reasonable consumers to make an informed decision  
9 whether to purchase and/or continue paying for the Plans. Defendants have failed to discharge  
10 this ongoing duty of reasonable disclosure.

11           79. Defendants' misrepresentations and omissions about Ancillary Plans including  
12 their benefits, limitations, and exclusions alleged herein were material in that a reasonable  
13 person would attach importance to such information in making the decision to agree to accept,  
14 and purchase and pay for, and to continue to pay for, one or more Plans, whether voluntarily or  
15 involuntarily.

16           80. Defendants' misrepresentations and omissions about Ancillary Plans including  
17 Payment Protection as alleged herein were and remain material to the reasonable consumer;  
18 and reliance upon such misrepresentations and omissions is presumed as a matter of law.

19           81. Defendants' course of conduct relating to their Ancillary Plans is also unlawful  
20 within the meaning of the UCL in that Defendants have and continue to violate relevant laws,  
21 statutes, and regulations including but not limited to Cal. Civil Code section 1750, *et seq.*  
22 ("CLRA"). Defendants, through their misleading conduct in enrolling California consumers,  
23 their ongoing concealment and failure to disclose the limitations and exclusions to their Plans,  
24 and their continued operation of Plans including but not limited to Payment Protection to the  
25 monetary detriment of those continuing to be billed and charged for purported Payment  
26 Protection program benefits, including those consumers who did not qualify for the purported  
27 benefits of the Plans Defendants enrolled their credit card customers, have and continue to  
28 violate sections 1770(a)(5), (7) and (14) of the CLRA. These sub-sections, respectively,



1 prohibit Defendants from representing in a transaction intended to result or which results in the  
2 sale of goods or services to any consumer that such goods or services: (1) have characteristics,  
3 uses, or benefits they do not; (2) are of a particular standard, quality or grade if they are not;  
4 and (3) confer rights or remedies they do not.

5 82. Defendants' aforementioned wrongful conduct is also "unfair" within the  
6 meaning of the UCL because it offends established public policy designed to protect California  
7 consumers from business practices likely to mislead, is immoral, unethical, oppressive,  
8 unscrupulous, and substantially injurious to the people of the State of California. Defendants'  
9 wrongful conduct is also unfair because the public policy offended by Defendants' course of  
10 conduct is tethered to specific statutory and regulatory provisions, including but not limited to  
11 the CLRA, which prohibit and limit Defendants from acting in the manner herein alleged to the  
12 detriment of California consumers. There is no countervailing benefit to Defendants' conduct,  
13 and the injury to consumers and to fair competition in this State is real and substantial.

14 83. Defendants' fraudulent, unlawful, and unfair business practices were  
15 specifically designed to enroll and to keep California consumers enrolled in and paying for  
16 Ancillary Plans including Payment Protection despite the fact that many enrollees were *per se*  
17 ineligible for the Plans' benefits.

18 84. Defendants' fraudulent, unlawful, and unfair practices as alleged herein are  
19 likely to and in fact have deceived California consumers.

20 85. Were it not for Defendants' unfair competition, California consumers would not  
21 have been unwittingly and unknowingly enrolled in, signed up, or purchased and paid for  
22 Ancillary Plans including Payment Protection.

23 86. Defendants' unlawful, unfair and fraudulent Ancillary Plan practices have and  
24 continue to injure California consumers, and impede and impair fair business competition in  
25 the State of California in a manner which is substantially injurious to the people of the State of  
26 California. Section 17204 of the UCL provides that injunctive relief designed to address and  
27 rectify unfair competition may be pursued by, *inter alia*, any district attorney in a civil action  
28

1 brought in the name of the people of the State of California, and Plaintiff seeks the imposition  
2 of appropriate injunctive relief against Defendants, and each of them, in this action.

3 87. California consumers have lost money as the result of Defendants' unfair  
4 competition in that each paid for purported Ancillary Plan benefits they would not have paid  
5 for had they been reasonably apprised of their alleged enrollment in Ancillary Plans, and the  
6 Plans' limitations and exclusions. Plaintiff seeks restitution of all ill-gotten monies paid to  
7 Defendants as the resulting from their unlawful, unfair and fraudulent Ancillary Benefit Plan  
8 scheme.

9 88. Section 17206 of the UCL authorizes the imposition of civil penalties of up to  
10 \$2,500.00 for each and every act of unfair competition Defendants have or propose to engage  
11 in as part of their Ancillary Plan programs. Section 17206 provides that these penalties shall  
12 be assessed and recovered by, *inter alia*, any district attorney in a civil action brought in the  
13 name of the people of the State of California, and Plaintiff seeks to assess and recover these  
14 penalties in this civil action.

15 89. Defendants' unlawful, unfair and fraudulent practices alleged herein have and  
16 continue to prey upon California's "senior citizen[s]," those age 65 and older. Section 17206.1  
17 of the UCL provides for the imposition of additional and cumulative civil penalties of up to  
18 \$2,500.00 for each act of unfair competition perpetrated against a "senior citizen." Plaintiff is  
19 entitled to and does seek these additional penalties for the acts of unfair competition engaged  
20 in by Defendants against California "senior citizen[s]."

21 90. Defendants' unlawful, unfair and fraudulent practices as alleged herein have  
22 and continue to prey upon California's "disabled person[s]," those with a physical or mental  
23 impairment which substantially limits one or more life activities. Section 17206.1 of the UCL  
24 provides for the imposition of additional and cumulative civil penalties of up to \$2,500.00 for  
25 each act of unfair competition perpetrated against a "disabled person." Plaintiff is entitled to  
26 and does seek these additional penalties for the acts of unfair competition engaged in by  
27 Defendants against California "disabled person[s]."

91. Plaintiff is entitled to recover pre-judgment interest, attorneys' fees, and the expenses and costs of this action.

**RELIEF**

WHEREFORE, the People of California, by and through the District Attorney for the County of Trinity, respectfully pray that this Court grant the following relief:

1. Entering Judgment in favor of the People in a final order against each Defendant;

2. Enjoining Defendants and their employees, officers, directors, agents, successors, assignees, merged or acquired predecessors, parent or controlling entities, subsidiaries, and all other persons acting in concert or participation with them, from engaging in unfair or deceptive practices in violation of California law and ordering temporary, preliminary or permanent injunctive relief;

3. Declaring that each act of Defendants described in this Complaint constitutes a separate violation of California law;

4. Awarding restitution of all ill-gotten monies paid to Defendants as the result of their violations of the UCL;

5. Imposing civil penalties of up to \$2,500 for each violation of the UCL, as authorized by Cal. Bus. & Prof. Code § 17206;

6. Imposing additional civil penalties of up to \$2,500 for each violation of the UCL engaged in against "senior citizen[s]" as authorized by Cal. Bus. & Prof. Code § 17206.1;

7. Imposing additional civil penalties of up to \$2,500 for each violation of the UCL engaged in against "disabled person[s]" as authorized by Cal. Bus. & Prof. Code § 17206.1;

8. Awarding attorneys' fees, costs; and expenses;

9. Awarding pre-judgment interest; and

10. For such other and further relief as the court deems just and proper.

11. For clarification, notwithstanding any language set forth in this paragraph or otherwise in this Complaint, the monetary relief sought by the State in the form of

1 disgorgement and damages is sought on behalf of the State alone for the State's losses and  
2 damages, and the State specifically does not seek an award of private damages on behalf of  
3 individual California citizens.

4 Date: August 28, 2015

Respectfully submitted,

5  
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CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Please, State Bar number, and address): Kirk J. Wolden, Esq. SBN: 138902 CARTER WOLDEN CURTIS LLP 1111 Exposition Blvd. Suite 602, Sacramento, CA 95815 TELEPHONE NO. 916-567-1111 FAX NO. 916-567-1112 ATTORNEY FOR (Name) Plaintiffs		FOR COURT USE ONLY  <b>FILED</b>  SEP - 4 2015  CLERK OF THE SUPERIOR COURT COUNTY OF TRINITY BY: MARJIE WATKINS, DEPUTY CLERK
SUPERIOR COURT OF CALIFORNIA, COUNTY OF TRINITY STREET ADDRESS: 11 Court Street MAILING ADDRESS: P.O. Box 1258 CITY AND ZIP CODE: Weaverville, 96093 BRANCH NAME: Main Courthouse		
CASE NAME: The People of the State of California, et al. v. Discover Financial Services, et al.		
<b>CIVIL CASE COVER SHEET</b> <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)	<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	CASE NUMBER 15CV079
Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		JUDGE DEPT

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

<b>Auto Tort</b> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) <b>Other P/DPD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b> <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/DPD/WD (23) <b>Non-P/DPD/WD (Other) Tort</b> <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (18) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-P/DPD/WD tort (35) <b>Employment</b> <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	<b>Contract</b> <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) <b>Real Property</b> <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) <b>Unlawful Detainer</b> <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (36) <b>Judicial Review</b> <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	<b>Provisionally Complex Civil Litigation</b> (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) <b>Enforcement of Judgment</b> <input type="checkbox"/> Enforcement of judgment (20) <b>Miscellaneous Civil Complaint</b> <input type="checkbox"/> RICO (27) <input checked="" type="checkbox"/> Other complaint (not specified above) (42) <b>Miscellaneous Civil Petition</b> <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- |  |  |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties   | d. <input checked="" type="checkbox"/> Large number of witnesses   |
| b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve | e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court |
| c. <input checked="" type="checkbox"/> Substantial amount of documentary evidence  | f. <input type="checkbox"/> Substantial postjudgment judicial supervision  |
3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): One, Cal. Bus. & Prof. Code Section 17200, et seq.
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015)

Date: September 3, 2015

Kirk J. Wolden, Esq.

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

## NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

 Form Adopted for Mandatory Use  
 Judicial Council of California  
 CM-010 (Rev. July 1, 2007)

## CIVIL CASE COVER SHEET

 Cal. Rules of Court, rules 2.58, 3.220, 3.400-3.403, 3.740;  
 Cal. Standards of Judicial Administration, sec. 3.10  
 www.courtinfo.ca.gov  
 Westlaw Case & Form Builder

ADR PACKET  
&  
BLANK CASE MANAGEMENT STATEMENT  
(Judicial Council Form CM-110)

TO BE SERVED ON THE DEFENDANT(S) AT THE TIME  
THE COMPLAINT IS BEING SERVED.



SUPERIOR COURT OF CALIFORNIA, COUNTY OF TRINITY  
ALTERNATIVE DISPUTE RESOLUTION (ADR) INFORMATION PACKAGE

Most civil disputes are resolved without filing a lawsuit, and most civil lawsuits are resolved without a trial. The courts, community organizations, and private providers offer a variety of Alternative Dispute Resolution (ADR) processes to help people resolve disputes without a trial. Many courts encourage or require parties to try ADR before trial, and it may be beneficial to do this early in the case.

Below is some information about the potential advantages and disadvantages of ADR, the most common types of ADR, and how to find a local ADR program or neutral. You can read more information about these ADR processes and watch videos that demonstrate them at [www.courts.ca.gov/3074.htm](http://www.courts.ca.gov/3074.htm).

**Potential Advantages and Disadvantages**

ADR may have a variety of advantages or disadvantages over a trial, depending on the type of ADR process used and the particular case:

**Potential Advantages**

- Saves time
- Saves money
- Gives parties more control over the dispute resolution process and outcome
- Preserves or improves relationships

**Potential Disadvantages**

- May take more time and money if ADR does not resolve the dispute
- Procedures to learn about the other side's case (discovery), jury trial, appeal, and other court protections may be limited or unavailable

**Most Common Types of ADR**

**Mediation** - An impartial person called a "mediator" helps the parties communicate in an effective and constructive manner so they can try to settle their dispute. The mediator does not decide the outcome, but helps the parties to do so. Mediation is usually confidential and may be particularly useful when parties want or need to have an ongoing relationship, such as in disputes between family members, neighbors, co-workers, or business partners.

**Settlement Conferences** - A judge or another neutral person called a "settlement officer" helps the parties to understand the strengths and weaknesses of their case and to discuss settlement. The judge or settlement officer does not make a decision in the case but helps the parties to negotiate a settlement. Settlement conferences may be particularly helpful when the parties have very different ideas about the likely outcome of a trial and would like an experienced neutral to help guide them toward a resolution.

**Arbitration** - The parties present evidence and arguments to a neutral person called an "arbitrator" who then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are usually relaxed. If the parties agree to *binding arbitration*, they waive their right to a trial and agree to accept the arbitrator's decision as final. With *nonbinding arbitration*, any party may reject the arbitrator's decision and request a trial. Arbitration may be appropriate when the parties want another person to decide the outcome of their dispute but would like to avoid the formality, time, and expense of a trial, or want an expert in the subject matter of the dispute to make the decision.

**Neutral Evaluation** - The parties briefly and informally present their facts and arguments to a neutral person called an "evaluator," who is often an expert in the subject matter of the dispute. The evaluator does not decide the outcome of the dispute, but helps the parties to do so by giving them a non-binding



opinion about the strengths, weaknesses, and likely outcome of their case. Depending on the neutral evaluation program and the parties' wishes, the evaluator may then help the parties try to negotiate a settlement. Neutral evaluation may be appropriate if the parties want a neutral person's opinion about how the case might be resolved, if the primary dispute is the amount of damages, or if there are technical issues that the parties would like a neutral expert to help resolve.

### **Selecting an ADR Program and Neutral**

Selecting an ADR program and neutral are important decisions. Be sure to learn about the rules of any program and the qualifications of any neutral you are considering, and about their fees. Some programs and neutrals do not charge the parties for their ADR services, but others charge the parties administrative fees and/or fees for the neutral's time.

### **Local ADR Programs**

#### **Court Programs**

The Superior Court of California, County of Trinity conducts settlement conferences pursuant to Local Rule 3.8. The Court may discuss other ADR options at the Case Management Conference conducted in general civil cases (See Local Rules 3.1 and 3.2.). The Court Executive Officer can provide information regarding ADR and can be contacted at 530-623-1369.

Although complaints about ADR neutrals in court programs are very unusual, should you have a complaint or a concern about a neutral who handled a case as part of this court's ADR program, please contact the Court Executive Officer at 530-623-1369.

#### **Private ADR Providers**

Information about available private ADR programs or neutrals may be found on the Internet, in your local telephone or business directory, or legal newspaper for dispute resolution, mediation, settlement, or arbitration services.

### **Legal Representation and Advice**

To participate effectively in ADR, it is generally important to understand your legal rights and responsibilities and the likely outcomes if you went to trial. ADR neutrals are not allowed to represent or to give legal advice to the participants in the ADR process. If you do not already have an attorney, the California State Bar or your local County Bar Association can assist you in finding an attorney. Information about obtaining free and low cost legal assistance is also available on the California Courts Web site at [www.courts.ca.gov/selfhelp-lowcosthelp.htm](http://www.courts.ca.gov/selfhelp-lowcosthelp.htm).

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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address)		FOR COURT USE ONLY
TELEPHONE NO. FAX NO. (Optional)		
E-MAIL ADDRESS (Optional)		
ATTORNEY FOR (Name):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF TRINITY STREET ADDRESS: 11 Court Street MAILING ADDRESS: PO Box 1258 CITY AND ZIP CODE: Weaverville, CA 96093 BRANCH NAME:		
PLAINTIFF/PETITIONER:		
DEFENDANT/RESPONDENT:		
<b>CASE MANAGEMENT STATEMENT</b> (Check one): <input type="checkbox"/> UNLIMITED CASE (Amount demanded exceeds \$25,000) <input type="checkbox"/> LIMITED CASE (Amount demanded is \$25,000 or less)		CASE NUMBER:
A CASE MANAGEMENT CONFERENCE is scheduled as follows: Date: Time: Dept.: Div.: Room: Address of court (if different from the address above): <input type="checkbox"/> Notice of Intent to Appear by Telephone, by (name):		

INSTRUCTIONS: All applicable boxes must be checked, and the specified information must be provided.

- Party or parties (answer one)
  - ☐ This statement is submitted by party (name):
  - ☐ This statement is submitted jointly by parties (names):
- Complaint and cross-complaint (to be answered by plaintiffs and cross-complainants only)
  - The complaint was filed on (date):
  - ☐ The cross-complaint, if any, was filed on (date):
- Service (to be answered by plaintiffs and cross-complainants only)
  - ☐ All parties named in the complaint and cross-complaint have been served, have appeared, or have been dismissed.
  - ☐ The following parties named in the complaint or cross-complaint
    - ☐ have not been served (specify names and explain why not):
    - ☐ have been served but have not appeared and have not been dismissed (specify names):
    - ☐ have had a default entered against them (specify names):
  - ☐ The following additional parties may be added (specify names, nature of involvement in case, and date by which they may be served):
- Description of case
  - Type of case in ☐ complaint ☐ cross-complaint (Describe, including causes of action):

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PLAINTIFF/PETITIONER:	CASE NUMBER
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- 4 b Provide a brief statement of the case, including any damages. (If personal injury damages are sought, specify the injury and damages claimed, including medical expenses to date [indicate source and amount], estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, describe the nature of the relief.)

☐ (If more space is needed, check this box and attach a page designated as Attachment 4b)

5 Jury or nonjury trial

The party or parties request ☐ a jury trial ☐ a nonjury trial. (If more than one party, provide the name of each party requesting a jury trial):

6 Trial date

a. ☐ The trial has been set for (date):

b. ☐ No trial date has been set. This case will be ready for trial within 12 months of the date of the filing of the complaint (if not, explain):

c. Dates on which parties or attorneys will not be available for trial (specify dates and explain reasons for unavailability):

7. Estimated length of trial

The party or parties estimate that the trial will take (check one):

a. ☐ days (specify number):

b. ☐ hours (short causes) (specify):

8. Trial representation (to be answered for each party)

The party or parties will be represented at trial ☐ by the attorney or party listed in the caption ☐ by the following:

a. Attorney:

b. Firm:

c. Address:

d. Telephone number:

f. Fax number:

e. E-mail address:

g. Party represented:

☐ Additional representation is described in Attachment 8.

9. Preference

☐ This case is entitled to preference (specify code section):

10. Alternative dispute resolution (ADR)

a. ADR information package. Please note that different ADR processes are available in different courts and communities; read the ADR information package provided by the court under rule 3.221 for information about the processes available through the court and community programs in this case.

(1) For parties represented by counsel: Counsel ☐ has ☐ has not provided the ADR information package identified in rule 3.221 to the client and reviewed ADR options with the client.

(2) For self-represented parties: Party ☐ has ☐ has not reviewed the ADR information package identified in rule 3.221.

b. Referral to judicial arbitration or civil action mediation (if available).

(1) ☐ This matter is subject to mandatory judicial arbitration under Code of Civil Procedure section 1141.11 or to civil action mediation under Code of Civil Procedure section 1775.3 because the amount in controversy does not exceed the statutory limit.

(2) ☐ Plaintiff elects to refer this case to judicial arbitration and agrees to limit recovery to the amount specified in Code of Civil Procedure section 1141.11.

(3) ☐ This case is exempt from judicial arbitration under rule 3.811 of the California Rules of Court or from civil action mediation under Code of Civil Procedure section 1775 et seq. (specify exemption):

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PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	CASE NUMBER
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10. c. Indicate the ADR process or processes that the party or parties are willing to participate in, have agreed to participate in, or have already participated in (check all that apply and provide the specified information):

	The party or parties completing this form are willing to participate in the following ADR processes (check all that apply):	If the party or parties completing this form in the case have agreed to participate in or have already completed an ADR process or processes, indicate the status of the processes (attach a copy of the parties' ADR stipulation):
(1) Mediation	<input type="checkbox"/>	<input type="checkbox"/> Mediation session not yet scheduled <input type="checkbox"/> Mediation session scheduled for (date): <input type="checkbox"/> Agreed to complete mediation by (date): <input type="checkbox"/> Mediation completed on (date):
(2) Settlement conference	<input type="checkbox"/>	<input type="checkbox"/> Settlement conference not yet scheduled <input type="checkbox"/> Settlement conference scheduled for (date): <input type="checkbox"/> Agreed to complete settlement conference by (date): <input type="checkbox"/> Settlement conference completed on (date):
(3) Neutral evaluation	<input type="checkbox"/>	<input type="checkbox"/> Neutral evaluation not yet scheduled <input type="checkbox"/> Neutral evaluation scheduled for (date): <input type="checkbox"/> Agreed to complete neutral evaluation by (date): <input type="checkbox"/> Neutral evaluation completed on (date):
(4) Nonbinding judicial arbitration	<input type="checkbox"/>	<input type="checkbox"/> Judicial arbitration not yet scheduled <input type="checkbox"/> Judicial arbitration scheduled for (date): <input type="checkbox"/> Agreed to complete judicial arbitration by (date): <input type="checkbox"/> Judicial arbitration completed on (date):
(5) Binding private arbitration	<input type="checkbox"/>	<input type="checkbox"/> Private arbitration not yet scheduled <input type="checkbox"/> Private arbitration scheduled for (date): <input type="checkbox"/> Agreed to complete private arbitration by (date): <input type="checkbox"/> Private arbitration completed on (date):
(6) Other (specify):	<input type="checkbox"/>	<input type="checkbox"/> ADR session not yet scheduled <input type="checkbox"/> ADR session scheduled for (date): <input type="checkbox"/> Agreed to complete ADR session by (date): <input type="checkbox"/> ADR completed on (date):

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DEFENDANT/RESPONDENT:	

## 11. Insurance

- a. ☐ Insurance carrier, if any, for party filing this statement (name):
- b. Reservation of rights: ☐ Yes ☐ No
- c. ☐ Coverage issues will significantly affect resolution of this case (explain):

## 12. Jurisdiction

Indicate any matters that may affect the court's jurisdiction or processing of this case and describe the status.

☐ Bankruptcy ☐ Other (specify):

Status:

## 13. Related cases, consolidation, and coordination

- a. ☐ There are companion, underlying, or related cases.

(1) Name of case:

(2) Name of court:

(3) Case number:

(4) Status:

☐ Additional cases are described in Attachment 13a.

- b. ☐ A motion to ☐ consolidate ☐ coordinate will be filed by (name party):

## 14. Bifurcation

- ☐ The party or parties intend to file a motion for an order bifurcating, severing, or coordinating the following issues or causes of action (specify moving party, type of motion, and reasons):

## 15. Other motions

- ☐ The party or parties expect to file the following motions before trial (specify moving party, type of motion, and issues):

## 16. Discovery

- a. ☐ The party or parties have completed all discovery.
- b. ☐ The following discovery will be completed by the date specified (describe all anticipated discovery):

Party

Description

Date

- c. ☐ The following discovery issues, including issues regarding the discovery of electronically stored information, are anticipated (specify):

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## 17. Economic litigation

- a. ☐ This is a limited civil case (i.e., the amount demanded is \$25,000 or less) and the economic litigation procedures in Code of Civil Procedure sections 90-98 will apply to this case.
- b. ☐ This is a limited civil case and a motion to withdraw the case from the economic litigation procedures or for additional discovery will be filed (if checked, explain specifically why economic litigation procedures relating to discovery or trial should not apply to this case).

## 18. Other issues

- ☐ The party or parties request that the following additional matters be considered or determined at the case management conference (specify):

## 19. Meet and confer

- a. ☐ The party or parties have met and conferred with all parties on all subjects required by rule 3.724 of the California Rules of Court (if not, explain):
- b. After meeting and conferring as required by rule 3.724 of the California Rules of Court, the parties agree on the following (specify):

## 20. Total number of pages attached (if any): \_\_\_\_\_

I am completely familiar with this case and will be fully prepared to discuss the status of discovery and alternative dispute resolution, as well as other issues raised by this statement, and will possess the authority to enter into stipulations on these issues at the time of the case management conference, including the written authority of the party where required.

Date:

\_\_\_\_\_  
(TYPE OR PRINT NAME)\_\_\_\_\_  
(TYPE OR PRINT NAME)▶ \_\_\_\_\_  
(SIGNATURE OF PARTY OR ATTORNEY)▶ \_\_\_\_\_  
(SIGNATURE OF PARTY OR ATTORNEY)☐ Additional signatures are attached.



# EXHIBIT B

**CONTRACT FOR SERVICES AGREEMENT**

**WHEREAS**, the District Attorney of Trinity County, California (the District Attorney) has determined that claims should be made against Discover Financial Services, Inc. and its related and affiliated entities (hereinafter collectively referred to as “Defendants”), and potentially other financial institutions as mutually agreed upon by the parties to this Agreement, for similar predatory credit card practices related to fee-based products that are ancillary to credit cards (including but not limited to payment protection plans and protection against identity theft and lost or stolen credit cards) in violation of, *inter alia*, the California Consumer Protection Act, the Dodd-Frank Act, and the California common law (hereinafter referred to as “the Claims”); and

**WHEREAS**, the District Attorney has determined that the damages incurred by the citizens of Trinity County, California and the State of California are likely to be substantial in nature; and

**WHEREAS**, the District Attorney has determined that the investigation, research and litigation of the Claims will likely require the expenditure of large sums of money and require work of numerous lawyers and experts who are familiar with the Defendants and their wrongful acts and/or omissions.

**WHEREAS**, the District Attorney has further determined that it is in the best interest of the County and the State and its citizens that attorneys experienced in the prosecution of such claims be retained; and

**WHEREAS**, the below-listed attorneys are experienced in the prosecution of mass tort, consumer fraud and complex commercial litigation and have consented to represent Trinity County, in association with the District Attorney, according to the terms of this Contract for Service Agreement (“Agreement”), respecting the Claims and pursuant to the terms and conditions hereof,

**IT IS, ACCORDINGLY, AGREED as follows:**

1. **Retention.** The Office of the District Attorney of Trinity County, California hereby retains the law firms of **GOLOMB & HONIK, P.C.**, and its principal members, **RICHARD M. GOLOMB, RUBEN HONIK** and **KENNETH J. GRUNFELD, BARON & BUDD, P.C.** and its principal members, **RUSSELL W. BUDD, J. BURTON LeBLANC, IV** and **ANN SAUCER**, and **CARTER WOLDEN CURTIS L.L.P** and its principal members **CLIFF CARTER** and **KIRK WOLDEN** ("the Law Firms"). The Law Firms are hereby designated as Special Assistant District Attorneys to assist in the investigation, research, filing and prosecution of the Claims in any appropriate Court or Courts or before any appropriate government agency. The Law Firms are authorized and directed to assist the District Attorney in making such claims for Trinity County, and to prosecute such claims through assessment, enforcement, collection and all necessary and reasonable appeals as the District Attorney shall direct, and to enforce all judgments and settlements as shall be obtained. The Law Firms shall provide all legal services that are reasonably necessary for such representation and assistance, including without limitation, the preparation and filing of all claims, pleadings, responses, motions, petitions, memoranda, brief, notices and other documents. The Law Firms shall also conduct negotiations and provide representations at all hearings, depositions, trials, appeals, and other appearances as may be required in said actions, under the direction of the District Attorney.

2. **Authority Over the Action.** Trinity County, through the District Attorney's Office, does not relinquish its constitutional or statutory authority or responsibility through this Agreement. The District Attorney of Trinity County Eric L. Heryford has sole and final authority to initiate and settle this litigation on behalf of Trinity and its citizens, and retains final authority over all aspects of the litigation. The Law Firms shall consult with the District

Attorney and obtain approval on all material matters pertinent to these Claims and any litigation arising therefrom, and the District Attorney shall cooperate with the Law Firms and use best efforts to secure the cooperation of other County and State agencies as necessary. Prior to initiating inquiries or demands to any person or entities, the District Attorney and the Law Firms will agree upon entities to be contracted and/or claims to be pursued; the Law Firms will thereafter be entitled to reasonable fees and expenses, as provided below, on any recovery (including on any civil penalties) obtained as consequence of the Law Firms' inquiry/demand.

**3. Coordination with and Reporting to the County.** Trinity County, through the District Attorney's Office, shall have and maintain direct oversight and control over the work of the Law Firms, and has complete control over aspects of the lawsuit. The District Attorney may designate a member of the District Attorney's staff to coordinate the services to be provided by the Law Firms in order to complete the performance required in the Agreement. The Law Firms shall maintain communications with the person so designated at all stages of the Law Firms work, and submit to that person for resolution any questions which may arise as to the performance of this Agreement. The Law Firms shall make periodic status reports to the District Attorney at a minimum of every three (3) months or at such other times as may be reasonably requested by the District Attorney. If the District Attorney does not designate a member of the District Attorney staff to coordinate this Agreement, the District Attorney will be the coordinator of services. The Law Firms shall keep the District Attorney and his designated staff member(s) fully informed on all matter pertaining to the Claims at all times.

**4. Relationship of Parties: Independent Law Firms Status and Responsibilities.**

- A. In the performance of services required under this Agreement, the Law Firms are **"Independent Contractors"** with the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement; however, the District Attorney shall have a general right to inspect work in progress to determine whether, in the District Attorney's opinion, the services are being performed by the Law Firms in compliance with this Agreement. Unless otherwise provided by special condition, it is understood that the District Attorney does not agree to use the Law Firms exclusively, and that the Law Firms are free to contract to provide services to other individuals or entities while under contract with the District Attorney or Trinity County.
- B. The Law Firms and the Law Firms' employees and agents are not by reason of this Agreement, agents or employees of Trinity County for any purpose, and the Law Firms and the Law Firms' employees and agents shall not be entitled to claim or receive from Trinity County any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to County employees.
- C. The Law Firms are responsible for the accuracy, completeness, and adequacy of the Law Firms' performance under this Agreement. Furthermore, the Law Firms intentionally, voluntarily and knowingly assume the sole and entire liability to the Law Firms' employees and agents, and to any individual not a party to this Agreement, for all loss, damage, or injury caused by the Law Firms, or the Law Firms' employees or agents in the course of their employment.
- D. The Law Firms shall be responsible for payment of all applicable federal, state and county taxes and fees which may become due and owing by the Law Firms by reason of this Agreement, including but not limited to: (i) income taxes, (ii) employment related fees, (iii) general excise taxes. The Law Firms also are responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Agreement.
- E. The Law Firms are responsible for securing all employee-related insurance coverage for the Law Firms and the Law Firms' employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

**5. Personnel Requirements.**

- A. The Law Firms shall secure, at the Law Firms' own expense, all personnel required to perform this Agreement.
- B. The Law Firms shall ensure that the Law Firms' employees or agents are experienced and fully qualified to engage in the activities and perform the

services required under this Agreement, and that all applicable licensing and operating requirements imposed or required under federal, state or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with.

- C. The Law Firms shall promptly inform the District Attorney when any personnel assigned to this project leaves the employment of the Law Firms, whereupon the District Attorney may enter into separate new agreements with any former personnel of the Law Firms to work on this project.

6. **Nondiscrimination.** No person performing work under this Agreement, including any Law Firms, employees, or agents of the Law Firms, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.

7. **No Assurance of Success.** The District Attorney and the Law Firms both recognize that the Claims present numerous factual and legal obstacles and that no assurance of success on these Claims has or can be made.

8. **Publicity.** The District Attorney shall maintain responsibility for the public distribution of information concerning this matter. All press inquiries shall be referred to the District Attorney for comment and response. All media contacts with the Law Firms about the subject matter of this Agreement shall be referred to the District Attorney or the District Attorney's designee.

9. **Compensation.** The Law Firms have agreed to represent Trinity County, and the District Attorney hereby agrees that the Law Firms will be compensated for their efforts on the following basis:

- A. The Law Firms shall receive no fee and no reimbursement of costs or expenses if there is no recovery as a result of the Action.
- B. If there is a recovery as a result of the Action, the Law Firms' will be paid a contingency fee of 30% of the Net Recovery, which shall include



damages, restitution, disgorgement, civil and/or statutory fines or penalties, *cy pres* or the value of injunctive relief. The Law Firms shall receive no additional compensation for any legal action taken or other services rendered to accomplish collection of any recovery except as provided in this Agreement.

- C. All reasonable and necessary costs of litigation, including but not limited to legal research costs (*e.g.* Lexis), court costs, travel expenses (*e.g.* lodging, mileage reimbursement, airfare), witness fees, consultants, accounting and expert fees and expenses, shall initially be borne entirely by the Law Firms, but shall be reimbursed from any gross recoveries from the pursuit of such Claims on a case-by-case basis, subject to the following conditions:
  - i. Reimbursement for travel expenses, including but not limited to transportation, lodging and meals, shall be for reasonable, actual, ordinary and necessary expenses;
  - ii. Reimbursement for communications, including telephone, postage and packages delivery, shall be for reasonable, actual, ordinary and necessary expenses only;
  - iii. Reimbursement for photocopies or other reproduction made by the Law Firms "in-house" to be reimbursed at the rate of \$.20 per page; and,
  - iv. Other costs, including expert consultants and witnesses, court filing fees, court reporter services, electronic data storage and document storage, control and analysis procured by the Law Firms from a source outside the Law Firms shall be reimbursed for reasonable, actual, ordinary and necessary expenses only.
- D. The Law Firms shall obtain District Attorney approval before incurring any expenses greater than \$50,000.00, or incurring any other significant expenses in fulfilling the terms of this Agreement that are not identified in this Agreement.
- E. The Law Firms shall receive no compensation or reimbursement for any costs or expenses advanced or incurred by the Law Firms in fulfilling the terms of this Agreement other than set out above. In event that no recovery is realized, the Law Firms shall receive no compensation or reimbursement.

**10. Prompt Payment.** Any money paid to the Law Firms shall be dispersed to the Law Firms within ten (10) days after receipt of the money in accordance with the terms of the Agreement; provided that the Law Firms have met all the terms and conditions of the Agreement.

**11. Non-assignable and non-transferable.** With the prior approval of the District Attorney, the Law Firms may associate other attorneys at their own expense and at no cost to Trinity County. Notwithstanding such association of other attorneys, this Retention Agreement is non-assignable and non-transferable, nor are the Law Firms commitments delegable without the express, written approval of the District Attorney.

**12. Termination.** This Agreement may be terminated at the option of the District Attorney upon ten (10) days written notice to the Law Firms. If the District Attorney elects to terminate, the Law Firms shall be entitled to reasonable payment for services rendered under the Agreement up to the time of termination. The Law Firms may withdraw from this Agreement with the consent of the District Attorney, with reasonable payment for services rendered due within thirty (30) days of termination. Any such withdrawal must comply with the ethics standards applicable to the practice of law. The District Attorney's consent shall not be withheld unreasonably.

**13. Confidentiality.** All records, documents, data or material given to or made available to the Law Firms by virtue of this Agreement will be safeguarded by the Law Firms and shall not be disclosed to any individual or organization without the prior written approval of the District Attorney. The Law Firms agree to implement appropriate and reasonable

technological safeguards that are acceptable to the District Attorney to reduce the risk of unauthorized access to such information.

- A. Security Breaches. The Law Firms shall report to the District Attorney in a prompt and complete manner any security breaches involving records, documents, data or material given to or made available to the Law Firms by virtue of this Agreement. The Law Firms agree to mitigate, to the extent practicable, any harmful effect is known to Law Firms because of a use or disclosure of such information by the Law Firms in violation of the requirements of this Agreement.

**14. Record Ownership, Use and Retention.**

- A. All documents, data and records provided to the Law Firms in carrying out the obligations and services hereunder, without limitation and whether preliminarily or final, are and remain the property of Trinity County.
- B. Any documents, data and records prepared or obtained by the Law Firms under this Agreement shall not be made available to any individual or organization by the Law Firms without prior written approval of the District Attorney, except for associated counsel approved by the District Attorney and in the normal course of Litigation. Any information secured by the Law Firms from the District Attorney in connection with providing the services described in this Agreement shall be kept confidential unless disclosure of such information is approved in writing by the District Attorney or is directed by a court or other tribunal of competent jurisdiction.
- C. Upon completion of the services hereunder or at the termination of this Agreement, all such documents, or copies of such documents, data and records shall, at the option of the District Attorney, be appropriately arranged, indexed and delivered to the District Attorney by the Law Firms.
- D. Upon completion of the services hereunder or at the termination of this Agreement, The Law Firms agree not to retain, use or disclose all such documents, or copies of such documents, data and records for any purpose other than as permitted or required by this Agreement or as approved in writing by the District Attorney.

**15. Recordkeeping.** In addition to the duties and obligations outlined hereinabove, the Law Firms and any attorneys the Law Firms associate with in the prosecution of any real or potential actions described herein shall maintain itemized records of the time and reasonable and necessary litigation expenses incurred in the prosecution of the action(s).

- A. The Law Firms agree to maintain contemporaneous time and expenses records in a form acceptable to the District Attorney.
- B. Upon request, the Law Firms agree to submit quarterly statements to the District Attorney setting forth for the period a detailed description of the services performed, the time spent in performance of each service, and all disbursements.
- C. The Law Firms shall prepare and provide a final accounting of all disbursements at the conclusion of the Litigation, including all appeals, in a form acceptable to the District Attorney.
- D. The Law Firms shall maintain and preserve all data, records and other information pertaining to expenses for a period of two (2) years after the date of final payment to the Law Firms, and during that period shall produce, upon request of the District Attorney, all data, records and other evidence pertaining to expenses incurred by the Law Firms in connection with this Agreement for the purpose of an audit or other examination.

**16. Modification of Agreement.** Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Agreement shall be made by written amendment to this Agreement, signed by the Law Firms and the District Attorney. No oral modifications, alterations, amendments, changes or extension of any terms, provisions or conditions of this Agreement shall be permitted.

**17. Entire Agreement.** This Agreement sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the District Attorney and the Law Firms relative to this Agreement. This Agreement supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations oral or written, express or implied, between the District Attorney and the Law Firms other than as set forth or as referred herein.


18. **Severability.** In the event that any provisions of this Agreement is declared invalid or unenforceable by a court, such validity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Agreement.

19. **Waiver.** The failure of the Law Firms or the District Attorney to insist upon the strict compliance with any term, provision, or condition of this Agreement shall not constitute or be deemed to constitute a waiver or relinquishment of rights to enforce the same in accordance with this Agreement.

20. **Notices.** Any written notices required to be given by a party to this Agreement shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid. Notice to the District Attorney shall be sent to the District Attorney at the District Attorney's address as indicated in the Agreement. Notice to the Law Firms shall be sent to the Law Firms at the Law Firms' address as indicated in the Agreement. A Notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. The Law Firms are responsible for notifying the District Attorney in writing of any change of address.

DISTRICT ATTORNEY OF TRINITY  
COUNTY, CALIFORNIA

BY:

  
Eric L. Heryford

DATED this 28<sup>th</sup> day of August, 2015.

**BARON & BUDD, P.C.**

**BY:** \_\_\_\_\_  
Russell W. Budd, Esquire

**DATED this** \_\_\_\_\_ **day of** \_\_\_\_\_, 2015.

**GOLOMB & HONIK, P.C.**

**BY:** \_\_\_\_\_  
Richard M. Golomb, Esquire

**DATED this** \_\_\_\_\_ **day of** \_\_\_\_\_, 2015.

**CARTER WOLDEN CURTIS L.L.P.**

**BY:** \_\_\_\_\_  
Kirk Wolden, Esquire

**DATED this** 30 **day of** Sept, 2015.



# EXHIBIT C

# Trinity DA sues credit card companies on behalf of state

BY AMY GITTELSON  
THE TRINITY JOURNAL

Trinity County District Attorney Eric Heryford has sued three large credit card companies, saying credit card holders have been charged for services they didn't want and couldn't use.

Heryford filed the lawsuits against Citigroup Inc., Alliance Data Systems, First Premier Bank and their subsidiaries in September on behalf of the people of the state of California. A fourth lawsuit followed in October, naming Volkswagen of America Inc.

Although similar lawsuits have been filed by district attorney's offices in oth-

er states, these are the first in California.

"It wouldn't surprise me if at some point the Attorney General's Office or other counties wind up working with us on these," Heryford said.

The complaint against Citigroup alleges the company was offering cardholders monthly insurance for a fee so that payment requirements would be suspended if the customer were injured, became unemployed involuntarily or had certain changes in their family status.

However, telemarketers weren't telling the cardholders of exclusions for people such as sole business owners, disabled

See **LAWSUITS**, page 8

## LAWSUITS: Credit cards

Continued from page 1

people and retirees, according to the complaint.

"They still continued collecting the money," Heryford said.

The complaint also alleges "slamming," when cardholders were signed up for these add-on services without their consent. One trick listed in the complaint was a purported courtesy call, followed by a lengthy description of services offered and the question, "OK?" or "understand?" Whereupon the cardholder might respond affirmatively, and be signed up.

The complaints against the other companies list similar issues, Heryford said.

The case against Volkswagen also alleges unfair business practices. The company used computer software on its diesel vehicles that reduced emissions of pollutants from the vehicles only when they were undergoing emissions tests, the complaint states.

Then the company mounted a huge campaign advertising the vehicles as "green and environmentally friendly," Heryford said, "when in fact they were anything but."

The companies have not yet filed re-

sponses to the complaints. An e-mail to Citigroup's public affairs office seeking comment went unanswered, and a Volkswagen spokesman said the company doesn't comment on active lawsuits.

Heryford said the cases won't cost the county or his office any money because they are being handled by attorneys working on a contingency fee basis. Although he will have oversight of the cases, "it won't interfere with my caseload," he said.

While the county won't be out any money, there is "potential for substantial benefit for the county," Heryford said.

He seeks civil penalties imposed against the companies of up to \$2,500 for each violation against each victim statewide under the Unfair Business Practices code.

However, he stressed that other counties with more victims than Trinity County are likely to join in. "As the case moves forward I think it gives our county a seat at the table," he said.

Heryford notified the Trinity County Board of Supervisors about the lawsuits at the board's Oct. 20 meeting, saying it would generate state and media attention and he wanted them to hear about the cases from him first.

Wednesday, October 28, 2015



Daylight-saving time ends  
Sunday, Nov. 1, at 2 a.m.;  
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# THE TRINITY JOURNAL



**Halloween fun**  
Full list of all area Halloween festivities

— page

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# EXHIBIT D

Filed 9/24/12

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FEDERAL DEPOSIT INSURANCE CORPORATION / CONSUMER FINANCIAL PROTECTION BUREAU

WASHINGTON, D.C.

_____	)	JOINT
In the Matter of	)	CONSENT ORDER,
	)	ORDER FOR RESTITUTION,
DISCOVER BANK	)	AND ORDER TO PAY
GREENWOOD, DELAWARE	)	CIVIL
	)	MONEY PENALTY
	)	
(INSURED STATE NONMEMBER BANK)	)	Docket Numbers FDIC-11-548b;
_____	)	FDIC-11-551k & 2012-CFPB-0005

The Federal Deposit Insurance Corporation ("FDIC") is the appropriate Federal banking agency with respect to Discover Bank, Greenwood, Delaware ("Discover"), under section 3(q) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1813(q). The Consumer Financial Protection Bureau ("CFPB") has jurisdiction over Discover, pursuant to sections 1002(6), 1025 and 1053(b) of the Consumer Financial Protection Act ("CFP Act"), 12 U.S.C. §§ 5481(6), 5515 and 5563(b). The term "Discover" shall include Discover Bank and all institution-affiliated parties, as defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), and, in connection with the Products as defined herein, all affiliates of Discover who are service providers as defined in sections 1002(1) and (26) of the CFP Act, 12 U.S.C. §§ 5481(1) and (26).

The FDIC and CFPB have determined that Discover has engaged in deceptive acts and practices in or affecting commerce, in violation of section 5 of the Federal Trade Commission Act ("Section 5"), 15 U.S.C. § 45(a)(1), and in deceptive acts and practices in violation of sections 1031 and 1036 of the CFP Act (together "Section 1036"), 12 U.S.C. §§ 5531, 5536, in

connection with the marketing, sales, and operation of Discover's Payment Protection, Identity Theft Protection, Wallet Protection and Credit Score Tracker products, as well as any related predecessor products (each a "Product" and, collectively, the "Products") that were offered and sold to individual holders of Discover consumer credit card accounts (each a "Cardmember") by Discover. The FDIC further has determined that Discover has engaged in unsafe or unsound banking practices.

Discover, by and through its duly elected and acting Board of Directors ("Board"), has executed a STIPULATION AND CONSENT TO THE ISSUANCE OF A JOINT CONSENT ORDER, ORDER FOR RESTITUTION, AND ORDER TO PAY CIVIL MONEY PENALTY ("CONSENT AGREEMENT"), dated September 21, 2012, that is accepted by the FDIC and the CFPB. With the CONSENT AGREEMENT, Discover has solely for the purpose of this proceeding, without admitting or denying the findings of fact, conclusions of law, or any violations of law or regulation for which civil money penalties may be assessed herein, consented to the issuance of this JOINT CONSENT ORDER, ORDER FOR RESTITUTION, AND ORDER TO PAY CIVIL MONEY PENALTY (collectively "JOINT CONSENT ORDER") by the FDIC and the CFPB.

#### **FINDINGS OF FACT**

The FDIC and the CFPB find, and Discover neither admits nor denies, the following facts:

1. Discover marketed and sold the Products to Cardmembers during the period December 1, 2007 through August 31, 2011 (the "relevant time period"). During this time, Discover sold one or more Products to approximately 4.7 million Cardmembers.
2. During the relevant time period, Discover telemarketed the Products to Cardmembers through both outbound sales calls and inbound customer service calls. Discover contracted with telemarketing vendors to conduct outbound sales calls. Additionally, Discover's



in-house telemarketers marketed the Products when Cardmembers called to activate their Discover credit cards or placed other types of customer service calls.

3. Discover developed numerous versions of telemarketing scripts that were used to market each Product. Discover required its in-house and third-party telemarketers to adhere to these scripts. The scripts led telemarketers through the introduction and sales of the Products and the outbound telemarketing scripts also typically provided the telemarketers with specific responses to questions that Cardmembers might raise during a telemarketing call.

4. Discover's inbound and outbound telemarketing scripts contained material misrepresentations and omissions related to the Products. These misrepresentations and omissions were likely to mislead reasonable consumers about whether they were purchasing a Product during a telemarketing sales call. Examples of these misrepresentations and omissions include, but are not limited to, the following:

- a. Introductory statements contained in the outbound telemarketing scripts that disguised the purpose of an outbound sales call by indicating to Cardmembers that Discover was placing a courtesy call and misleadingly implied that a Product was a free "benefit" rather than a program for which Discover charged an additional fee.
- b. Language in telemarketing scripts that frequently asked Cardmembers if they agreed to "be enrolled" in or "become a member" of a Product program but omitted the material fact that enrollment or membership constituted an agreement to purchase the Product.
- c. Language in telemarketing scripts that frequently solicited Cardmembers' interest in "enrolling" in a Product program before providing the Product's price or material terms and conditions.

- d. Statements in telemarketing scripts that typically stated that Cardmembers would receive a letter describing the Payment Protection Product's material terms and conditions before Cardmembers were required to pay for that Product, implying that Cardmembers had not purchased the Product before receipt of the letter. In fact, Discover sent its Cardmembers this letter only after Cardmembers had been enrolled in the Payment Protection Product program.
- e. Suggested rebuttal responses in outbound telemarketing scripts that implied that Cardmembers could comparison shop by reviewing a comprehensive list of Product terms and conditions before they were enrolled in a Product program. In fact, Cardmembers were required to first purchase a Product before receiving a comprehensive list of Product terms and conditions.

5. Frequently, Discover's telemarketers spoke more rapidly during the mandatory disclosure portion of the sales call, which included a statement of the Product's price and some – but not all – material terms and conditions of the Product. Discover's telemarketers also frequently downplayed this mandatory disclosure during their telemarketing sales presentation, implying to Cardmembers that the mandatory disclosure was not important, even though it was designed to alert Cardmembers to the Product's price and certain terms and conditions.

6. The impact of Discover's deceptive telemarketing scripts and presentations was compounded by the fact that Discover did not need to ask Cardmembers for their credit card numbers in order to bill them for the Products because it had access to Cardmembers' credit card numbers and could (and did) directly bill the cost of the Products to Cardmembers' Discover accounts.

7. Discover's telemarketing scripts for the Payment Protection Product also typically failed to disclose material terms and conditions of the Payment Protection Product. For example, these scripts failed to state that individuals who are self-employed, unemployed, employed part-time, or suffering from a pre-existing medical condition cannot obtain certain Payment Protection Product benefits.

Having determined that the requirements for issuance of an order under sections 8(b) and 8(i)(2) of the FDI Act, 12 U.S.C. §§ 1818(b) and 1818(i)(2), and sections 1053(b) and 1055(c) of the CFP Act, 12 U.S.C. §§ 5563(b) and 5565(c), have been satisfied, the FDIC and the CFPB hereby jointly issue the following order:

#### **JOINT CONSENT ORDER**

IT IS HEREBY ORDERED that Discover cease and desist from the following violations of law and regulations and from engaging in the following unsafe or unsound banking practices and deceptive acts and practices, all of which were identified through the investigation by the FDIC and the CFPB which focused on the time period December 1, 2007 through August 31, 2011:

- (a) operating in violation of Section 5 or of Section 1036;
- (b) engaging in deceptive marketing and sales of the Products in violation of Section 5 or of Section 1036;
- (c) operating Discover with an inadequate compliance management system to ensure compliance with Section 5 and with Section 1036 and all implementing rules and regulations, regulatory guidance, and statements of policy;
- (d) operating Discover without adequate oversight by the Board and supervision by senior management of the Products to ensure compliance with Section 5 and with Section 1036 and all implementing rules and regulations, regulatory guidance, and statements of policy; and



(e) operating Discover with an inadequate system of internal controls and an inadequate internal audit system with regard to the Products to ensure compliance with Section 5 and with Section 1036 and all implementing rules and regulations, regulatory guidance, and statements of policy.

IT IS FURTHER ORDERED that Discover take affirmative actions as follows:

#### **BOARD OVERSIGHT**

1. The Board shall participate fully in the oversight of Discover's compliance management system, and take full responsibility for ensuring that appropriate policies and procedures are in place. The Board shall also ensure that Discover adequately supervises its compliance-related activities, consistent with the role and expertise commonly expected for directors of banks of comparable size and complexity and offering comparable banking products and services. Without limiting the generality of the foregoing, the Board shall require, consistent with this Order, policies and objectives to ensure that all marketing, sales, and operations efforts relating to the Products comply with Section 5 and with Section 1036, as described more particularly herein.

#### **CORRECTIVE ACTIONS**

2. (a) Within 60 days from the effective date of this JOINT CONSENT ORDER, Discover shall take all actions necessary to eliminate all violations of Section 5 and of Section 1036 concerning the marketing, sales and/or operation of the Products. In addition, Discover shall take all necessary steps to ensure future compliance with Section 5 and with Section 1036, as described more particularly, and in accordance with the time frames set forth, herein.

(b) Within 60 days from the effective date of this JOINT CONSENT ORDER, unless an alternate timeframe is set forth in this JOINT CONSENT ORDER, Discover shall take all actions necessary to ensure the revision of any and all advertising, marketing, and promotional materials, and any other oral, written, or electronic communications used in connection with any

solicitation that mentions any of the Products, to disclose clearly and prominently (1) all material conditions, benefits, and restrictions concerning the Products; and (2) that Cardmembers are being asked to purchase a Product that is not required for the extension of credit.

3. (a) Discover shall not make, or allow to be made, any material misleading or deceptive representation, statement, or omission, expressly or by implication, in the marketing materials, telemarketing scripts and/or sales presentation used to solicit any Cardmember or prospective Cardmember, or in any similar communication in connection with any Product.

(b) Within 60 days from the effective date of this JOINT CONSENT ORDER, Discover shall take all actions necessary to comply with the specific guidance set forth in *Unfair or Deceptive Acts or Practices by State-Chartered Banks* (FIL-26-2004, issued March 11, 2004).

(c) Without limiting the generality of the foregoing, Discover shall not make or allow to be made, directly or indirectly, any misrepresentation or omission, expressly or by implication, about any material term of an offer related to any Product in connection with the advertising, marketing (including telemarketing and online marketing), offering, soliciting, eligibility, billing, servicing, or account maintenance with respect to a Product, including but not limited to misrepresentations or omissions as to the following:

- (i) any and all fees, costs, expenses, and charges associated with the Products;
- (ii) all material conditions, benefits, and restrictions related to the Products;
- (iii) the purpose of sales calls and/or sales portions of servicing or other calls;
- (iv) payment terms for a Product, including a description of when a Cardmember will be charged for a Product or incur charges for a Product;
- (v) refunds or adjustments for a Product fee and Discover policies for such refunds and adjustments; and
- (vi) the balance upon which any percentage fee charge for the Payment Protection Product would be based, and the fact that the Cardmember will

be charged a fee for the Payment Protection Product even if the  
Cardmember pays the outstanding balance in full on the due date thereof.

4. (a) When soliciting the Products by telephone, Discover shall:
  - (i) comply with all requirements of the Telemarketing Sales Rule ("TSR"),  
16 C.F.R. Part 310;
  - (ii) state promptly after beginning an outbound telemarketing call, and  
promptly after beginning discussion of a Product on an inbound  
telemarketing call, that the purpose of the call or portion of the call is to  
determine whether a Cardmember has interest in and wishes to purchase  
an optional Product;
  - (iii) for all Products other than the Payment Protection Product, disclose  
clearly, prior to purchase, the total cost of the Product and how frequently  
the fee is assessed, and, as to the Payment Protection Product, disclose  
clearly, prior to purchase, how the fee is calculated and that the  
Cardmember will be charged a fee for the Product at the end of each  
billing cycle during which the Cardmember has a balance, regardless of  
whether the Cardmember paid the balance in full by the due date thereof;
  - (iv) disclose clearly, prior to purchase, all material conditions, benefits and  
restrictions relating to a Product;
  - (v) disclose clearly, prior to purchase, that the Cardmember is not required to  
purchase the Product, and that the purchase of the Product is voluntary and  
optional;
  - (vi) clearly and prominently explain relevant material restrictions on eligibility  
for the Products, including, in the case of the Payment Protection Product,  
explaining to Cardmembers the restrictions on eligibility for benefits, such



as those related to being unemployed, self-employed, or on a leave of absence from their place of employment, or suffering from a pre-existing medical condition;

(vii) disclose all Product disclosures, including any disclosures required herein or otherwise required by law, in a clear manner and at a reasonable speed; and

(viii) after such disclosures are read, require that a Cardmember acknowledge that the purchase of the Product is optional and voluntary and that the Cardmember affirmatively requests or consents to purchase the Product.

(b) Directly after a Cardmember purchases a Product by telephone, Discover shall disclose clearly the following information during that same telephone call:

- (i) that the Cardmember has purchased the Product;
- (ii) that the Cardmember's Discover credit card will be charged or that the Cardmember's account will start to incur charges for the Product within two billing cycles or less, but no sooner than fifteen days from the date of the telephone call, pending completion of additional enrollment verification steps and other enrollment procedures and that the charge for the Product will appear on the Cardmember's billing statement;
- (iii) the Product's cancellation policy and the phone number that the Cardmember must use to cancel enrollment in the Product program; and
- (iv) the Product's refund policy, including the time frame within which the Cardmember must cancel before incurring a fee.

(c) When Cardmembers request that additional information about a Product be sent prior to purchasing that Product, Discover shall provide the Cardmember with that information, including but not limited to the material conditions, benefits, and restrictions of the Product and

shall not condition in any way the provision of such materials on the Cardmember agreeing to purchase or enroll in a Product program. The materials may be provided in electronic or hard copy format.

(d) Discover shall refrain from marketing or soliciting the Products during or in connection with activation calls, unless, prior to any solicitation, the Cardmember is first informed that activation is complete; that listening to the Product solicitation is optional; and that the Product being sold is optional and not a condition for the extension of credit.

(e) Within three business days after a Cardmember purchases the Payment Protection Product, and within seven business days after a Cardmember purchases any Product other than the Payment Protection Product, Discover shall mail the Cardmember a disclosure that clearly and prominently presents the following information:

- (i) the fact that the Cardmember has purchased a Product, the date on which the Cardmember purchased the Product and the amount of the fee for the Product;
- (ii) the Product's material conditions, benefits and restrictions;
- (iii) the fact that the Cardmember's Discover credit card account will incur fee charges for the Product and the date when those charges will appear on his or her billing statement;
- (iv) the billing period during which the Product fee charges will begin appearing on the Cardmember's account statement;
- (v) for all Products other than the Payment Protection Product, the total cost of the Product and how frequently the fee is assessed, and, as to the Payment Protection Product, how the fee is calculated and that the Cardmember will be charged a fee at the end of each billing cycle during

which the Cardmember maintains a balance, regardless of whether the Cardmember pays the balance in full during the applicable grace period;

- (vi) the Product's cancellation policy and the phone number the Cardmember must use to cancel; and
- (vii) the Product's refund policy, including the date by which the Cardmember must cancel before incurring a fee.

(f) Discover must obtain the Cardmember's express affirmative consent to purchase the Product, separate from any consent Discover may obtain to pull a Cardmember's consumer report. In obtaining a Cardmember's consumer report in relation to any of the Products, Discover must comply with the Fair Credit Reporting Act, 16 U.S.C. § 1681 *et seq.*

(g) Discover shall include a message on the first three periodic statements on which a Product charge appears, highlighting inclusion of the charge. The statement shall be positioned in a clear and conspicuous manner and shall be in 12-point font or any larger type.

(h) In any telephone conversation in which a Cardmember indicates that he or she did not authorize the purchase of, does not want, or wishes to cancel a Product, Discover shall immediately agree to cancel the Product, no longer charge that Cardmember for the Product, and not attempt to re-sell the Product to that Cardmember during the cancellation call. In addition, in response to a Cardmember's inquiry or complaint that a Product purchase was not agreed to, Discover shall review whether any such Product purchase was agreed to by the Cardmember. If Discover determines that the purchase was agreed to, Discover shall provide the Cardmember with all information providing the basis for this determination, including but not limited to any voice recording of a telemarketing sales call or portion of such a call. Discover shall make any such determination by reviewing all relevant information, including any voice recording, and this determination shall only be made by a Bank employee who is specifically trained to determine whether a telemarketing sales call complied with the provisions of this JOINT CONSENT

ORDER and all other disclosures required by law. If Discover determines that a purchase was not agreed to, Discover shall promptly refund all of the Product Fees and finance charges on Product Fees incurred by the Cardmember.

(i) If at any time a Cardmember applies for, but is denied, benefits related to a Product, or the Cardmember's benefits are suspended, Discover must clearly and prominently explain the relevant material limitations of the Product and restrictions on eligibility for the Product, including, in the case of the Payment Protection Product, explaining to Cardmembers the restrictions on eligibility for benefits, such as those related to being unemployed, self-employed, or on a leave of absence from their place of employment, or suffering from a pre-existing medical condition. After disclosing such material limitations and restrictions on eligibility, Discover must require that the Cardmember acknowledge that the purchase of the Product is optional and voluntary and that the Cardmember affirmatively requests or consents to remain enrolled in and continue to pay for the Product.

(j) During any telemarketing solicitation in which a Cardmember requests or expresses a desire that Discover make no further calls to the Cardmember with respect to a Product, Discover shall immediately place the Cardmember on Discover's No Call List. Discover shall provide an updated copy of the No Call List to all third-party telemarketers on a bi-weekly basis.

(k) With respect to Paragraphs 3(c), 4(a)(i), 4(a)(iv), 4(a)(vi), 4(b)(ii), 4(b)(iv), 4(d), 4(e), 4(h), and 4(i), Discover shall have 120 days from the effective date of this JOINT CONSENT ORDER to comply with the requirements set forth in those Paragraphs.



### COMPLIANCE MANAGEMENT SYSTEM

5. (a) Within 60 days from the effective date of this JOINT CONSENT ORDER, Discover shall review, revise, and/or develop as necessary a risk-based compliance management system, including a comprehensive written compliance program (“Compliance Program”) to ensure that the marketing, sale, and operation of the Products comply with Section 5 and with Section 1036. This Compliance Program shall be designed to comply with all provisions of this JOINT CONSENT ORDER. At a minimum, the Compliance Program shall provide for:

- (i) Board designation of Discover management responsible for review and approval prior to first use, and subsequent re-reviews as may be required by, among other things, regulatory guidance and changes in laws and/or regulations, of (1) all marketing and solicitation materials, including direct mail or Internet solicitations, promotional materials, advertising, and telemarketing scripts regarding the Products, (2) other materials provided to Cardmembers generated in connection with the administration and servicing of the Products, and (3) changes or amendments with respect to the materials described in (1) and (2);
- (ii) a training program that includes regular, specific, and comprehensive training related to Section 5, Section 1036, and all implementing rules and regulations, regulatory guidance, and statements of policy for appropriate Discover personnel and, specifically, for employees having responsibilities that relate to Section 5 and to Section 1036, including senior management and the Board, commensurate with their individual job functions and duties;
- (iii) a training and compliance program that monitors all third parties, including all telemarketing vendors and Product program administrators,

involved in the marketing, sales, and/or operation of the Products to ensure that these third parties comply with Section 5, Section 1036, and all implementing rules and regulations, regulatory guidance and statements of policy;

- (iv) an appropriate number of compliance personnel, as reasonably determined by Discover, with sufficient experience in and knowledge of the Products and applicable laws, including but not limited to Section 5 and Section 1036, to administer the Compliance Program;
- (v) procedures for promptly addressing and resolving all consumer complaints arising from any Product, regardless of the source of the complaints or the channel through which the complaint was submitted, including through any third parties, and maintaining appropriate records of all complaints and the resolution of the complaints; and
- (vi) a policy providing that any bonus or incentive compensation payable to any employee, agent, or third party that is calculated based directly on the sale of one or more of the Products will not be due or payable if the Cardmember to whom the Product is sold did not maintain the Product for at least three billing cycles.

(b) The Compliance Program shall be administered by compliance personnel with sufficient experience in, and knowledge of, Section 5 and Section 1036 and shall provide for sufficient personnel in order to fully comply with all requirements of this JOINT CONSENT ORDER.

(c) Within 60 days from the effective date of this JOINT CONSENT ORDER, Discover shall submit the written Compliance Program to the Regional Director of the FDIC's New York Regional Office ("FDIC Regional Director"), the CFPB Assistant Director of the



Office of Enforcement, and the CFPB Regional Director, Midwest Regional Office (“CFPB Regional Director”) for review and non-objection.

(d) Within 60 days following receipt of comments or non-objection from the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director, Discover shall adopt and implement the Compliance Program, as revised, and shall record the adoption of the Compliance Program in the minutes of the Board.

#### **INTERNAL CONTROL SYSTEM**

6. Within 90 days from the effective date of this JOINT CONSENT ORDER, Discover shall enhance its internal control system to provide for:

(a) an organizational structure for the day-to-day operation and oversight of the Products, and internal controls systems related thereto, that provides for (i) clear lines of authority and identification of reporting lines; (ii) clear assignment of responsibility along the lines of authority for assessing and monitoring the compliance of Discover with all requirements of Section 5 and Section 1036, as well as all applicable policies and procedures of Discover; and (iii) clear assignment of responsibility for reporting to the Board the results of the assessment and monitoring activity performed under this subparagraph, including specification of information and data to be reported to the Board on a periodic, but not less than quarterly, basis;

(b) initial and periodic, but not less than quarterly, written reports to the Board assessing the regulatory and compliance risks associated with the Products and related marketing; and

(c) an adequate number of staff to effect and maintain full and complete compliance with subparagraphs (a) and (b) above.

#### **COMPLIANCE AUDIT PROGRAM**

7. (a) Within 60 days from the effective date of this JOINT CONSENT ORDER, Discover shall review and revise its internal compliance audit program as necessary to ensure an

effective and independent review of Discover's internal policies and procedures and compliance with Section 5 and with Section 1036 with respect to the Products and internal compliance audit functions related thereto. The revised internal compliance audit program shall, at a minimum, include policies, procedures, and processes that ensure:

- (i) that the internal compliance audits of the Products are independent and adequate in scope and that the audit and compliance staff is comprised of a sufficient number of qualified persons;
- (ii) completion of an internal compliance audit plan each calendar year that is reviewed and approved by the Board;
- (iii) annual risk assessments of the Products to ensure that internal compliance audits are performed with reasonable frequency;
- (iv) assignment of ratings or expressions of opinion as to the adequacy, effectiveness, and efficiency of the internal control environment of the Products; and
- (v) provisions for a formal tracking and monitoring system for exceptions identified by internal compliance audits and regulatory examinations, the tracking of deficiencies and exceptions noted in audit reports with periodic, but not less than quarterly, status reports to the Board with each deficiency and material exception identified, the source of the deficiency or exception and date noted, responsibility for correction assigned, and the date corrective action was taken in the report.

(b) Internal compliance audit findings, deficiencies, and recommendations shall be documented in a written report and provided to the Board within thirty (30) days after completion of the audit. Discover shall promptly forward a copy of each internal compliance audit report and the minutes reflecting the Board's review of such report to the FDIC Regional

Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director. No later than at its next regularly scheduled board meeting following receipt of the written audit report, the Board shall take action to address the audit's findings, correct any deficiencies noted, and implement any recommendations. The Board may, where appropriate, direct management to take certain actions related thereto, and where management has been so directed, ensuring that findings, deficiencies, and recommendations are appropriately addressed. The Board's review of the written report shall be fully documented in its minutes, together with a report of the actions in response to the audit, including, where applicable, an explanation as to why a recommendation has not been implemented.

#### **OVERSIGHT COMMITTEE**

8. (a) Within 30 days from the effective date of this JOINT CONSENT ORDER, the Board shall establish an oversight committee ("Oversight Committee") or designate an existing Board committee as an Oversight Committee. This Committee shall be charged with the responsibility of ensuring compliance with the provisions of this JOINT CONSENT ORDER.

(b) The Oversight Committee shall monitor compliance with this JOINT CONSENT ORDER and submit a written report quarterly to the entire Board, prior to the regularly scheduled meeting of the Board, and a copy of the report and any discussion related to the report or this JOINT CONSENT ORDER shall be part of the minutes of the Board meeting. Copies of the quarterly report shall be submitted to the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director, as part of the quarterly progress reports and certificates of compliance required by Paragraph 9 of this JOINT CONSENT ORDER. Nothing contained herein shall diminish the responsibility of the entire Board to ensure compliance with the provisions of this JOINT CONSENT ORDER.



### **PROGRESS REPORTS AND CERTIFICATIONS OF COMPLIANCE**

9. Within 30 days from the end of each calendar quarter following the effective date of this JOINT CONSENT ORDER, Discover shall furnish to the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director, written progress reports addressing each provision of this JOINT CONSENT ORDER and detailing the form, manner, results, and dates of any actions taken to secure compliance with the provisions of this JOINT CONSENT ORDER. All progress reports shall be reviewed by the Board and made a part of the Board minutes. The progress reports shall be true and accurate and accompanied by a certification of compliance by a member of the Board who is a member of the Oversight Committee. The certification of compliance shall include the following:

(a) a statement confirming that Discover is in compliance with all provisions of the JOINT CONSENT ORDER, or

(b) if Discover is not in compliance with all provisions of the JOINT CONSENT ORDER, Discover must provide:

(1) a list of the provisions with which Discover is not yet in compliance, an explanation of why Discover is not yet in compliance with each specific provision, and a description of the actions Discover has taken to comply with the provision; and

(2) a statement that Discover will be in full compliance with the JOINT CONSENT ORDER, as well as a description of the actions Discover will take to be in full compliance, no later than 90 days from submission of the first progress report and certificate of compliance submitted to the FDIC and the CFPB following the effective date of the JOINT CONSENT ORDER.

### **SHAREHOLDERS**

10. Discover shall provide or otherwise furnish to its shareholders a description of this JOINT CONSENT ORDER. The description shall fully describe the JOINT CONSENT

ORDER in all material respects. The description and any accompanying communication, statement, or notice shall be sent to the FDIC, Division of Depositor and Consumer Protection, Accounting-Registration, Disclosure and Securities Section, 550 17th Street, N.W., Washington, D.C. 20429 and to the CFPB, Office of Enforcement, 1700 G Street, N.W., Washington, D.C. 20552, for non-objection or comment prior to dissemination to shareholders. Any changes requested to be made by the FDIC or CFPB shall be made prior to dissemination of the description, communication, notice, or statement. This description shall be disseminated in conjunction with Discover's next shareholder communication and in conjunction with its notice or proxy statement preceding Discover's next shareholder meeting. The terms "next shareholder communication" and "next shareholder meeting" mean the next shareholder communication and next shareholder meeting immediately after the FDIC and CFPB provide Discover with either non-objections to or comments about the description.

#### **RECORDKEEPING**

11. (a) For a period of at least two years from the date a Cardmember is no longer enrolled in a Product program, Discover must retain the following records concerning that Cardmember and his or her enrollment in that Product program:

- (i) A file containing the name, address, phone number, dollar amounts paid, quantity of Products purchased, description of the Product(s) purchased, date on which the Product(s) was purchased, and records reflecting the date on which the required welcome kit was mailed for each Cardmember (if a Cardmember left the program, include the date the Cardmember left a Product program and the reason the Cardmember left the Product program); and
- (ii) Records for each Cardmember reflecting that a Cardmember expressly agreed to purchase the Product, including time-stamped copies of voice

recordings of telephone calls during which a Cardmember purchased the Product.

- (b) For a period of six years from the effective date of this JOINT CONSENT ORDER, Discover must retain the following records:
- (i) All documents and records necessary to demonstrate full compliance with each provision of this JOINT CONSENT ORDER;
  - (ii) Records reflecting, on an annual basis, the number of Cardmembers who canceled a Product, the number of Cardmembers who were enrolled in a Product Program who closed their Cardmember accounts, and the number of Cardmembers who were enrolled in a Product Program whose Cardmember accounts were charged off by Discover;
  - (iii) All Cardmember complaints and refund requests (whether received directly or indirectly, such as through a third party) related to the Products, and any responses to those complaints or requests;
  - (iv) Copies of all versions of sales scripts, training materials, advertisements, or other marketing materials, including terms and conditions, fulfillment packages, and welcome kits related to the Products, including any such materials used by a third party on Discover's behalf; and
  - (v) All records pertaining to the restitution described below in Paragraph 12, including, but not limited to, documentation of the processes and procedures used to determine the Eligible Consumers, as that term is defined below, the names, contact, and account information of the Eligible Consumers, any mailing records, and documentation that the appropriate restitution was made.



(c) For a period of two years from the effective date of this JOINT CONSENT ORDER, Discover must retain accounting records that reflect the cost of Product(s) sold and revenues generated.

### **RESTITUTION AND OTHER RELIEF**

IT IS FURTHER ORDERED that

12. (a) Within 90 days from the effective date of this JOINT CONSENT ORDER, Discover shall commence the restitution and other relief described below and complete such restitution within 150 days from the effective date of this JOINT CONSENT ORDER.

(b) Restitution shall be provided to all Eligible Consumers, as that term is defined below, notwithstanding any waiver or relinquishment contained in any settlement notice applicable to any class action or settlement class from which an Eligible Consumer did not opt-out or any other waiver executed by an Eligible Consumer.

(c) For purposes of this JOINT CONSENT ORDER, the following definitions will apply:

- (i) "Account" shall mean a Discover individual credit card account associated with a Cardmember at any time during the Eligibility Period (as defined herein).
- (ii) "90 Days of Fees" shall mean, with respect to a particular Product, (1) the total Product Fees (as defined herein) charged to a Cardmember for the particular Product during the Restitution Period (as defined herein), (2) divided by the total number of calendar days the Cardmember was enrolled in the particular Product, even if multiple enrollment periods were not contiguous, during the Restitution Period (as defined herein), (3) multiplied by 90.

- (iii) “Eligible Consumer” shall mean any Cardmember who has had an Account to which a Product Fee was posted at any time during the Eligibility Period due to any Product purchase made during the Eligibility Period. The term “Eligible Consumer” shall include all existing and former Cardmembers, including all Cardmembers whose Accounts have been closed, charged-off, sold, or otherwise transferred, through securitization or otherwise, by Discover. The term “Eligible Consumer” shall not include, with respect to the Payment Protection Product, any Cardmember enrolled in the Payment Protection Product, if the Cardmember activated and received Payment Protection Product benefits at any time during the Eligibility Period. Nonetheless, any Cardmember enrolled in the Payment Protection Product who is not an “Eligible Consumer” with respect to the Payment Protection Product may be an “Eligible Consumer” with respect to any other Product purchased during the Eligibility Period regardless of the receipt of any Payment Protection Product benefits. With respect to each Product, the term “Eligible Consumer” shall include only those Cardmembers who purchased the Product through a telemarketing sales channel.
- (iv) “Eligibility Period” shall mean the period beginning on December 1, 2007 and ending on August 31, 2011.
- (v) “Product Fees” shall mean all fees, charges, premiums, or other amounts posted to, or otherwise charged to, an Eligible Consumer’s Account with respect to any Product or Products, however characterized. Product Fees shall not include finance charges or interest associated with the Products.

- (vi) "Refunded Product Fees" shall mean any refunds of Product Fees made by Discover and received by an Eligible Consumer prior to the effective date of this JOINT CONSENT ORDER (including any payments to Eligible Consumers by Discover pursuant to the settlement of any class action litigation).
  - (vii) "Restitution Amount" shall mean, with respect to each Eligible Consumer, an amount, if greater than zero, equal to:
    - (A) for all Eligible Consumers who were enrolled in any Product for an aggregate total of 364 days or less, the total amount of Product Fees charged to the Cardmember related to each such Product during the applicable Restitution Period, minus Refunded Product Fees, if the resulting amount is greater than zero; and
    - (B) for all Eligible Consumers who were enrolled in any Product for an aggregate total of 365 days or more, 90 Days of Fees minus Refunded Product Fees, if the resulting amount is greater than zero.
  - (viii) "Restitution Period" shall mean, for each Eligible Consumer, all periods beginning on the date any Cardmember was enrolled in a Product and ending on the last date of the billing cycle in which a Product Fee was posted to the Account, but ending no later than August 31, 2011.
- (d) Discover shall provide restitution to each Eligible Consumer pursuant to the following process based on the Account status as of the effective date of the JOINT CONSENT ORDER:

- (i) for any open Account, Discover shall provide a credit posted to the Account for the Restitution Amount, regardless of whether such action results in a credit balance.
- (ii) for any closed Account, unless the Account has an outstanding balance, has been charged off, or is delinquent, Discover shall mail a certified restitution check in the Restitution Amount to such Eligible Consumer.
- (iii) for any closed Account that is delinquent but not charged off, Discover shall issue a credit decreasing the delinquent balance by the Restitution Amount. Where the Restitution Amount is greater than the delinquent balance, Discover shall mail a restitution check for the difference between the delinquent balance and the Restitution Amount to the affected Eligible Consumer.
- (iv) for any charged-off Account, Discover shall issue a credit decreasing the charged-off balance by the Restitution Amount. Where the Restitution Amount is greater than the existing charged-off balance, Discover shall mail a restitution check for the difference between the charged-off balance and the Restitution Amount to the affected Eligible Consumer.
- (v) with respect to any bankruptcy, probate, accounts in litigation and sold charged-off accounts, for which Discover has notice, Discover shall take all appropriate action to reflect the credit of the Restitution Amount and any additional Restitution Amount as appropriate, consistent with the requirements set forth in Paragraph 12(g).

(e) In the event that the aggregate Restitution Amounts provided to all Eligible Consumers pursuant to Paragraph 12(d) equal an amount less than \$200,000,000, Discover shall promptly inform the FDIC Regional Director, the CFPB Assistant Director of the Office of



Enforcement, and the CFPB Regional Director, of the amount of the difference between the aggregate Restitution Amounts provided and \$200,000,000 (such amount is referred to as the “Additional Restitution”). In such an event, the Additional Restitution shall be distributed in equal amounts to all Eligible Consumers who were enrolled in any Product for an aggregate total of 365 days or more in accordance with the process set forth in Paragraph 12(d) above.

(f) Discover shall not condition the payment of Restitution Amounts or Additional Restitution to any Eligible Consumer on that Eligible Consumer waiving any right.

(g) With respect to any Eligible Consumer’s Account that receives a Restitution Amount and/or Additional Restitution in the form of a credit that decreases the existing balance or charged-off balance, Discover shall:

- (i) report the updated balance to each credit reporting agency to which Discover had previously furnished balance information for the account; or
  - (ii) delete the account trade line at each credit reporting agency to which Discover had previously furnished balance information for the account; or
  - (iii) in the case of an account sold to an unaffiliated third party, also inform the third party of the credit to the Account and the resulting adjustment of the unpaid balance and request that such third-party owner of the debt report the updated balance to, or delete the account trade line at, each credit reporting agency to which the third-party owner of the debt had previously furnished balance information for the account.
- (h) (i) Within 30 days from the effective date of this JOINT CONSENT ORDER, Discover shall submit to the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director for review and non-objection the proposed text of the letters that will be sent to Eligible Consumers regarding Restitution Amounts in the form of

account credits or restitution checks. Such letters shall include language explaining the reason Discover is crediting an Account or sending a restitution check, together with an explanation of the manner in which the amount of restitution was calculated, and shall include a statement that the restitution payment is because of, and in accordance with, the terms of this JOINT CONSENT ORDER.

- (ii) Upon receipt by Discover of the written non-objection of, or comments from, the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director the letters described above shall be promptly mailed, incorporating the comments, if any, of the FDIC Regional Director and the CFPB Assistant Director of the Office of Enforcement, by United States Postal Service certified mail, address correction service requested. The envelopes shall contain no materials other than the approved letters, restitution checks, when appropriate, and any other materials reviewed and not objected to by the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director. Discover shall make reasonable attempts to locate Eligible Consumers whose notification letter and/or restitution check is returned for any reason, including conducting a standard address search using the National Change of Address System. Discover shall promptly re-mail all returned letters and any restitution checks to corrected addresses, if any.

- (i) Within 90 days from the effective date of this JOINT CONSENT ORDER, and every 30 days thereafter until completion of the restitution required by this JOINT CONSENT ORDER, Discover's "Audit and Risk Committee," or the equivalent Committee of the Board,



shall prepare and send to the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director, a detailed written report that explains the processes and procedures by which Discover identified the Eligible Consumers and determined the applicable Restitution Amounts described above. The report shall also include the following:

(i) total number of Eligible Consumers, (ii) names, contact, and account information of the Eligible Consumers, (iii) Restitution Amount and/or Additional Restitution to which each Eligible Consumer is entitled, (iv) total amount of Restitution Amounts and/or Additional Restitution to be paid, (v) Discover's procedures for contacting Eligible Consumers who no longer maintain an Account and (vi) number of Eligible Consumers for whom the Restitution Amount and/or Additional Restitution has yet to be determined.

(j) Within 30 days from the effective date of this JOINT CONSENT ORDER, Discover shall hire an independent auditor that is acceptable to the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director to verify that Discover has accurately identified Eligible Consumers and the Restitution Amount and/or Additional Restitution with respect to whom restitution checks are to be issued or for whom Accounts are to be credited as required by this JOINT CONSENT ORDER. The independent auditor shall prepare a detailed written report of the processes and procedures by which Discover intends to make the restitution. Before Discover initiates the restitution process and within 90 days from the effective date of this JOINT CONSENT ORDER, the report described shall be submitted to the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director for review, comment and non-objection. A detailed written report from the independent auditor describing the status of Discover's restitution distribution shall be submitted to the FDIC Regional Director, the CFPB Assistant Director of the Office of Enforcement, and the CFPB Regional Director for review, comment

and non-objection every 30 days thereafter until completion of the restitution required by this JOINT CONSENT ORDER.

### **JOINT ORDER TO PAY**

IT IS FURTHER ORDERED that, by reason of the alleged violations of law and/or regulations, and after taking into account the CONSENT AGREEMENT, the appropriateness of the penalty with respect to the financial resources and good faith of Discover, the gravity of the conduct by Discover, the severity of the risks to or losses of consumers, the history of previous conduct by Discover, and such other matters as justice requires, pursuant to section 8(i)(2) of the FDI Act, 12 U.S.C. § 1818(i)(2) and section 1055(c) of the CFP Act, 12 U.S.C. § 5565(c): a civil money penalty of FOURTEEN MILLION UNITED STATES DOLLARS (\$14,000,000.00) is assessed against Discover. Within fifteen (15) days of the effective date of this JOINT CONSENT ORDER, Discover shall pay such civil money penalty to the Treasury of the United States and to the Consumer Financial Civil Penalty Fund administered by the CFPB under section 1017(d) of the CFP Act, 12 U.S.C. § 5497(d), as directed by the FDIC and CFPB. Discover shall pay such civil money penalty itself, and is prohibited from seeking or accepting indemnification for such payment from any third party.

### **MISCELLANEOUS**

The provisions of this JOINT CONSENT ORDER shall not bar, estop, or otherwise prevent the FDIC, the CFPB or any other federal or state agency or department from taking any other action against Discover.

This JOINT CONSENT ORDER shall be effective on the date of issuance.

The provisions of this JOINT CONSENT ORDER shall be binding upon Discover Bank, all institution-affiliated parties, as defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), and in connection with the Products as defined herein, all affiliates of Discover who are service

providers as defined in sections 1002(1) and (26) of the CFP Act, 12 U.S.C. §§ 5481(1) and (26), and any successors and assigns thereof.

Calculation of time limitations for compliance with the terms of this JOINT CONSENT ORDER shall be based on calendar days, unless otherwise noted.

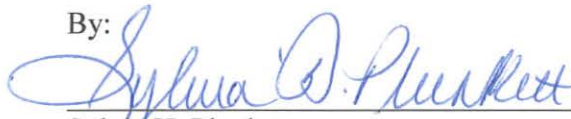
The provisions of this JOINT CONSENT ORDER shall remain effective and enforceable except to the extent that, and until such time as, any provision has been modified, terminated, suspended, or set aside in writing by the FDIC and the CFPB.

Any violation of this JOINT CONSENT ORDER may result in the imposition by the CFPB of the maximum amount of civil money penalties allowed under section 1055(c) of the CFP Act, 12 U.S.C. § 5565(c).

The provisions of this JOINT CONSENT ORDER shall be enforceable by either the FDIC or the CFPB.

Issued Pursuant to Delegated Authority this 24<sup>th</sup> day of September, 2012.

By:



Sylvia H. Plunkett  
Senior Deputy Director  
Division of Depositor and Consumer Protection  
Federal Deposit Insurance Corporation

Issued this 24<sup>th</sup> day of September, 2012.

By:



Richard Cordray  
Director  
Consumer Financial Protection Bureau

# EXHIBIT E

**UNITED STATES OF AMERICA  
CONSUMER FINANCIAL PROTECTION BUREAU**

**ADMINISTRATIVE PROCEEDING**

File No. 2012-CFPB-0005

**In the Matter of:**

**DISCOVER BANK  
GREENWOOD, DELAWARE**

**ORDER TERMINATING  
CONSENT ORDER, ORDER FOR  
RESTITUTION, AND ORDER TO  
PAY CIVIL MONEY PENALTY**

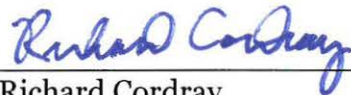
With the consent of Discover Bank (Discover), by and through its duly elected and acting Board of Directors, the Consumer Financial Protection Bureau (Bureau) and the Federal Deposit Insurance Corporation jointly issued a CONSENT ORDER, ORDER FOR RESTITUTION, AND ORDER TO PAY CIVIL MONEY PENALTY (CONSENT ORDER) on September 24, 2012 related to the Bank's marketing, sales, and operation of Discover's Payment Protection, Identity Theft Protection, Wallet Protection, and Credit Score tracker products.

To this date the Bureau has determined that Discover fulfilled its obligations under the CONSENT ORDER, including, among other things, providing at least \$200 million in redress to affected consumers, and paying a civil money penalty of \$14 million.



Accordingly, IT IS HEREBY ORDERED, that the CONSENT ORDER, issued against Discover on September 24, 2012, pursuant to section 1053(b) of the Consumer Financial Protection Act, 12 U.S.C. § 5563(b), is terminated.

Dated this 20th day of July, 2015.

  
\_\_\_\_\_  
Richard Cordray  
Director  
Consumer Financial Protection Bureau



## CIVIL COVER SHEET

Case 2:16-cv-00312-KJM-KJN Document 1-2 Filed 02/16/16 Page 1 of 2

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

AMERICAN BANKERS MANAGEMENT COMPANY, INC.

(b) County of Residence of First Listed Plaintiff Miami-Dade County, FL  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Carlton Fields Jorden Burt, LLP, Meredith M. Moss, 2000 Avenue of the Stars, Suite 530, North Tower, Los Angeles, California 90067, (310) 843-6300

**DEFENDANTS**

ERIC L. HERYFORD, in his official capacity as DISTRICT ATTORNEY, TRINITY COUNTY

County of Residence of First Listed Defendant Trinity County, California  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question  
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 U.S.C. sec. 1983

Brief description of cause:

Violation of due process

**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE

02/16/2016

SIGNATURE OF ATTORNEY OF RECORD

/s/ Meredith M. Moss

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

Case 2:16-cv-00312-KJM-KJN Document 1-2 Filed 02/16/16 Page 2 of 2  
**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
  - (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
  - (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
- United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.